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Narrative and Narratology in Classroom and Courtroom

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In lieu of an abstract, here is a brief excerpt of the content:

Narrative and Narratology in Classroom and Courtroom

Richard A. Posner

In a previous article in this journal, I remarked the difficulty of finding

literary exemplars of today's outlook on social problems such as race and sex.¹ Some American law professors have decided to furnish those exemplars themselves, by writing stories. This is a bold advance over "law and literature" scholarship that is conventional in form and merely *argues* for a greater role of imaginative literature in legal thought. I want to describe and evaluate this new direction of the law and literature movement, which I shall call "legal narratology," and to relate it to narrative theory on the one hand and to the use of narrative in the law itself (as distinct from writing about law) on the other.

Although fiction by law professors on legal themes is not entirely new,² the scale of the new legal narratology, and its predominantly "oppositional" character, are new. Moreover, "story" (or "narrative") is not synonymous with "fiction." Plato's dialogues are fictions, but not stories. And a story can be true or false, while a fiction, even if not completely "made up," invariably contains false particulars though it will often contain a heavy admixture of literal truths, for instance a gallery of real people thinly, and sometimes not at all, disguised as fictitious. Some legal narratologists, such as Derrick Bell, write outright fiction, in his case science-fiction stories plainly not offered as literally true, while others write stories that purport to be autobiographical and so are offered as literally true; yet not only are the stories unverifiable, but the story mode, and sometimes specific details, undermine their veracity.³

The stories written by legal narratologists are explicitly didactic, and so invite ethical criticism in a way that most literature, I believe, does **[End Page 292]** not.⁴ I will discuss the aesthetic dimension of these stories only insofar as it affects the fulfillment of the stories' didactic aims. Yet it is not those aims that make this the right approach for me to take; a great deal of literature was in its origin didactic. It is the absence from most of these stories of anything else worth attending to.

A story is a sequence of events invented, selected, emphasized, or arranged in such a way as to vivify, explain, inform, or edify. 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.”⁵ The story need not be true, but it must be coherent, intelligible, significant.

Ubiquitous in history, biography, literature, myth, and most religions, storytelling plays a smaller but still important role in other fields as well. One of these fields, surprisingly, is economics, where “story,” contrasted with a formal model, denotes the informal, intuitive explanation—often indeed story-like—of an economic phenomenon. Stories play a big role in the legal process quite apart from the new oppositionist legal storytelling. In a trial, the plaintiff and the defendant each tell a story—actually a translation of their “real” story into the narrative and rhetorical forms authorized by law—and the jury chooses the story 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.) This is not how the law conceptualizes the trial process. The law requires the plaintiff to prove each element of his claim by a preponderance of the evidence (beyond a reasonable doubt if it is a criminal case), and likewise the defendant if he pleads any affirmative defenses. Ronald Allen has shown that if this, the official account of the trial process, were taken literally, plaintiffs would win cases in which the likelihood that their claim was valid was actually very slight.⁶ 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 other side’s.⁷

The Supreme Court has magnified the story element in the sentencing phase of capital...



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Justice by consent: Plea bargains in the American courthouse, the atom is a Muscovite.

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