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Narration and Narrative in Legal Discourse

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1 Definition

Narration plays a central role in legal discourse and permits law to be communicated, adjudicative acts to be justified, and their principles to be explained (Fludernik 2010). Documents such as charges of indictment, formal disciplinary complaints, legal briefs, appellate judgments, and legal commentaries contain narrative elements, as do orally transmitted opening and closing statements, cross-examinations, and judges' announcements of the sentence.

Legal narratives are moreover the subject of law; in common, civil, and mixed legal systems, the re-construction of what happened to whom or to what is central to a given sequence of events' being adjudged in juristic terms. Applying an abstract legal norm to a particular case in the civil law tradition requires that an interpretive process is undertaken that involves recourse to methods of narrative analysis such as differentiating between the frame of the telling, the telling, and the told, naming functions of narrative structures, and identifying types of tellers. Since the advent of "legal studies after the cultural turn" (Moran 2012), law has been regarded as narratively based and culturally embedded, suggesting the benefits of a narratologically literate approach to legal discourse.

2 Explication

"Narration" in legal discourse most commonly denotes the contest of stories that transpires in adversarial or, with different actors, in inquisitorial trials. "Adversarial" refers to legal systems in which the prosecution and defense produce evidence that is evaluated during the course of the trial; in inquisitorial systems, trials take place without juries and judges play a larger role in determining the proceedings, examining the witnesses, and adjudging cases' outcomes. On the discourse level, the act of narrating is central to legal proceedings: the facts of a case are related with varying rhetorical intensity depending on the type of trial and legal system and the stage of the trial in which the narrational act occurs. "Narrative" in legal discourse can also be used to describe a legal concept's or a statute's development: from precedent to new judgment in common law systems; in commentaries on legal

concepts and their jurisprudential developments in codified ones.

According to a leading proponent of a narrative approach to law: “Law, one might say, needs a narratology” (Brooks [2005] 2008: 425). Brooks argues that law perpetually attempts to hide its storytelling qualities in the interest of preserving its autonomy from other disciplines and defending its seemingly exclusive reliance on abstract norms and logical reasoning. Uncovering the narrative qualities of legal texts and judgments, including their sequencing and causal presentation of events as well as their investments in prescriptive assumptions about correct behavior, is accordingly vital to understanding how law operates, under what premises, and with what contingencies.

The study of narration and narrative in legal discourse comprises several subtypes. It includes investigations into legal narration as a contest of narratives (3.1.1), and examinations of law in narrative literature or as rhetoric (3.1.2). Another approach juxtaposes personal accounts of marginalized individuals with dominant legal narratives to advocate rights and critique hegemonic legal practices (3.1.3). A fourth area of study analyses the narrational qualities of legal discourse and interpretation (3.1.4). Allowing for a more metaphorical definition of narrative, the interface between legal and cultural narrative has gained critical interest, and describing this field will reveal meta-level issues concerning narrative studies of the law (3.2).

3 Aspects of the Phenomena

3.1 Subtypes of Research on Narration and Narrative in Legal Discourse

3.1.1 Legal Narration as a Contestation of Narratives

The study of narration understood in the narrow sense as the act of telling a story centers on investigations of witness testimony and statements by the prosecution and the defense and has primarily focused on adversarial Anglo-American trials. Yet this research is also applicable to codified law and civil law system procedures. Jackson (1988a, 1988b, 1990) points out that the pragmatics of how the micro-narratives that make up a given case are narrated, by whom, and under what authority influences the outcome of adversarial trials. Like Brooks (1996), Jackson describes the criminal courtroom’s “contest between competing narratives, which will be resolved on the criteria of *relative similarity to narrative typification*” (1996: 28, emphasis in original). Narrative typification refers to evaluative judgments based on their perceived likeness to collective, prototypical images of criminals (1996: 32–3), as well as other narratively organized forms of social knowledge

(Jackson n.d.). Such differentiations allow Jackson to distinguish between the micro-narratives related within a trial and the macro-narrative of the trial itself (1996: 33). The perceived completeness of stories recited in trials and their apparent compliance with norms of legal reasoning determine whether they will be regarded as plausible. In the common law tradition, this involves the principle of *stare decisis*; in the civil law tradition, plausibility is based on the perceived clarity, consistency, and coherence with which the code is applied.

Brooks argues that law has implicitly recognized the power of storytelling in the courtroom through "formulas by which the law attempts to impose form and rule on stories" (1996: 19). Rules about what is considered to be relevant narration in the courtroom include the degree of detail and presumed objectivity of witness testimony and prohibitions concerning admissible narratives. Assumptions about what makes testimony valid influence the telling and retelling of the events that trials seek to narrate conclusively. Further, as Coombe points out, the contest of narratives begins much earlier than in the dramatic setting of the jury courtroom with the selection of evidence that contributes to the narratives presented in courtrooms (2001: 46). Similarly, in inquisitorial systems, the state attorney's assessment of the illegality of the accused's actions determines whether a case will be tried; her or his narration of the facts in a dossier influences the judge's "master narrative" (Grunewald 2013: 382).

Courtroom exchanges are also subject to generic restrictions. Künzel posits a preference for the norms of realist narratives, with their appearance of verisimilitude, that may be detrimental to perceptions of victims' testimony in rape trials. Due to the traumatic nature of their experiences, victims may testify in an affective, non-linear, and dissociative mode—qualities resembling norms of avant-garde or Modernist texts—hence appearing suspect to those who adjudge these trials (2003: 249–54). Other scholars have also conducted genre-based narrative interrogations of law. With recourse to Frye's archetypal criticism, West compares the "jurisprudential traditions [of] natural law, legal positivism, liberalism, and statism" to the genres of "romance, irony, comedy, and tragedy," respectively ([1954] 1993: 347); and Sarat (2002) diagnoses the melodramatic elements that underlie US American trials and are employed to justify capital punishment.

Although these differentiations might appear to pertain only to the courtroom, Sternberg argues with recourse to biblical law that the legal code represents a form of narration involving if-plots, ordering, and turn-taking, and is infinitely generative of further storytelling: "law […] incorporates the narrativities of repetition and quotation among its makings, workings, aids to processing and understanding" (2008 : 38). Accordingly, the story of codified law consists of the reconstruction of events

and the filling-in of narrative gaps. Similarly, semiotic interpretations of law suggest that “legal practice is a narrative endeavour” that occurs “within legal discourse as a complex economy of signs” (Broekman 2011: 3), regardless of whether it is practiced in a civil or common law system.

The predominance of narrative studies concerning courtroom discourse may be explained by the adversarial trial’s dramatic structure and the prosecution and defense’s reliance on conflicting arguments about the alleged perpetrator’s actions. Thus courtroom discourse resembles the structures of oral narratives (von Arnauld 2009; Fludernik → Conversational Narration – Oral Narration [1]). Yet researchers’ emphasis on competing courtroom stories may also be due to the medial dominance of representations of Anglo-American adversarial trials.

Discussions of how defense lawyers have to disrupt the prosecution’s narration of events recited in past tense with counter narratives focusing on the present is typical of this type of research (Amsterdam & Hertz 1992: 55). Since in civil law systems the judge or judges and lay assessors determine the description of previous events on the basis of accumulated evidence, witness questioning, and argument, the meta-narrative of a case has to be reproduced in a written protocol of judgment, which employs persuasive narrative strategies (Vismann 2011: 98–111).

3.0.1 Law and Literature, Law as Rhetoric

“Law and Literature” developed in a critical response to the law-as-economics movement that predominated in US American legal training during the 1970s and which sought to institutionalize a rational-choice approach to adjudication (Kayman 2002; Peters 2005; Olson 2010, 2012). Law and Literature interfaces legal protocols with literary narratives to demonstrate the contingent nature of justice. Accordingly, one type of research, called “law-in-literature,” critiques legal processes using the alternative ethics that are suggested by literary texts; another type, called “law as literature,” analyzes law as rhetoric and reads legal texts using philological means.

One ethical-rhetorical approach dates from the work of White (1973). For White (1995), adjudication is indivisible from rhetoric; ideally, it transforms the communities into which it is received as did Abraham Lincoln and Nelson Mandela’s texts. White’s performative legal rhetoric attempts to restore an ethics to law and legal education through the imaginative and transformative use of language. Although his work is more often associated with the trajectory of Law and Literature that examines how law is critiqued in “fictions about law” (Weisberg 2011: 50), Weisberg also looks for “textual standards of [legal] conduct” in literature (1988: 145). He describes how “good code” can be provided by law when it is interpreted by “good interpreters” (Weisberg 2011: 52), and “resentful code” can be combated

by “just individuals” (53); and both types can be illuminated using literary narrative. Legal and literary rhetoric thus intersect with the ethics of interpretation.

Emerging out of a different tradition altogether, Postmodernist Jurisprudence combines semiotics, psychoanalysis, and rhetorical analysis to demonstrate English law’s metaphoricity, narrativity, and literariness. Goodrich’s (1987) rhetorical analysis of law is employed to highlight law’s pretentions to rational authority. Most pertinently, in terms of its potential for narratological research, Goodrich has argued that the basis of law as a science and an autonomous discipline can be found in the medieval philological interpretation and preservation of the *Corpus Iuris Civilis* (1987: 33). In essence, the establishment of law as a science involved a disregard for the context in which legal texts were created.

Goodrich contends that the still dominant positivist approach to legal interpretation, based on Kelsen’s and Hart’s work, has mirrored developments in structuralist approaches to language, thus suggesting that the recent history of jurisprudence has followed developments in linguistics: “The specific context of contemporary legal science, which is to form the subject of the present chapter, is co-extensive with linguistics itself” (1987: 34). This argument is not dissimilar from Fludernik’s observation that narratology has developed in line with linguistics ([2005] 2008: 48). The critical rhetorical approach to law that Goodrich advocates “begins by throwing the possibility and status of law into question” (1987: 211), demonstrating law’s anything but unique discursiveness.

3.0.2 Legal Narrative and the Recognition of Minoritarian Experience

Critical legal studies has brought the narrative qualities of law to the fore in an effort to undermine law’s service to the entitled and to force legal practitioners to acknowledge the experiences of the underrepresented. Challenging law’s autonomy as a rational system, critical legal studies has grown into a plurality of approaches that focus on law’s narrativity and contingent relations to forms of subordination: this includes critical race studies and storytelling, feminist jurisprudence, queer theory, and intersectional legal analysis.

Within the US American context, stories that display a high degree of experientiality about being materially disadvantaged and institutionally excluded have provided counter-punctual arguments to the assumption that the legal subject is a white, propertied man. In advocacy of this type of storytelling, Delgado asserted that: “Many, but by no means all, who have been telling legal stories are members of what could be loosely described as outgroups, groups whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized” (1989: 2412).

Delgado's argument departs from the assumption that reality and group identity are constructed and mediated through acts of narration (cf. Bruner 1991) (Bamberg → Identity and Narration [2]). Accordingly, one field of narrative legal scholarship concerns reciting alternative stories to those related in hegemonic legal contexts. This has included introducing literary narratives about race to the US legal classroom, as in Derrick Bell's fictions or Patricia Williams' autobiographical writings. Feminist critique uncovers how acts of domestic abuse do not cohere with legal models which assume that violence takes place between men in public places, and how rape complaints are consistently discredited if their stories do not comply with this model—if the assailant was not a stranger, did not use a weapon, and did not attack a woman outside her home.

This entails bringing attention to law's lacunae. Personal testimonies to experiences unattended to by legal code and legislation have become vehicles for raising public notice of how rape and sexual slavery are employed as systematic tools of oppression during wartime. The rights of indigenous peoples have been rendered tangible through personal narrative; and these narratives have contributed to challenging the legal status quo. Commenting on how such narratives function as forces for legal emancipation, Schaffer and Smith write: "Emergent in communities of identification marginalized within the nation, such movements embolden individual members to understand personal experience as a ground of action and social change" (2004: 4).

3.0.3 Legal Narrative as Narration, and Narrative Issues in Legal Interpretation

Somewhat underrepresented in narrative approaches to legal discourse is research that invokes structuralist work on narration and deals specifically with categories of temporality, tense, internality or externality, and reliability. Legal decisions are often composed without a narrative presence or an overt voice, thus belying the existence of a person or persons behind the text, as in: "IT IS ORDERED that [...] the law license of Brenda Gloria Christian, State Bar Card Number 04226500, heretofore issued by the Court, be cancelled" (*Supreme Court of Texas* 1994: 1). In German statutes one finds similarly impersonal narration about anonymous agents involved in a sequence of hypothetical actions, e.g.: "(1) By a purchase agreement, the seller of a thing is obliged to deliver the thing to the buyer and to procure ownership of the thing for the buyer. The seller must procure the thing for the buyer free from material and legal defects" (Div. 8 Sec. 433 of the *German Civil Code* [2012]). Depending on how wide or narrow their definition of narrative is, some narratologists will argue that this law does not meet the minimum requirements of experientiality, eventfulness, human-like agency, etc.

This pattern differs considerably in preambles, where allusions are made to political collectives as a strategy of legitimation (von Arnauld 2009: 13). Particularly in constitutions, narrative authority is evoked through references to a common historical narrative, as in the US Constitution's "We the people" or in Art. 1 sub 2 of the *Basic Law for the Federal Republic of Germany*: "The German people therefore acknowledge inviolable and inalienable human right as the basis of every human community, of peace and justice in the world" (2010). Noting the rhetorical differences between impersonally and personally narrated legal texts and their ideological effects can be achieved through attention to the specific narrative qualities of law.

Most pressingly, the issue of how to deal with narrative arises in legal interpretation. This entails the application of codified law or precedent judgments to the case at hand according to competing rules of application and it raises issues of narrative intentionality. In the US, debate continues about whether the Constitution should be interpreted according to the presumptive original intentions of those who composed it, the exact semantic meanings of the words at the time an act or amendment was enacted, or according to the general purpose of the enactment, which has to be viewed contextually. This debate has enduring political consequences, as recent US Supreme Court decisions regarding campaign financing and healthcare have amply shown.

Legal interpretation concerning European Community law functions differently, as does the application of codified law in civil law systems. On the basis of treaties, regulations and directives are issued and may be enacted as laws by national legislatures; they are subsequently translated into the community's twenty-three languages, rendering the issue of lexical or 'plain' meaning of words moot (McLoughlin & Gardner 2007: 101). Decisions regarding the scope of EU legislation are made by comparing the wording of the texts into which a law has been translated or through recourse to its "purposiveness," the law's coherence with guiding principles of the union and its achievement of a desired end (Rösler 2012). Further, "whenever one of the member states submits a proposal for new supranational legislation, it does so inescapably from its own context" (Gaakeer 2012 : 259). Thus recent efforts to homogenize European law and rules of application interface with narratological concerns, as methods of interpreting narrative texts may be variously based on intrinsic textual signals, linguistic concerns, extratextual realities, or historical contingencies.

3.1 Legal Narrative as Cultural Narrative

The insight that legal discourse is not autonomous but inextricably bound to its

historical context can be attributed to many sources including Friedman (1969), who argued that a legal system is indivisible from the legal culture through which it is understood, and Cover (1983). Cover contended that while law may give the appearance of autonomy and rationality, it is never free from the narratives that lend it sense: “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. […] Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live” (Cover 1983: 4–5). On the one hand, law is rendered comprehensible through narrative. On the other hand, law is embedded in the cultural narratives that frame it. Hence legal prescriptions cannot be separated from the narratives that situate, explain, and legitimize their prerogative. As a consequence, Cover argues that not only do trials represent contests between narratives, but so do all legal texts as they are interpreted, re-interpreted, and applied over time. Arguments for a given interpretation then rest on founding myths about whence the law derives its authority to enact the state’s rule or violence (Cover 1986).

Narratives of law also extend into the future in normative projections of their effects. As Cover writes: “A *nomos,* as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures” (1983: 7). Legal decisions can represent corrective counterfactual readings of the present as in *Brown v. Board of Education* (1954), which deemed the regular practice of segregating school children on the basis of race unconstitutional. Accordingly, the legal precept “separate but equal” that had authorized segregation until *Brown* can be understood as part of the ongoing history of US American race laws, extending from Colonialist prohibitions of interracial unions to current disputes about the scope of affirmative action and the protection of voting rights. Constructing the historical narrative of a given body of law depends on the legal system in which it transpires and on the sociocultural factors that inform its historicization.

Narrative approaches to law go beyond the courtroom to examine histories of statutes and the developments of legal systems: social contract theory can, for example, be understood as the study of the story element that enables participants to understand how their legal collective came to be (Tait & Norris 2011). Foundational legal narratives legitimate a given legal system’s normative status by establishing resemblances between themselves and other master plots in a process not dissimilar from what Butler (1990) has called performativity.

Another form of narrative analysis investigates how literary narratives and their forms participate in altering legal processes. This work has concentrated mostly on

the 18th and 19th centuries; it unites genre investigations with narratology and historical investigations of legal procedures. Thus Bender (1987) argues that the English novel anticipated the end of public executions; Grossman (2002) contends that forensic novels occasioned a new awareness of the courtroom as a site for relating individual, clashing stories. Scholars such as Miller (1988), Thomas (1987, 2007), and Gladfelder (1997) demonstrate how protocols of law and citizenship have intersected with novelistic prose and its representation of consciousness. Their work demonstrates that narrative techniques overlap with changing procedures as well as readers' notions of self, corroborating Cover's thesis that legal narratives are embedded in cultural ones.

4 Relevance for Narratology

While assuming that law has much to gain through the scrutiny of the narrative principles that underlie its texts and procedures, Wolf's (2011) caveat about the dangers of narratology's cannibalizing other disciplines should be heeded: legal practitioners remain skeptical of constructivist, sometimes poorly informed efforts of those who pursue narrative inquiries into the law (Posner [1988] 2009). Further, a narratologically informed investigation of law may alter the manner in which narrative and narrativity are understood. Just as investigations of games, visual phenomena, and music have demonstrated the limitations of structuralist models, the analysis of narration and narrative in legal discourse may expose some narratological concepts' investments in institutions and discourses of power.

5 Topics for Further Investigation

Narrative studies of legal discourse favor texts with overtly narrational elements such as appellate and Supreme Court opinions. Yet the norms transported through legal narratives are disseminated through symbols and images as well as language. Thus the integration of narrative approaches to law with "Law and Semiotics" and "Law and Visual Culture" needs to occur.

From a narratological standpoint, open questions include: how does the framing of legal narratives through interpretive schemata and generic conventions differ from that of other types of narratives? How do legal hypotheticals and possible worlds theory relate? Might narrator unreliability be better understood through recourse to assessments of witness reliability? What differing narrative premises underlie various legal systems' justifications of judgments and interpretive procedures? And will such premises change as legal systems become increasingly hybridic?

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