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Narrative and the Legal Neighborhood

THOMAS PATRICK GANNON*

JAY A. ZIEMER**

NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW. Edited with introductory comments and discussion questions by *David Ray Papke*. Liverpool, U.K.: Deborah Charles Publications, 1990. Pp. ix, 368. \$35.00.

In his prefatory remarks to *Narrative and the Legal Discourse*, Professor David Ray Papke¹ employs an appealing metaphor to describe the tentative relationship between storytelling and the dominant legal order: “[n]arrative lives across the street from law’s established home.”² If the articles collected in this volume are any indication, then the law does indeed have some noisy new neighbors. But demographic changes are not always easy. One can already imagine the grumblings coming from law’s home — “there goes the neighborhood.”

Just who are these boisterous, Simpsonsque intruders? And why might their presence cause discomfort to the stodgy, old law family across the street? With respect to the latter question, an appreciation of narrative casts doubt on fundamental assumptions about the law in much the same

* Assistant Director, The Center for Law and Health, Indiana University School of Law-Indianapolis; B.A., 1987, Indiana University; J.D., 1990, Indiana University School of Law-Indianapolis.

** Assistant Public Defender, Cook County Public Defender’s Office, Chicago; B.A., 1987, Marquette University; J.D., 1991, Indiana University School of Law-Indianapolis.

1. Professor of Law and American Studies, Indiana University School of Law-Indianapolis; A.B., 1964, Harvard College; M.A., 1978, Yale University; J.D., 1973, Yale University; Ph.D., 1984, The University of Michigan.

2. D. PAPKE, NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW 3 (1990).

manner that the popular television show, *The Simpsons*, undermines America's mythical *Leave-It-To-Beaver* notions of family life. What once seemed "natural," now appears quaint. A paradox of storytelling, however, is that the capacity to form alternative narratives, especially alternative legal narratives, is often limited by the stock of stories already told.

As for the identity of these newcomers, *Narrative and the Legal Discourse* provides at least a provisional answer. Using a group of influential, sometimes provocative, law-related articles published within the last half decade, Professor Papke has compiled an accessible and up-to-date anthology exploring the connections between law and narrative in four broad areas: legal education, litigation, legal doctrine (namely, the appellate opinion), and alternative legal narratives. The majority of contributors teach at law schools around the United States. One author is a practicing litigator although others teach sociology, criminal justice, and anthropology.

Why narrative? One reason is that storytelling is the basic, predominant form of human communication. Stories are found in all cultures and all cultural products, including law. These articles persistently remind the reader of the numerous ways in which storytelling is used to comprehend, shape, and organize our understanding of law and the social order. From our first days in law school through our professional lives as attorneys, judges, and scholars, we use language as the "tool" of our "craft." Indeed, such metaphors reveal an underlying confidence in the precision of language.

Yet, since at least the beginning of the twentieth century, philosophers, linguists, literary theorists, and others have recognized that the relationship between language, meaning, and truth is highly problematical. The focus of inquiry has shifted to the complex processes of interpretation. From the various humanistic and semiotic perspectives³ found in *Narrative and the Legal Discourse*, legal communication is seen as a subjective or interpretive process mediated by social, cultural, or psychological factors through which meaning, and thus "reality," are not so much received as generated or constructed. If narrative, as Papke defines it, is "the transformation of events and sentiments into stories which impart meaning,"⁴ then narrative has even greater importance for legal study because it challenges the notion that law is fixed, or that one can neatly separate theories, facts, and values.

Despite the centrality of narrative as a mode of social and legal communication, Professor Papke argues that legal thinkers in the United

3. Legal semiotics is the study of signs and codes that underlie legal informational exchanges. See Tiefenbrun, *Legal Semiotics*, 5 CARDOZO ARTS & ENT. L.J. 89, 96 (1986).

4. D. PAPKE, *supra* note 2, at 4.

States have either ignored or displayed hostility to narrative theory because jurisprudential thought has been largely dominated by legal scientism or legal positivism.⁵ Like many disciplines, modern jurisprudence and legal education were shaped by the postenlightenment, scientific milieu of the nineteenth century. Borrowing from the methods of the natural sciences, Dean Langdell of the Harvard Law School established the fundamentals of legal formalism: the law library was to become the “laboratory” in which case law would be analyzed.⁶ Using the Socratic method and syllogism, law professors guide students to the “correct” answer through deductive logic.⁷

Papke also suggests that law’s isolation as a discipline has obscured the inherent subjectivity of legal content. Although various movements such as legal realism have managed to broach the walls of the citadel from time to time, law has remained largely isolated from the interdisciplinary developments that affect other fields. In the last twenty years, however, law and economics, critical legal studies, feminist legal theory, and the law and literature movement have contributed to make the study of law and narrative possible.

Taken together, the articles in *Narrative and the Legal Discourse* constitute an emerging alternative jurisprudence which may serve to integrate the legal neighborhood. Papke argues that narrative sensitivity might not only have a beneficial effect on the smug insularity of legal scholarship, but that it also encourages everyone, including the public,

to conceptualize the law differently. [The law] ceases to be limited, settled and formal and becomes instead fluid, contested and even

5. The famous English scholar H.L.A. Hart proffered five useful definitions of legal positivism:

- (1) the contention that laws are commands of human beings.
- (2) the contention that there is no necessary connection between law and morals or law as it is and ought to be.
- (3) the contention that the analysis (or study of the meaning) of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, “functions,” or otherwise.
- (4) the contention that a legal system is a “closed logical system” in which correct legal decisions can be deduced by logical means from predetermined legal rules without reference to social aims, policies, moral standards, and
- (5) the contention that moral judgments cannot be established or defended as statements of fact can, by rational argument, evidence, or proof.

Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601-02 n.25 (1958).

6. D. PAPKE, *supra* note 2, at 2.

7. For a discussion of the development of this method, see R. STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 51-64 (1983).

contradicted. . . . [N]arrative enables us to break free of assumptions that the law is objectively created and applied and to appreciate instead the subjectivity of the law. We can more freely enjoy and participate in the ongoing process of re-creating the law. . . . [W]e can understand law not as restriction and control but rather as a realm of possibilities.⁸

Nevertheless, law and narrative scholars may disagree among themselves about the purpose and goals of their study.

One can already detect different perspectives among the various contributors to *Narrative and the Legal Discourse*. Papke himself discerns two strains within the law and narrative movement: a humanistic strain and a more analytical semiotic strain, dedicated to a methodologically rigorous, even scientific, study of signs.⁹ Indeed, some readers may find that the more analytical articles on litigation in Part Two are rather slow-going and less interesting than other sections.

Bernard Jackson, Queen Victoria Professor of Law at the University of Liverpool, is by far the most articulate and theoretical contributor to Part Two. Although a full appreciation of his essay presumes some familiarity with poststructural theory, Jackson's thesis is essentially that narrative is an inherent feature of legal reasoning: neither legal rules nor facts exist autonomously as the uncomplicated subject matter of deductive logic or syllogistic reasoning. They are instead, Jackson argues, narrative constructs applied by a set of legal actors, each with his or her own experiences.¹⁰ Although these important insights should not be overlooked, some of the articles offer little more than sophisticated quantifying, strikingly devoid of normative conclusions about how such information might be used once learned. Indeed, Papke hints that the more humanistic members of the law and narrative household would be disturbed by their kinfolks' "tendency toward a new legal science, one capable of the denial which [the humanists find] so troubling in the dominant legal culture."¹¹

As recent law school graduates, the authors of this review found the articles on legal education relevant to their own experiences. For example, Professor James Elkins of the West Virginia University College of Law summarily observes that "[a]n education in law is a love/hate relationship."¹² Drawing on the journals he assigned first year law students

8. D. PAPKE, *supra* note 2, at 5.

9. *See id.* at 3-4.

10. Jackson, *Narrative Models in Legal Proof*, in *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* 159, 170-71 (D. Papke ed. 1990).

11. D. PAPKE, *supra* note 2, at 4.

12. Elkins, *The Quest for Meaning: Narrative Account of Legal Education*, in *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* 10, 11 (D. Papke ed. 1990).

to keep,¹³ Elkins charts the changes and disillusionment many of his students experienced.

Elkins argues that severe time constraints, an overemphasis on grades, dull and repetitious exercises, and anti-intellectualism in the classroom, contribute to the loss of student idealism. In many ways, law school is a hierarchical and alienating place. These characteristics are undoubtedly attributable in part to the stultifying Langdellian educational model described above, as well as to a larger cultural belief reflected in the law wherein emotion is devalued and virtually everything is treated as a commodity.

The other two essays in the section on legal education offer intriguing ways in which legal pedagogy might be made more humane and rewarding. Professor Andrew McThenia, Jr. of the Washington and Lee University School of Law argues that teaching is a form of storytelling, a transaction between teller and audience that can result in a mutual learning experience. Implicit in McThenia's argument is the recognition that the public and private spheres overlap, that these are in some sense arbitrary distinctions:

Whoever the storyteller is, she is shaped by one or more narratives. And she is carried by the stream of her own history to that moment of meeting an audience which itself brings one or more stories. As these streams merge, none of the individual lives can ever be the same again.¹⁴

McThenia says that meaning is collectively shaped and is contingent in the sense that one can never be sure of "the truth."

Because of his epistemological skepticism, his insistence that the teaching, learning, and practice of law are value-laden and his belief that teaching is a form of mutual storytelling, McThenia concludes that to be an effective teacher he must reveal who he is: a Christian, an academic, and the loved one of an alcoholic. He says "[t]he issue is *how* to do it, and not *whether* to do it."¹⁵ McThenia's argument suggests that the Langdellian emphasis on objectivity is constantly distorted by values and bias, especially in the classroom.

For David O. Friedrichs, Professor of Sociology and Criminology at the University of Scranton, legal understanding has an undeniable experiential dimension, a sentiment reflecting Oliver Wendell Holmes's observation that "[t]he life of the law has been not logic: it has been experience."¹⁶ Friedrichs argues that narratives occupy a marginal, sub-

13. He actually gave them this option instead of taking exams or writing papers!

14. McThenia, *Telling a Story About Storytelling*, in *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* 30, 31 (D. Papke ed. 1990).

15. *Id.* at 37 (emphasis in original).

16. See O.W. HOLMES, *THE COMMON LAW* 1 (1881).

versive, even “heretical” status in relation to both the orthodoxy of legal education and practice, as well as to undergraduate education, because narratives lack “efficiency” for a professional culture slavishly obsessed with time and reason and are negatively associated with children’s stories.¹⁷ He claims that the use of parables, poems, literature, biography, and autobiography in the classroom can lead students to appreciate the normative, subjective aspects of law and thus enable them to challenge established doctrines.

The articles in Part Three also speak to legal education by focusing on the problems of legal doctrine in the United States that are typically exemplified by case law. Applying literary theory to three of Shakespeare’s plays, Professor John Denvir of the University of San Francisco School of Law argues that the traditional “statist,” positivistic approach of jurisprudence in this country contributes to the continuing problems of racism and other constitutional issues, especially with respect to fashioning remedies.

Borrowing from literary theorist Northrop Frye, Denvir advances what he calls a “jurisprudence of comedy” that embraces “the twin goals of liberation and reconciliation.”¹⁸ He states that:

[H]uman passion, not legal rules, must be the starting place for a theory of law: the major task of jurisprudence must be to create legal institutions that transform human passion into a force for social regeneration, rather than to spin out justifications for sterile rules and often violent repression.¹⁹

He argues that an appreciation of literature counterbalances the black-letter emphasis of positivism in legal education. Law’s supposed neutrality, abstraction, and scientism stand in contrast to literature’s subjectivity, complexity, and passion.

Denvir’s jurisprudence of comedy also has an overtly communitarian political dimension which “recognize[s] that moral norms are usually created at the community level, rather than [by] the state.”²⁰ Thus, he disdains the philosophical assumptions of liberals and others who exalt the individual against the state in matters of constitutional law. He adopts, instead, a communitarian or group-oriented approach which emphasizes “the relationships between competing moral and legal visions within that

17. Friedrichs, *Narrative Jurisprudence and Other Heresies: Legal Education at the Margin*, in *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* 43, 45 (D. Papke ed. 1990).

18. Denvir, *William Shakespeare and the Jurisprudence of Comedy*, in *NARRATIVE AND THE LEGAL DISCOURSE* 183, 184 (D. Papke ed. 1990).

19. *Id.* at 183.

20. *Id.* at 197.

state . . . and underscore[s] the necessity for the state to mediate through its law these insular legal universes and thereby mend tears in the larger social fabric.”²¹ The proper constitutional role of the state, he asserts, is to protect less powerful groups and to upset the status quo.²²

As an example, Denvir examines J. Anthony Lukas’s study of public school desegregation in Boston. Denvir argues that Judge Arthur Garrity’s busing decree was a “disaster” for many black families, a form of scapegoating, a “betrayal” for white working-class families who could not afford to send their children to private schools and was hypocritical essentially because it permitted privileged white liberals to assuage their guilt without directly confronting the status quo.²³ Denvir suggests that the traditional approach to constitutional law perpetuates racism in three ways: by failing to address “private” acts of discrimination as beyond the pale of “state action,” by distinguishing between *de jure* and *de facto* acts, and by distinguishing constitutional liability from remedy.²⁴ Whether or not one agrees with Denvir’s philosophical assumptions, his jurisprudence of comedy offers a refreshing perspective on continuing sociolegal problems. His article also raises a perplexing problem: “the moral imperative to act without the consolation of certainty that our acts are morally justified.”²⁵

By far, the most intriguing and provocative articles in *Narrative and the Legal Discourse* are found in Part Four. These readings address the strategies and difficulties of constructing alternative legal narratives. Drawing on the memoirs of nineteenth century property criminals, Professor Papke contends that these accounts paradoxically reflect the dominant culture’s attitudes: “Rather than speaking as critical outsiders, the criminal memoirists of the period proffer autobiographical narratives which champion the institutions, norms and values most valorized by legitimate Americans. The criminal memoirs, grounded in a strong sense of professionalism, illustrate the power of societal hegemony.”²⁶ Papke’s interpretation suggests that law and legal attitudes are imbued with ideology—not simply “propaganda,” but a normative vision about how the world works, social relations, and one’s place within that order. In this sense, ideology has a mythical aspect. Ideologies are powerfully constructed and reinforced by society and seen as “natural” or unalterable.

21. *Id.*

22. *Id.*

23. *Id.* at 200.

24. *Id.* at 201.

25. *Id.* at 198-99.

26. Papke, *Legitimate Illegitimacy: The Memoirs of Nineteenth-Century Professional Criminals*, in *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* 226, 226 (D. Papke ed. 1990).

To challenge this “natural” order, one must first confront one’s social conditioning or the stories one has already learned.

“Success” in altering one’s own consciousness, however, does not ensure that others will accept these views. Jim Thomas, Professor of Sociology at Northern Illinois University, clarifies this point in an article examining the petitions of prisoners for postconviction relief.²⁷ Professor Thomas observes that legal storytelling is a complex linguistic, rhetorical, and conceptual process involving both storyteller and audience.²⁸ Although storytellers differ in their narrative ability to frame issues in patterned and predictable legalistic frames, Thomas shows that how law clerks and judges interpret stories is important in determining whether a specific claim will be successful or even heard. Interpretation is thus ineluctably linked with notions of justice.

The most interesting article in *Narrative and the Legal Discourse* was written by Marie Ashe, Professor of Law at the West Virginia University School of Law.²⁹ What distinguishes Ashe’s piece from the others is not only her subject matter, but her method. Using narrative and literary techniques, she offers profound intellectual insights while engaging the reader with her story. Ashe’s article is narrative as praxis.

Professor Ashe begins by describing her anger at the legal objectification of women:

Whenever I read law relating to women and motherhood, I find myself sickened. When I read *Roe v. Wade* I am filled with anger; when I read the *Baby M* trial court decision, I am enraged. When I hear women referred to as “surrogates,” I have the same reaction as arises when I hear women called “bitches” or “sluts.” Feelings of humiliation, of indignation, of desperation, of horror, of rage. Reading *A.C.*, I feel something close to despair.

Often, in the last several weeks, I have set aside my notes and readings concerning motherhood and law. I leave them with a sense of hopelessness. Often I have picked up some needlework—sewing, embroidery, needlepoint, knitting—seeking some respite from the feelings that overwhelm me, restoration. The rhythm of my fingers becomes a rhythm of my inner being, a peace in my breast. A dropped stitch. A gentle flutter. A minor

27. Thomas, *Prisoner Cases as Narrative*, in *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* 237 (D. Papke ed. 1990).

28. *See id.* at 239-44.

29. Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on “Reproduction” and the Law*, in *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* 262 (D. Papke ed. 1990).

interruption of rhythm and pattern. I pick it up easily, drawing it into the larger design. I exist in a silent space. Untroubled.

Law reaches every silent space. It invades the secrecy of women's wombs. It breaks every silence, uttering itself. Law-language, jurisdiction. It defines. It commands. It forces.

Law as the seamless web we believe and die in. I cannot think of a single case involving legal regulation of motherhood without thinking of all. They constitute an interconnected network of variegated threads.³⁰

Ashe appropriates and reinterprets the famous legal metaphor of the seamless web³¹ to show how the institutionalization of medicine and law have used language to abstract, reduce, simplify, define, and categorize women.

By "deconstructing"³² this metaphor, Ashe also evokes the various cultural myths associated with traditional or devalued women's work: the Miller's Daughter, the Lady of Shalott, Penelope, Arachne, Ariadne, and Medea.³³ She then reconstructs the metaphor by linking it to a personal story about her grandmother's quilt and by urging women to define themselves through a new kind of writing and thinking "[m]arked by our varying rhythms and cycles. Our stitches will seldom be straight. Zig-zag stitchings and zig-zag thought. Useful (as in buttonholing) for definition; (as in edging seams) for strength; (as in embroidering) for beauty."³⁴ This metaphor then serves to define the structure of her piece. Indeed, Ashe is such a fine writer that she has perhaps created an entirely new, literary legal form.

By discussing her personal experience with birth, abortion, and miscarriages, Ashe constructs an ethics of "reproduction." She says, "[i]t seems to me that the departure point for such exploration must be women's own accounts of our experiences, uttered with a commitment of faithfulness to the truths of female bodies suppressed in the dominant discourse."³⁵ She rejects generalization, recognizing that each woman must

30. *Id.*

31. While the image of law as a seamless web has frequently been used to describe the interconnectedness of all areas of common law, its initial appearance may be attributable to the English legal historian Frederic William Maitland. "Such is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web." Maitland, *Prologue to a History of English Law*, 14 L.Q. REV. 13, 13 (1898).

32. Deconstructionism is a method or technique used to interpret text which destabilizes "common sense" meanings. See Tiefenbrun, *supra* note 3, at 148-50.

33. Ashe, *supra* note 29, at 263.

34. *Id.* at 264.

35. *Id.* at 380.

determine this for herself and thus, exposes the fallacy of essentialism.³⁶ She argues that law and medicine are guilty of this error:

The medicalization of abortion—like that of childbirth and pregnancy—has set women at a distance from the blood ceremonies of our bodies, placing us at the mercy of a technological priesthood that denies the sacred, detaching us from the physicality and the cultural implications of violence and bloodshed. We have become the victims, and not the agents, of bloodshed.³⁷

Ashe's article is a powerful normative statement which is bound to provoke reaction. More than any other article in this volume, it reveals the possibilities that narrative study can contribute to the legal discourse.

Narrative and the Legal Discourse is a stimulating and suggestive introduction to the emerging study of narrative jurisprudence. As such, the book raises more questions than it answers. Readers interested in more in-depth treatment of the various intellectual and philosophical issues raised by the book, however, will find ample resource material in the footnotes and discussion questions. The success of *Narrative and the Legal Discourse* lies in its critique of what Papke calls "dominant legal conceptualizations."

Narrative and the Legal Discourse challenges the dominant view that science is the only legitimate form of inquiry. Narrative theory undermines the positivistic premise that "facts" stand alone or that they have some philosophical primacy. Narrative theory shifts the debate to how meaning is constructed and challenges the notion that the law is determinate or that rules can simply be plucked from case law and applied neutrally. In this respect, narrative theory raises questions about one of our most cherished beliefs—the Rule of Law. If law is an essentially interpretive process, how can there be anything but a rule of "men"?

On another level, narrative jurisprudence offers a powerful tool for those seeking to change or reinforce the existing legal system. The diverse perspectives of the contributors to *Narrative and the Legal Discourse* suggest that narrative jurisprudence has only just begun to establish itself in the legal neighborhood.

36. "[T]he notion that every class or group of things has an essential or fundamental nature, common to every member of the class, and that the process of defining consists in isolating and identifying this common nature or intrinsic property." L. LLOYD & M. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* 53 (5th ed. 1985).

37. Ashe, *supra* note 29, at 282.

