THE ROLE OF NARRATIVE IN THE JUDICIAL PROCESS

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What is the law? A simple answer is that it is a collection of rules. They are what the law is made up of. A slight extension of that simple answer is to say that the law also involves the application of those rules to facts. That may match your intuition. It is an account which prioritises a view of lawyers as reasoning machines. Lawyers identify rules, they identify facts that are relevant, as a matter of logic, to the application of those rules, and they derive an outcome from the reasoned application of the rules to the facts. The facts and the rules are like building blocks which can be constructed in the shape of a syllogism or other logical form to produce an outcome. I suggest that many would find that account of the law uncontroversial, even trite.

But there is another way of looking at the law - not as a collection of facts married together by the logic of rules, but as a web of stories. So, one way of looking at a trial is to understand it as a formal arrangement of narratives. After all, every participant is telling a story. And they do it in a conventionally ordered way. Pleadings, or at least statements of claim, are a form of stylised narrative. Counsel will probably give a narrative of the case in opening, sometimes a detailed one by reference to the documents. Then come the witnesses - what are they doing, if not telling stories? Then come closing submissions and, finally, the need for the judge, and perhaps the jury, to develop their own narrative about what happened. While we can't peer into the mysteries of the jury room, in the case of a trial by judge alone, that narrative will make its way into written reasons and become the definitive story. Definitive, that is, unless it is appealed. The story of the case may then be written again, and battle may be joined over yet more narratives - the stories about what happened at the trial itself.

It is unsurprising that the court process, which is at the heart of the legal process, is saturated with narrative in this way. After all, stories are persuasive. Professor Robert A Ferguson, whose interdisciplinary scholarship had roots in both the English Department and the Law School of Columbia University, suggested that human beings are driven to tell and listen to

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stories by a 'narrative desire', which is in turn driven by a passion for meaning.[1] The historian Hayden White has referred to a demand for closure which 'arises out of a desire to have real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary'.[2] Daniel A Farber and Suzanna Sherry describe a 'unified critical viewpoint on the legal system' which holds that 'the conscious process of legal reasoning is not really what accounts for the results in cases' and that:

> tacit understandings are communicated through images, stories, and other symbols …. This transmission takes place at an unconscious level and is distinct from the conscious process of reasoning … [so that] persuasion must take place through the use of stories, which can operate at a deep level of mindset construction.[3]

But an even stronger claim can be made: that facts or events have no existence outside a narrative. They are not separate things. They are nodes in a web of relations. The relations may be temporal, they may be causal, or they may take other forms, such as relations of meaning or similarity. But they take their meaning from their relationship with each other. So, as Peter Brooks has said, 'Narratives do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results.'[4]

Most practising lawyers understand that instinctively. The lawyer who eschews narrative coherence risks making no sense at all. That was the fate of the defendant who was lampooned by Theophilus Parsons, Chief Justice of Massachusetts from 1806 to 1813:

> A plaintiff brings an action against a neighbour for borrowing and breaking the iron pot in which he cooked his dinner. The defendant says that he never borrowed any pot; and that he used it carefully; also, that the pot was broken and useless when he borrowed it; also that he borrowed the pot of somebody not of the plaintiff; also that the pot in question was the defendant's own pot; also that the plaintiff never owned any pot, iron or other; also that the defendant never had any pot whatever'.[5]

[1] Robert A Ferguson, 'Untold Stories in the Law' in Peter Brooks and Paul Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 84, 85.
[2] White, 'The Value of Narrativity in the Representation of Reality' in W Mitchell (ed), *On Narrative* (University of Chicago Press, 1981) 1, 20, quoted in Robert M Cover, 'Nomos and Narrative' (1984) 97 Harvard Law Review 4 at fn 6.
[3] Daniel A Farber and Suzanna Sherry, 'Legal Storytelling and Constitutional Law: The Medium and the Message' in Peter Brooks and Paul Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 37, 49.
[4] Peter Brooks, 'Narrative in and of the Law' in James Phelan and Peter J Rabinowitz (eds), *A Companion to Narrative Theory* (Blackwell Publishing, 2005) 415, 419 ('Narrative in and of the Law').
[5] Theophilus Parsons, Jr., *Memoirs of Theophilus Parsons, Chief Justice of the Supreme Judicial Court of Massachusetts: with Notices of Some of His Contemporaries* (Boston: Ticknor and Fields, 1859) 218-219.

There are contemporary High Court decisions which have similarly criticised the undue proliferation of alternatives.[6]

And yet, the 'building blocks' understanding of the law, as I described it at the beginning of this speech, is not a straw person. A commitment to the rule of law, including notions of fairness and equality before the law, requires that generalisable principles, capable of application to a wide variety of different factual situations, can be derived at some level of abstraction. So it has been said that 'mainstream legal scholars believe that legal rules and principles are capable of intellectual coherence and practical utility at some general level independent of historical circumstances'.[7] That seems to bring with it 'the law's general assumption' as described by Professor Brooks, 'that it solves cases with legal tools of reason and analysis that have no need for a narrative analysis'.[8] For example, the National Judicial College of Australia teaches an approach to judgment writing which suggests that judgments should be organised by reference to an analysis of the issues, which can be presented without any single narrative thread.

Further, there can be a distrust of narrative in the law. Harlan L Dalton has said '[w]hen a story is well told, I park my analytic faculties at the door. I suspend judgment rather than employing it'.[9] To say a person is 'telling stories' can be to imply that the person is embellishing or fictionalising. Hence Andrew Bricker has depicted narrative as both omnipresent and precarious in the law: 'Storytelling might be everywhere, but it is equally the redheaded stepchild of legal discourse, forever and perilously on the margins of legitimacy.'[10]

Alan Dershowitz made a fierce attack on the legitimacy of narrative in the trial process in a paper called 'Life Is Not a Dramatic Narrative', which he delivered in 1995 to a symposium at Yale Law School.[11] He took as his starting point Anton Chekhov's well known piece of literary advice: 'If in the first chapter you say that a gun hung on the wall, in the second or third chapter

[6] See, e.g., *Forrest v Australian Securities and Investments Commission* [2012] HCA 39; (2012) 247 CLR 486 at [26]-[27] (French CJ, Gummow, Hayne and Kiefel JJ).
[7] Robert Weisberg, 'Proclaiming Trials as Narratives: Premises and Pretenses' in Peter Brooks and Paul Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 61.
[8] Brooks, 'Narrative in and of the Law', above n 4 at 424.
[9] Harlon L Dalton, 'Storytelling on its Own Terms' in Peter Brooks and Paul Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 57.
[10] Andrew Bricker, 'Is Narrative Essential to the Law?: Precedent, Case Law and Judicial Emplotment' (2016) 15(2) *Law, Culture and the Humanities* 1, 3 ('Is Narrative Essential to the Law?').
[11] Alan Dershowitz, 'Life is Not a Dramatic Narrative' in Peter Brooks and Paul Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (Yale University Press, 1996) 99 ('Life is Not a Dramatic Narrative').

it must without fail be discharged.'[12] This, Dershowitz claimed, was an example of a drive to false coherence, a teleological view of reality to the effect that every event has a purpose and a meaning.[13] For Dershowitz:

> Life is not a purposive narrative that follows Chekhov's canon. Events are often simply meaningless, irrelevant to what comes next; events can be out of sequence, random, purely accidental, without purpose. If our universe and its inhabitants are governed by rules of chaos, randomness, and purposelessness, then many of the stories - if they can be called stories - will often lack meaning. Human beings always try to impose order and meaning on random chaos, both to understand and control the forces that determine their destiny. This desperate attempt to derive purpose from purposelessness will often distort reality, as, indeed, Chekhov's canon does.

Dershowitz agrees with Sartre that when you tell a story about life, although you seem to start at the beginning, in truth you start at the end.[14] Lawyers, at least, must resist the temptation to impose order on chaos in this way. Otherwise, they risk confusing fact with fiction, and so endanger the fact finding process. According to Dershowitz, 'human experience cannot be cabined into the structure of narrative'.[15]

Dershowitz is no doubt right to caution against false coherence. We are all prone to see faces in clouds. But I suggest that if advocates or judges, in legal practice, were to embrace Dershowitz's aversion to narrative, they would be giving up at least five things that are of fundamental importance to the law.

The first I have already described: simple comprehension. It may be that, from the perspective of a criminal defence lawyer, the aim is to demonstrate that the apparent coherence of the prosecution's narrative is false, so that under a barrage of logic it disintegrates into reasonable doubt. But other perspectives simply cannot do without narrative as a way of transmitting meaning. The basic human drives I have already mentioned mean that prosecutors, plaintiffs, judges, juries and, in truth, most defendants have no choice but to embrace the telling of stories as the vehicle for the persuasion and explanation that is demanded of their roles.

[12] *Anton Tchekhov: Literary and Theatrical Reminiscences,* S.S. Koteliansky (ed. and trans.) (1974) 23, quoted in Dershowitz 'Life is Not a Dramatic Narrative', above n 11, 100.
[13] Dershowitz 'Life is Not a Dramatic Narrative', above n 11, 100.
[14] Jean-Paul Sartre, *Nausea*, (Lloyd Alexander, trans., 1964) 39-40, quoted in Dershowitz 'Life is Not a Dramatic Narrative', above n 11, 101.
[15] Dershowitz 'Life is Not a Dramatic Narrative', above n 11, 105.

The second attribute of narrative which is essential to the law is context. This stems from the first attribute, because placing things in their proper context is essential if they are to be understood. But it goes beyond that. It is about fidelity to lived experience. It is reflected in the approach which McHugh J exhorted in *Butcher v Lachlan Elder Realty,* of examining conduct said to be misleading or deceptive as a whole in the light of the relevant surrounding facts and circumstances, not in isolated parts.[16] For the flipside of illusory coherence is the presentation of facts removed from the context in which they are embedded. The relations between events which show them in their true aspect can thus be lost.

The third essential attribute of narrative is its concreteness, its specificity. A story can only ever be a representation, a simulation of lived experience. But it is capable of capturing much more of that experience than an abstract syllogistic argument ever will. Stories reinsert details which can be left out of more general statements that are tailored to the logic of the legal principle involved. The contrast that Nicholas Hasluck has just described between the judgments of the majority in *Chester* and Evatt J's dissent is a vivid illustration of this.[17]

The fourth essential attribute of narrative is its ethical dimension. Anyone who has heard a parable or has read a story to a child knows that narrative is not just a carrier of information, it is a carrier of values. Professor Robert Cover, in an influential foreword to the 1982 term of the Supreme Court of the United States, put it this way:

> In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse - to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral.[18]

While lawyers do not answer purely ethical questions and apply those answers directly, the legitimacy of the law depends on the extent to which it embodies the values of the society it serves. To discard narrative is to attenuate that ethical dimension of the law. The result would be a system at risk of floating free from the foundations of its legitimacy.

[16] *Butcher v Lachlan Elder Realty Pty Limited* [2004] HCA 60; (2004) 218 CLR 592 at [102], [109].
[17] The Hon Nicholas Hasluck AM QC, 'The Narrative Voice in Law and Fiction' (Speech, Australian Academy of Law, Curtin University Law School, 27 October 2021).
[18] Robert M Cover, 'Nomos and Narrative' (1983-1984) 97 *Harvard Law Review* 4, 5.

The fifth and final thing that we would lose if we were to walk away from narrative would be the common law itself. The doctrine of precedent is, or at least should be, about comparing the narrative before the court, with the narratives in previously decided cases, so as to determine whether there is enough relevant similarity to dictate an equivalent result. When counsel submits that the case before the court is 'on all fours' with a previously decided case, she is saying that the stories are the same. So Dr Bricker calls 'the invocation of precedent in legal opinions' an 'almost archetypal act of formalized storytelling'.[19] Narrative, he says, enables the 'cognitive pull' of precedent.[20]

Closer to home, Peter Quinlan SC, writing before his appointment as Chief Justice of Western Australia, referred to the common law's narrative tradition as a dynamic 'conversation between the new story and the old stories'. He said:

> A tradition, if it is healthy, carries within it the mechanisms for its own correction. The conversation between the new story and the old stories does not, for example, simply inform the judgment to be made in the case at hand (the new story). It may also reveal something hitherto unnoticed in the old story, something latent within that story which clarifies the standard or principle in question. Indeed, it may be that, in light of the most recent case, something is revealed which suggests that the tradition has gone off course in the past - and that one of the old stories might have turned out differently if we could have seen then what we can see now.[21]

The common law is 'thick', in the sense of contextually rich, rather than 'thin' in the sense of abstract:[22]

> That is why we remember, for example, that May Donoghue's drink on 26 August 1928 was bought for her by a friend. That Giovanni and Cesira Amadio were in their kitchen when they executed a guarantee in favour of their son in 1977. That Maree Whitaker was apprehensive about her upcoming surgery in July 1984 and asked questions 'incessantly'. That John and Brenda Miller didn't care much for cricket ... [23]

So narrative is part of the law's DNA. The answer to the concerns that Dershowitz raises is not to discard narrative, but to take its chronological aspect seriously. It may be that the job of counsel is to start at the end: both the end of the story and the end the client wants to achieve,

[19] Bricker, 'Is Narrative Essential to the Law?', above n 10, 3-4.
[20] Ibid, 4.
[21] Peter Quinlan SC, 'The Human Rights Delusion: A Defence of the Narrative Tradition of the Common Law' (2010) 12 *University of Notre Dame Australia Law Review* 69 at 93-94
[22] Ibid, 85, 92-93.
[23] Ibid, 93.

if that can be reached without doing violence to the evidence. But that is not the job of the judge. Judges should start at the beginning, and build their account of the case from there. While any narrative involves selecting some facts and discarding or ignoring others, the selection should be informed by the imperatives of chronology and causation, not by the need to reach a predetermined goal. And it should be alive to the need for texture and context, which includes a refusal to gloss over inconvenient facts, or to sand them down until they fit the rest of the story. Approaching the matter that way can be a kind of 'decision hygiene', a term coined by Daniel Kahneman, Olivier Sibony and Cass Sunstein in their recent book, *Noise: A Flaw in Human Judgment*. It describes a set of techniques designed to minimise cognitive and other distortions such as confirmation bias.[24] In honouring the chronology, it is akin to a method those authors call 'linear sequential unmasking', in which investigators in forensic laboratories are provided with relevant information at staged intervals in order to minimise distortions of that kind.[25]

To bring the discussion back to the subject of submissions and judgments, I hope I have reminded practitioners of those crafts why they should not lose sight of the importance of the narrative form. That is not just because telling a story is more persuasive (although it is). It is also because using narrative keeps submissions, and reasons for decision, in touch with some of the deeper virtues of our system of law which I have tried to sketch briefly here.

In a sense, the oppositions inherent in the preceding discussion - between the specific and the general, the concrete and the abstract - are false, or at least they are not oppositions if they are seen through the lens of a true narrative. Stories do not just recite the facts of an event; they show what that event means. In that way, a good narrative will embrace both the general and the particular, the abstract and the concrete. It is capable of communicating both broad themes and values, and the nuance of specific, lived experiences. This paradoxical relationship of the specific and the general was captured as long ago as the following passage, from Aristotle:

> Lack of experience diminishes our power of taking a comprehensive view of the admitted facts. Hence those who dwell in intimate association with nature and its phenomena are more able to lay down principles such as admit of a wide and coherent development; while those whom

[24] Daniel Kahneman, Olivier Sibony and Cass Sunstein, *Noise: A Flaw in Human Judgment* (London: William Collins, 2021) 243.
[25] Ibid, 257.

> devotion to abstract discussions has rendered unobservant of facts are too ready to dogmatise on the basis of a few observations.[26]

Chief Justice Allsop described a similar interplay between abstraction and lived experience in his Patron's Address to this Academy delivered last week.[27]

I will close with one last quote, this from the Russian film director, Andrei Tarkovsky. While he is speaking of 'the artist', I suggest that what he says is also apposite to the lawyer, and certainly to the judge:

> A phenomenon is recreated truthfully in a work of art through the attempt to rebuild the entire living structure of its inner connections. And not even in cinema does the artist have freedom of choice as he selects and combines facts from a 'lump of time' - however thick and extensive that lump may be. His personality, of its own accord and of necessity, will influence both its selection and the process of giving artistic unity to what is selected. Reality is conditioned by a great many causal connections, and the artist can only grasp some part of these. He is left with the ones he has succeeded in catching and reproducing, which are thus a manifestation of his individuality and uniqueness. Moreover, the more he aspires to a realistic account, the greater his responsibility for what he makes. Sincerity, truthfulness and clean hands are the virtues demanded of him'[28]

[26] Aristotle, *On Generation and Corruption*, tr H. H. Joachim (Blacksburg, 2001) 316a 5-9.
[27] Chief Justice James Allsop, 'Thinking about Law: the importance of how we attend and of context' (Speech, Australian Academy of Law Tenth Patron's Address) 7-8.
[28] Andrey Tarkovsky, *Sculpting in Time: Reflections on the Cinema*, tr Kitty Hunter-Blair (University of Texas Press, 1989) 184.