1-1-1990

Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions

David Ray Papke
Marquette University Law School, david.papke@marquette.edu

Publication Information
David Ray Papke, Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions, 40 J. Legal Educ. 145 (1990)

Discharge As Denouement: Appreciating the Storytelling of Appellate Opinions

David Ray Papke

> We spend our years as a tale that is told.
> —Psalms 90:9 (King James)

The appellate opinion has for decades been a good friend for the American law professor, but even old friends must sometimes be told they have grown tiresome. In the classroom, contemporary law students rarely appreciate the discursive character of opinions and the dialogic educational experience such texts could facilitate. Especially in the later stages of their legal educations, students seem inclined only to extract rules from opinions, much like those who extract favors without truly respecting a benefactor. Too much legal scholarship, meanwhile, merely gathers large numbers of opinions together, assuming with positivist doggedness that "the law" will emerge from the crowd. Can anything be done to make the appellate opinion a more pleasing and valuable friend?

One possibility involves recognizing that the appellate opinion has an inherent tendency to tell stories. Over the years there have been tentative gestures in this direction, particularly by the judges and scholars who have contributed to the literature *in* law wing of the law and literature movement.[1] Among judges, Justice Cardozo not only displayed a strong narrative voice in his opinions but also published his now classic sketch of opinion prototypes,[2] and Justice Michael A. Musmanno, who served on the Pennsylvania Supreme Court from 1952 to 1968, wrote ostentatiously

David Ray Papke is Associate Professor of Law and American Studies, Indiana University School of Law—Indianapolis. The author would like to thank John Boyce and Susanah Mead for encouraging him to write this article. Colleen Coughlin, Anita Flax, David Friedrichs, and Barney Pace read an earlier draft and offered many valuable suggestions regarding both style and content.

1. For commentaries on the contemporary law and literature movement, see John D. Ayer, The Very Idea of "Law and Literature," 85 Mich. L. Rev. 895 (1987); William H. Page, The Place of Law and Literature, 39 Vand. L. Rev. 391 (1986); David Ray Papke, Neo-Marxists, Nietzscheans and New Critics: The Voices of the Contemporary Law and Literature Discourse, 1985 Am. B. Found. Res. J. 883. For a study of current law and literature courses in American law schools, see Elizabeth Villiers Gemmette, Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum, 23 Val. U. L. Rev. 267 (1989).
2. Benjamin N. Cardozo, Law and Literature, 14 Yale Rev. 669 (1925). The essay was subsequently reprinted in 1925 Conn. B.A. Rep. 90, 52 Harv. L. Rev. 471 (1939), 22 Law J. 1 (1957), and also in Benjamin N. Cardozo, Law and Literature and Other Essays and Addresses (New York, 1931), and Selected Writings of Benjamin Nathan Cardozo, ed. Margaret E. Hall 339 (New York, 1947).

literary opinions.[3] Assorted scholars have discussed the stylistics of individual judges and of appellate opinions in general[4]; James Boyd White and Richard Weisberg have demonstrated special sensitivities of this sort.[5] No less a light than Ronald Dworkin has compared a judge's decision in a hard case to the writing of a new chapter in a chain novel.[6] Indeed, the flurry of recent activity has led one respected scholar to say that enough is enough![7]

Added together, such writings demonstrate significant interest in the literary aspects of the appellate opinion, but neither the self-consciously literary judicial authors nor the scholarly commentators have explored in depth the way opinions tell stories. Even if one acknowledges that the technical features of narratology as a modern literary science are intimidating,[8] the failure to explore the narrative features of opinions constitutes a surprising oversight. Opinions are rich in stories, and prototypical stories structure entire areas of the law. Given the dominant position of opinions in professional legal education and mainstream legal scholarship, a narratology of the opinion may be a prerequisite for developing what the scholar James Elkins has called a "narrative jurisprudence."[9] Grasping how opinions and the law tell stories points the way to a larger understanding of the importance normative messages have in our lives.

Narrative Components of the Appellate Opinion

What are the various narrative aspects of opinions? For some, the narrative component of the appellate opinion resides simply in the compact restatement of facts that squats somewhere near the beginning of the text.[10] And indeed, these restatements *are* stories. They do not report sociolegal developments in any full or ultimate sense; judges and their clerks may omit or alter pertinent details, recharacterize what happened prior to or at

3. For comments on Musmanno's style, see Laura Krugman Ray, The Figure in the Carpet: Images of Family and State in Supreme Court Opinions, 37 J. Legal Educ. 331, 332–33 (1987).
4. Griffin B. Bell, Style in Judicial Writing, 15 J. Pub. L. 214 (1966); William Domnarski, The Tale of the Text: The Figurative Prose Style of Connecticut Supreme Court Justice Leo Parskey, 18 Conn. L. Rev. 459 (1986), and Style and Justice Holmes, 6 Del. Law. 54 (Summer 1987); Perlie P. Fallon, The Relation Between Analysis and Style in American Legal Prose, 28 Neb. L. Rev. 80 (1948); Ray D. Henson, A Study in Style: Mr. Justice Frankfurter, 6 Vill. L. Rev. 377 (1961); Laura Krugman Ray, Justice Brennan and the Jurisprudence of Dissent, 61 Temp. L. Rev. 307, 346–50 (1988); Irving Younger, On Judicial Opinions Considered As One of the Fine Arts, 51 U. Colo. L. Rev. 341 (1980).
5. James Boyd White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character and Community 247–70 (Chicago, 1984), and Heracles' Bow: Essays on the Rhetoric and Poetics of the Law 107–38 (Madison, 1985); Richard Weisberg, How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor, With an Application to Justice Rehnquist, 57 N.Y.U. L. Rev. 1 (1982).
6. Ronald Dworkin, Law As Interpretation, 60 Tex. L. Rev. 527, 542 (1982).
7. Robin L. West, Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement, 54 Tenn. L. Rev. 203 (1987).
8. Narratology—from the French *narratologie*—is an offshoot of twentieth-century structuralist literary criticism. Its leading practitioners include Tzvetan Todorov, A. J. Greimas, Roland Barthes, Claude Bremond, and Gérard Genette.
9. James R. Elkins, On the Emergence of Narrative Jurisprudence: The Humanistic Perspective Finds a New Path, 9 Legal Stud. F. 123 (1985).
10. L. H. LaRue, Posner on Literature, 85 Mich. L. Rev. 325, 328 (1986).

trial, or in various ways present the "facts" in a new narrative framework.[11] In certain instances, the restatement of facts may respond more to the opinion that follows than the opinion responds to the fact pattern. The restatement of facts is not just a snapshot; it is a composed, compacted narrative.

When the restatement of facts ends, the storytelling of appellate opinions does not cease but rather shifts gears. Beyond the restatement, opinions are laden with narrative vignettes designed to capture, among other things, precedents, different cases, hypothetical scenarios, and even expanded versions of the restatement of facts for the case at hand. "[T]he stories told in legal cases, like the stories told in popular songs," one scholar has written, "capture a rich variety of everyday experiences involving real world situations."[12] From the assorted vignettes emerge even larger and more abstracted stories, master narratives that might be used to organize and understand large groups of opinions. Then too, one could go even a step further and invoke Will Wright's suggestion that narrative is merely one form of reasoning about experience and society.[13] In this sense, the *entire* appellate opinion may be considered a narrative.

The master narratives of opinions are often overlooked. Present in virtually all areas of the law, master narratives perform a didactic function; they articulate normative understandings of social life. Master narratives have greater importance in future opinions than do the assorted vignettes, and, unlike the complex and variegated prose of the opinion as a whole, the master narratives can genuinely be treated as stories. What should we make of these master narratives? Might they be elevated to high literary art? Should they be reduced to the status of propaganda? Or is there another alternative?

It seems silly to compare the judicial authors of appellate opinions to distinguished literary artists and to assemble master narratives into a kind of canon.[14] Although some judges write exceptionally well and others quite poorly, they are hardly tortured artists probing the meaning of existence or achieving glorious epiphanies. Rather than addressing eternity, judges address their opinions to litigants and also, quite consciously, to one another. "Even in concurrence or dissent," observes the executive assistant of one state chief justice, "the impulse to persuade at least some of one's colleagues to join may tame the excesses of unrestrained personal style."[15] Despite their literary features, appellate opinions, because they are com-

11. Leigh Buchanan Bienen, The Law As Storyteller, 98 Harv. L. Rev. 494, 496 (1984).
12. Gary Minda, Phenomenology, Tina Turner and the Law, 16 N. Mex. L. Rev. 479, 480 n.4 (1986).
13. Will Wright, Sixguns and Society: A Structural Study of the Western 125 (Berkeley, 1975).
14. Richard A. Posner, Law and Literature: A Relation Reargued, 72 Va. L. Rev. 1351, 1386 (1986). Earlier in my career I compiled a law and literature bibliography that blithely blended together judicial and literary authors. David R. Papke, Law and Literature: A Comment and Bibliography of Secondary Works, 73 L. Libr. J. 421 (1980).
15. Ray, *supra* note 3, at 331–32.

mands backed by state power,[16] have more in common with legislation and government decrees than with great poems or novels.

Might appellate opinions, then, be profitably characterized as propaganda? Master narratives do characteristically "depend upon simplistic abstractions and common argumentative structures which create and perpetuate particular conceptions of social relationships."[17] In his analysis of the prototypical contracts opinion, Peter Gabel has described the dehumanizing alienation of the advanced capitalist system and related this alienation directly to class conflict. "The role of the law," he argues, "is to prevent such conflict from becoming overt, and to assure that if a dispute does 'break out,' it will be interpreted and resolved according to a system of thought which reinstates, in the realm of thought, the apparent necessity and legitimacy of the structures of normal practice."[18] If the characterization as high art unduly magnifies appellate opinions, Gabel's type of analysis may reduce them to sociopolitical lies. Rather, against a backdrop of professional identity and institutional restraints, judges try in their opinions to reach fair and appropriate results. Like everyone else (especially other types of governmental functionaries), judges internalize values and beliefs and make them part of their daily practices, but they do not for most part connivingly author duplicitous texts.

Rather than fine literature or raw propaganda, a third alternative—the formula story of popular fiction, television, or film—may offer better ground for comparison. John Cawelti suggests that "serious" literature "tend[s] toward some kind of encounter with our sense of the limitations of reality, while formulas embody moral fantasies of a world more exciting, more fulfilling, or more benevolent than the one we inhabit."[19] Comparing the master narrative of an appellate opinion to the formula story encourages consideration of both the literary and the political dimension of opinions. Further, formula stories arrange themselves into genres, and each genre has a fundamental, basically fixed formula. Individual authors develop variations, but the formula—narrative in character—creates requirements for authors and expectations for readers. Use of the formulaic model allows the critic to note that master narratives have generic exemplars, replicate the conventions of those exemplars, and almost invariably terminate with closed, definitive endings. Indeed, the images and core developments of master narratives may constitute virtual morality tales for the dominant system.

The Formula Story of Consumer Bankruptcy

For many commentators bankruptcy and narrative make an unlikely couple. According to Justice McReynolds, the concept of property is appropriate "for amplificative philosophic disquisition," but the bank-

16. West, *supra* note 7, at 207, 277. The holding in an opinion is most recognizably a command, but much of what precedes the holding is narrative persuasion.
17. Minda, *supra* note 12, at 480.
18. Peter Gabel, A Critical Anatomy of the Legal Opinion, 5 ALSA F. 5, 8 (Fall 1980).
19. John G. Cawelti, Adventure, Mystery, and Romance: Formula Stories As Art and Popular Culture 38 (Chicago, 1976).

ruptcy opinion is the wrong place to undertake it. "[T]he Bankrupt Law," in McReynolds's opinion, "is a prosy thing intended for ready application to the everyday affairs of practical business. . . ."[20]

Is McReynolds correct? I think not. The relatively closed professional subcommunity of bankruptcy lawyers, like other cohesive occupational subcommunities, has developed a pungent and metaphorical discourse.[21] Lunching with bankruptcy lawyers, one learns that bankrupts must be aware of the "cleavage line" but later might be able to use the "wild card," assuming, of course, they do not face a "cram down." Although appellate opinions in bankruptcy law may provide important rules and corollaries, they also include master narratives—prototypical stories—for each of the forms of bankruptcy.[22]

The Chapter 7 consumer bankruptcy is the most common, constituting roughly ninety percent of all bankruptcies, and its basic narrative is the most recognizable, at least for the critic, teacher, or scholar willing to read consumer-bankruptcy appellate opinions narratologically. Essentially, the prototypical opinion tells a story of an individual whose debts and poor financial management dictate a bankruptcy filing. Assorted legal twists and turns slow the bankruptcy, and in some cases the courts even terminate the proceeding. More commonly, the debtor and his or her counsel maneuver through the maze. In the tale's denouement, bankruptcy discharge is achieved. Freed from the shackles of debt, the discharged bankrupt begins anew and has a veritable "fresh start" on life.

Customarily in legal teaching and scholarship, we take this story for granted. We might, however, ask when and how this tale emerged. Its emergence follows the pattern of the mass cultural emergence of the detective story. In the Anglo-American cultural sphere, several precursors of the detective story appeared in the early and mid-nineteenth century.[23] They included assorted autobiographical reminiscences by actual detectives, "casebooks" of fictive detectives' exploits, and Edgar Allan Poe's exquisite Dupin stories. None of these were recognized in their own era as detective stories *per se*; they were first stirrings or anticipatory literary gestures. In the final decades of the century, however, the detective story coalesced as a genre. Exemplars included the works of Australian Fergus Hume and American Anna Katherine Green, but the dominant author and fictive detective were Arthur Conan Doyle and Sherlock Holmes.[24]

Similarly, tentative suggestions of the consumer bankruptcy master narrative appeared in late nineteenth and early twentieth-century opinions,

20. Gleason v. Thaw, 236 U.S. 558, 560 (1915).
21. For an especially interesting compilation of subcommunity argot, see David W. Maurer, Language of the Underworld (Lexington, Ky., 1981).
22. The Bankruptcy Code makes available liquidations, municipal debt adjustments, corporate reorganizations, adjustments of debts for individuals with regular income, and family farm bankruptcies. The last option was added in 1986, and although case law is only beginning to develop, family farm bankruptcy opinions seem certain to develop a master narrative with deep ideological resonance.
23. Treasury of Victorian Detective Stories 2–3, ed. Everett F. Bleiler (New York, 1979).
24. David Ray Papke, Framing the Criminal: Crime, Cultural Work and the Loss of Critical Perspective, 1830–1900, at 102–06 (Hamden, Conn., 1987).

in the period during which consumer capitalism increasingly supplemented earlier entrepreneurial and industrial capitalist forms. In his 1877 opinion of the Court in *Neal v. Clark*, for example, Justice Harlan wrote movingly of how under the federal bankruptcy law "the honest citizen may be relieved from the burden of hopeless insolvency."[25] Shortly after the turn of the century, Justice Day reiterated the same sentiments, using some of Harlan's language and adding the now familiar "fresh start" metaphor:

> Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes.[26]

Although the attempts to assist Civil War debtors through 1867 bankruptcy law reform and the fuller 1898 reform of bankruptcy law provide some backdrop for these opinions, the narrative feints in these opinions do not derive directly from statutes. Just as early detective writings prefigured a detective fiction genre, these feints hinted at what would become the master narrative of consumer bankruptcy. Although the quoted opinions, along with many others from lower federal courts, seem still to imagine an entrepreneurial debtor rather than a consumer,[27] these opinions begin to point to the consumer. Justice Day, in particular, continued to develop his images of unfortunate debtors, hoping for a discharge that would provide "a new opportunity in life,"[28] and at the turn of the century the emergent narrative of consumer bankruptcy grew recognizable enough to prompt at least one commentator to complain vigorously.[29]

The two most recent comprehensive redraftings of American bankruptcy law took place in 1898 and 1978, but roughly in the middle of that eighty-year period the consumer bankruptcy narrative truly coalesced. Justice Butler's gradual determination and then rhetorical assertion that discharge provisions distinguished federal bankruptcy law from state insolvency laws perhaps solidified the new narrative.[30] It was not Butler, however, but Justice Sutherland, another of the infamous Four Horsemen, who became the Conan Doyle of the genre. In his 1934 opinion of the Court in *Local Loan Co. v. Hunt*, Sutherland acknowledged many of the previously quoted narrative feints and then spoke glowingly of the way bankruptcy law led to a fresh start. Discharge in particular afforded "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."[31]

To say that Sutherland's language, images, and narrative caught on is an understatement indeed. Anyone so bold as to Shepardize *Local Loan*

25. Neal v. Clark, 95 U.S. 704, 709 (1877).
26. Wetmore v. Markoe, 196 U.S. 68, 77 (1904).
27. Appellate judges in this era speak frequently of how a bankruptcy proceeding might restore a debtor to business activity. Hardie v. Swafford Bros. Dry Goods, 165 Fed. 588, 591 (1908); White v. Brown Shoe Co., 30 F. 2d 674, 674 (1929).
28. Stellwagen v. Clum, 245 U.S. 605, 617 (1918).
29. James Monroe Olmstead, Bankruptcy a Commercial Regulation, 15 Harv. L. Rev. 829 (1901).
30. Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 265–66 (1929); Pobreslo v. Joseph M. Boyd Co., 287 U.S. 518 (1933).
31. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

through Westlaw during the summer of 1988 would have found no fewer than thirty-nine pages of citations, the great majority to the quoted language. Some opinions seem consciously determined to surpass *Local Loan* in metaphorical flair. To quote Judge Goldberg of the Fifth Circuit:

> The Bankruptcy Act was intended to be a sturdy bridge over financially troubled waters . . . . We refuse to make it a treacherous tightrope on which the slightest misstep spells disaster and over which only the most accomplished acrobat can successfully pass.[32]

An occasional judge even plays off Sutherland's language, contrasting "fresh starts" with "head starts."[33] In the professional secondary literature as well, commentators inspired by *Local Loan* can suggest, apparently without blushing, that bankruptcy provided "the opportunity to free a family from a living hell, permitting it to attain a new and brighter world, no longer oppressed by the clouds of fear, degradation and discouragement. . . ."[34] Sutherland's opinion in *Local Loan* is in direct and indirect ways the most influential modern consumer bankruptcy opinion.

The features and overall structure of the core narrative are simple. Characterization, for example, does not merely border on caricature; it approaches abstraction. Occasionally the reader or teacher of a consumer bankruptcy appellate opinion might learn in passing of a bankrupt's social travails or family arrangements, but such information is rare. More customarily, we learn only of the bankrupt's most fundamental characteristics. Although the bankrupt may be a wayward individual, he or she is fundamentally industrious, honest, and repentant. Admittedly, these characteristics leave the bankrupt without a human face; but still, the notation has meaning. Industry, honesty, and repentance, after all, are the opposites of laziness, dishonesty, and continued wantonness. If the bankrupt should in fact manifest any of the coded opposites, the master narrative stalls. In legal narratives of this sort, characters who are contradictory or idiosyncratic need not answer the casting call.

Predictability also dominates the linear structure of the master narrative. Unlike complicated novels, stories told by appellate judges rarely play plot and story off one another in creative ways.[35] The order of events in the text is essentially the same as the sequence of "actual" events. Were judges to achieve a greater anachrony (that is, discordance between plot and story), appellate opinions might be less deadening for the reader. As noted earlier, however, the appellate opinion is a narrative without being robustly literary. The diachronic movement of the narrative through linear time has three stages: The bankrupt goes astray; he or she undertakes a bankruptcy proceeding; he or she is discharged. The basic sequence is highly compacted and could be reduced to one overall thrust, much as A. J. Greimas does in his famous narratological studies of short stories.[36] Reducing the

32. Friendly Finance Discount Corp. v. Jones, 490 F.2d 452, 457 (1974).
33. Lines v. Frederick, 400 U.S. 18, 21 (1970).
34. David E. Nims, Jr., The Attorney for the Bankrupt, *in* Basic Bankruptcy, ed. Leslie W. Abramson, 1 (Ann Arbor, 1971).
35. For discussions of the interplay of plot and story, see Gérard Genette, Narrative Discourse (Ithaca, N.Y., 1980).
36. A. J. Greimas, Sémantique structurale recherche de méthode (Paris, 1966).

narrative to a typological scheme would, however, obscure the special power of discharge as denouement. In the denouement, more so than in the first two movements, metaphors blossom and the narrative comes to life, infusing the protagonist with hope, freedom, and thoughts of new opportunity.[37]

Beyond characterization and diachronic structure, the act and process of telling the story are noteworthy. All stories are told in a particular narrative voice, one that implies a narrator and that provides the listener or reader with a given perspective on the actual story. The storyteller in the bankruptcy master narrative disdains ambivalence, caution, and confusion. The narrative voice seems paternalistic. The reader listens to an omniscient judge. Indeed, the story is told by a "superjudge," who speaks in a stentorian, almost godlike voice. Each opinion conveys the smaller story at hand and also the story of consumer bankruptcy as a whole.

How should the reader react to this story? How should the law professor teach and critique it? Although there will be as many answers, with assorted subtle variations, as there are interpreters, two lines of interpretation might be suggested. The first, which I will call an "ideology critique," is a sociopolitical interpretation that relates the master narrative to the economy and the state. The second, "comedy appreciation," is more formalistic and treats the master narrative with reference to ageless literary forms. Although the interpretations are not mutually exclusive, they can be considered separately.

In ideology critique, the concept of "ideology" should not be confused with the previously discussed notion of "propaganda." Ideology, unlike propaganda, is not merely a disingenuous duping of the uninformed. To be sure, ideological values, images, and portrayals frequently favor the goals and practices of particular social groups, but the group members internalize ideology and live by it. Ideology is a normative vision; it is a kind of contemporary mythology that is pervasively present in law and legal texts.[38] In the words of the anthropologist Clifford Geertz, "[I]t is through the construction of ideologies, schematic images of social order, that man makes himself for better or worse a political animal."[39]

The master narrative of consumer bankruptcy is woven into the larger ideological fabric of advanced finance and consumer capitalism. Shortly after World War II, a consultant announced that the greatest challenge facing American business was convincing consumers that the "hedonistic

37. An exceptional bankruptcy article that recognizes that there is normative lore in bankruptcy law and that discharge has an especially important place in the lore is Thomas H. Jackson, The Fresh-Start Policy in Bankruptcy Law, 98 Harv. L. Rev. 1393 (1985).
38. Articles that interrelate law and ideology include Gerald E. Frug, The Ideology of Bureaucracy in American Law, 97 Harv. L. Rev. 1277 (1984); John Griffiths, Ideology in Criminal Procedure or a Third "Model" of the Criminal Process, 79 Yale L.J. 359 (1970); William H. Simon, The Ideology of Advocacy: Procedural Justice and Professional Ethics, 1978 Wis. L. Rev. 29.
39. Clifford Geertz, The Interpretation of Cultures 218 (New York, 1973).

approach to life is a moral, not an immoral one."[40] Although the opening decades of the twentieth century may have marked a giant step in this direction, the Great Depression and World War II slowed the march. In the years after World War II, the march resumed, and consumption became a veritable American ethos. Americans purchase goods to be happy, and many build social experiences around purchasing. Adult Americans even project commodity-related happiness on their young.[41] Retailers, advertisers, and financial institutions fuel the process; what some have labeled the "consumer culture" has become dominant.[42]

Unfortunately, some consumers lack restraint, have little ability to judge advertising promises, and generally stand vulnerable to the howling winds of the consumer culture. The master narrative of appellate bankruptcy casts a soothing light on the collapses that result. Contrary to the master narrative, bankruptcy in the contemporary economic system is hard and painful. The real-life bankrupt signs reaffirmation agreements for major secured debts and sees possessions and assets reduced to the niggardly levels of bankruptcy exemptions. The much fabled discharge, meanwhile, includes exceptions and denials, and even after it is achieved, embarrassment and destruction of credit ratings make the bankrupt's situation more stale than fresh. The modern state, acting through its bankruptcy laws, is hardly the cheery and nurturing body that the master narrative would suggest.

The master narrative of consumer bankruptcy opinions also invites a second interpretation—an interpretation more formalistic than political. Northrop Frye, the high priest of modern literary formalism, defines four grand narrative categories that are broader and more fundamental than ordinary genres such as science fiction or police procedurals.[43] These categories—the tragic, comic, romantic, and ironic (or satiric)—correspond to pregeneric myths and also arrange themselves into two opposed pairs. Tragedy and comedy are two poles on one axis, while romance and irony are polar opposites on a second axis dividing the first. Although such abstract charting and schematizing leads some to bristle,[44] Frye boldly places all the modes, archetypes, and genres of literature within this scheme. Following the lead of Robin West, who has applied Frye's scheme to jurisprudential works,[45] one can also apply Frye's fundamental narrative categories to appellate opinions.

As is perhaps obvious, the bankruptcy master narrative is comedy. This is not to suggest that bankruptcy opinions are full of belly laughs but rather

40. Douglas T. Miller & Marion Nowak, The Fifties: The Way We Really Were 117 (Garden City, N.J., 1977).
41. Consider the tendency of yuppie parents to buy every conceivable toy for their children. My favorite example is a recently encountered toy toilet-bowl brush.
42. For influential treatments of American consumer culture, see The Culture of Consumption, ed. Richard Wightman Fox & T. J. Jackson Lears (New York, 1983); Daniel Horowitz, The Morality of Spending: Attitudes Toward the Consumer Society in America, 1875–1940 (Baltimore, 1985).
43. Northrop Frye, Anatomy of Criticism (Princeton, N.J., 1957).
44. Terry Eagleton, Literary Theory: An Introduction 91–94 (Minneapolis, 1983).
45. Robin West, Jurisprudence As Narrative: An Aesthetic Analysis of Modern Legal Theory, 60 N.Y.U. L. Rev. 145, 148–51 (1985).

to place them within the fundamentally regenerative mode of comedy. In Frye's scheme tragedy follows the protagonist on the trail to defeat, while comedy traces a path from repression to liberation to regeneration. In a prototypical comedy, as John Denvir describes it, young lovers cement their relationship by overcoming the repressive opposition of their elders, with whom they are reconciled in the end at the wedding feast. "If law is an attempt to bring a regenerative order to an otherwise chaotic world," Denvir says in an intriguing jurisprudential essay, "then comedy is its fictive analogue."[46]

Even though Denvir may ultimately be too optimistic about the potential of law to direct social life, the master narrative of consumer bankruptcy does correspond to comedy. Debt weighs heavily on the honest but unfortunate citizen, who, at wit's end, knows not where to turn. But fear not—the bankruptcy process offers liberation. Via discharge, the bankrupt regains personal wholeness and integration with society. The appellate judge's tone, be it in *Local Loan* or a thousand progeny, is in the end one of optimistic regeneration.[47]

One could opt inflexibly for either an ideology critique or appreciation of comedy, for either a negative or a positive hermeneutic. There is, after all, a neo-Marxist growl in the first interpretation and an optimistic smile in the latter, and few critics can growl and smile simultaneously. In reality, however, the master narrative of consumer bankruptcy appellate opinions is *both* ideology and comedy.[48] Teachers and interpreters of the consumer bankruptcy master narrative should engage in a negative hermeneutic function; they should unmask, demystify, and demonstrate the way the master narrative embodies false consciousness and legitimates dominant power structures. Teachers and interpreters should also engage in a positive hermeneutic endeavor; they should show students and friends how legal narratives can speak of liberation, wholeness, and recuperation.

The Benefits of Sensitivity to Legal Narratives

Other appellate opinions could be read in similar ways, and additional master narratives shared by distinctive groups of opinions could be analyzed and interpreted. But would such an undertaking give us anything of value? Does sensitivity to the storytelling of opinions enrich the long-standing friendship between professional legal education and appellate opinions? I think so. Appreciating the narrative features of opinions leads to the recognition of the discursive character of opinions and invites not only a reading of the text but also reflection on how we read it. An

46. John Denvir, William Shakespeare and the Jurisprudence of Comedy, 39 Stan. L. Rev. 825, 827 (1987).
47. Judith Koffler, Dionysus in Bankruptcy Land, 7 Rut.-Cam. L.J. 655, 663 (1975) suggests the legal paradox of bankruptcy law is analogous to the Dionysian ritual of destruction and regeneration.
48. Critics recognize the ways ideology and comedy can be bedfellows and note that the securing of class domination is coupled with a utopian impulse in many mass cultural forms. Michael Denning, Mechanic Accents: Dime Novels and Working-Class Culture in Nineteenth-Century America 212–13 (New York, 1987); Fredric Jameson, The Political Unconscious: Narrative As a Socially Symbolic Act 296 (Ithaca, 1981).

awareness of storytelling helps insulate against reductive and positivist approaches to law and can make legal education a more fully empowering learning experience.

As noted earlier, one of the greatest frustrations of contemporary law professors, particularly those who prefer participatory dialogue to pontification from the podium, is the failure of students to recognize the verve, complexity, and contradictions of appellate opinions as texts. Beginning students tend to "brief" their opinions, but even this commendable diligence incorporates a brutal reductiveness. In the final semesters of law school, briefing itself declines; imbued with rule seeking, students treat opinions as cluttered display cases containing isolated pieces of legal jewelry. If approached with storytelling sensitivities, opinions might yield more than they do ordinarily.

Appreciation of narrative can underscore both the sequential legal process and the variability of legal meaning. A story, or an appellate opinion, possesses sequential fictive moments that more or less correspond to what litigants consider the stages of sociolegal conduct. Sociolegal conduct has a fluid, diachronic character, and law, even if heuristically differentiated from social context, is also a linear process. Awareness of sequential fictive moments in a legal narrative counters "the legal paradigm's emphasis on the application of static rule to freeze-frame fact."[49] When the legal narrative does end, storytelling sensitivities continue to aid the student and scholar. The ultimate meaning of an appellate opinion, contrary to the pronouncements of those prepared to distill its substantive essence, is plural rather than singular. One need not agree with modern deconstructionists that texts have unlimited openness to recognize that texts proffer a range of interpretive meanings. In the words of Roland Barthes, the text consists of "the *stereographic plurality* of signifiers that weave it."[50] This is, perhaps, most obvious with a poem, short story, or a novel, but it is also true with the opinion as text. Frequently law school classes work industriously to clamp down one meaning for an opinion, but at the conclusion of an opinion numerous strands remain woven into the text.

The traditional method of reading appellate opinions, taught and valorized for decades, insists upon a great evaluative divide in the content of opinions: part of the opinion is controlling, but much of it may be dismissed as mere dicta. Introductions to law libraries, legal education, and legal method, some sprightly and some turgid, insist that students learn to make this crucial distinction. Although learning to distinguish rule and holding from discussion and dictum is undoubtedly valuable, it is also limiting. Were one to use standard legal encyclopedias, digests, *American Law Reports*, and *Words and Phrases* to seek guidance and insight into the core story of consumer bankruptcy, one would find very little. The reason, simply, is that standard legal guides to the proverbial "case law" speak so univocally with reference to rules and holdings as to be able to articulate

49. Denvir, *supra* note 46, at 838.
50. Roland Barthes, From Work to Text, *in* Textual Strategies: Perspectives in Post-Structuralist Criticism, ed. Josué V. Harari, 76 (Ithaca, 1979).

virtually nothing else. These guides pierce and shred the humanistic fabric of the law; the story of the law they tell is storyless. By attending to narrative, however, one can knit together truly important material. In consumer bankruptcy and elsewhere, the master narrative is dicta, but it nevertheless establishes the most fundamental context.

Furthermore, changes in master narratives frequently mark significant watersheds in legal history. Legal narratives do not float free from historical developments; master narratives in appellate opinions change as technology, the economy, society, and ideology change. Cultural change does not in any precise way dictate the content of legal narrative—indeed, the master narratives are more general and mythic than precise and specific. As with generic discontinuities in literature,[51] however, narrative patterns in the law pull apart and new ones coalesce as historical epochs close or begin.

The classical contracts narrative, for example, lived well into the twentieth century, positing a meeting of minds and then casting as nasty those who broke agreements. The problem was that the "four-cornered" contract came increasingly to be imposed by those with significant economic advantage and to be other than truly negotiated. Breaking agreements, when the agreements themselves were manipulative, seemed less and less repugnant. Hence, the classical contracts narrative finally pulled apart, although even today newer narratives involving arm's-length bargaining, unconscionability, implied warranties, and other modern narratival feints are not as engrossing.[52] The appeal of the classical story may in fact be why contracts professors have difficulty putting outdated contracts opinions aside. These opinions are, even outside their epoch, wonderfully good stories.

Some have argued that literary sensibilities and methods have little applicability to law aside from the appellate opinion,[53] but one need not be so restrictive. Although the appellate opinion is the dominant text of legal education and scholarship and the first legal text to explore narratologically, the approach should also rub off on other legal texts. To some extent, this has already happened in constitutional law circles, in which methods and strategies borrowed from literary theory are increasingly used in constitutional interpretation. Certain recent constitutional law writings are as much literary as they are legal.[54]

Legislative commands, despite their tight, compacted language, so devoid of interesting figures of speech, can also be considered narratives. A federal statute mandating two month's notice before a plant closing, for example, imagines a social milieu of cohesive communities and families revolving around bountiful labor. A local ordinance banning smoking in public places idealizes a clean environment peopled by healthy and

51. Denning, *supra* note 48, at 75.
52. Grant Gilmore, The Death of Contract (Columbus, 1974); James E. Murray, Understanding Law As Metaphor, 34 J. Legal Educ. 714, 727 (1984).
53. Posner, *supra* note 14, at 1370–75.
54. Robert A. Ferguson, "We Do Ordain and Establish": The Constitution As Literary Text, 29 Wm. & M. L. Rev. 3 (1987); Daniel J. Kornstein, The Success of the Word: The Literary Critic As Constitutional Theorist, 4 Cardozo Arts & Ent. L.J. 277 (1985); Sanford Levinson, Law As Literature, 60 Tex. L. Rev. 373 (1982).

considerate souls. Statutes and ordinances, even though they do not retell past developments as do opinions, do clearly manifest imaginative mimesis when they look to the future. Every statute or ordinance, in L. H. LaRue's terms, "creates a 'fictive world.' "[55] Statutes make implicit and explicit claims about social situations. Although these claims are not false or disingenuous in a pejorative sense, they are fictitious. Most generally, statutes and ordinances include materials requiring interpretation.[56]

Writings in legal theory also include storytelling components. As Robin West has noted:

> Modern legal theorists persistently employ narrative plots at strategic points in their arguments, relating romantic sagas about mythical commanders and communities and saturating their writings with realistic anecdotes from lawyers' and judges' subjective experiences of law. Fictive protagonists also play an important role in legal theory: Dworkin's heroic "Herculean" judge and Holmes's one-dimensional "bad man," for example, are central devices by which these jurists convey their conceptions of the meaning of law.[57]

When West goes on to correlate four major jurisprudential traditions (natural law, positivism, liberalism, and statism) with Northrop Frye's four aesthetic myths, reviewers are perhaps justifiably cautious.[58] But West is most correct in insisting that not only jurisprudential writings with obvious storytelling components, such as Lon Fuller's "The Case of the Speluncean Explorers,"[59] but also virtually all jurisprudence becomes richer and more enlightening if read with storytelling awareness. Narrative is a crucial and central feature of jurisprudence.

Among others, judicial review theorist John Hart Ely, critical legal studies leader Roberto Unger, and law and economics godfather Richard Posner, seem "ripe" (to rely on a legal metaphor) for narratological critiques. Posner's neoclassical writings, in which free-willed protagonists make hearty, rational choices in the world as orderly marketplace, possess a mythic tone. When Arthur Leff first read Posner's *Economic Analysis of Law*,[60] he sensed the presence of a familiar genre. Racing through his mental catalogue of possibilities, Leff concluded that "as a matter of literary genre (though most likely not as a matter of literary influence) the closest analogue to *Economic Analysis of Law* is the picaresque novel."[61] Like Don Quixote, Tom Jones, or Huck Finn, Posner's protagonist is an eponymous hero confronted by a world of problems; he overcomes each of them, moving on with vigor to the next adventure. Although the comparison is meant to be scathing criticism, Leff's comments significantly contribute to our understanding both of Posner's work and of his intellectual appeal.

The possibility that my own comments may be challenged is in itself one of the greatest advantages of developing an appreciation of storytelling in

55. LaRue, *supra* note 10, at 327.
56. Kenneth S. Abraham, Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair, 32 Rutgers L. Rev. 676 (1979).
57. West, *supra* note 45, at 145–46 (notes omitted).
58. John D. Ayer makes and then rejects the suggestion that West's comparisons resemble those of undergraduate term papers. Ayer, *supra* note 1, at 899–900.
59. Lon L. Fuller, The Case of the Speluncean Explorers, 62 Harv. L. Rev. 616 (1949).
60. Richard A. Posner, Economic Analysis of Law (Boston, 1973).
61. Arthur Allen Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 Va. L. Rev. 451, 451 (1974).

the law. A positivist jurisprudence claims to be objective and even scientific; it takes the law simply to be what it is. An alternative jurisprudence recognizes that law is elaborately woven with rhetoric, morality, and ideology; it perceives law as an immense, variable, sometimes contradictory fabric. The law should be interpreted, evaluated, and sometimes rewritten. An awareness of its storytelling tendencies would greatly contribute to the process.

Conclusion

An approach to appellate opinions of the sort I have sketched has pedagogical, professional, and ontological ramifications. In the law school setting, focusing on legal storytelling might relieve the boredom and alienation of students who have become proficient in traditional opinion-reading techniques. Law school graduates might learn to tell better stories on behalf of clients, draft fairer imagined worlds in legislatures, and shape more thoughtful master narratives from the bench.[62] Legal educators might not only enliven their scholarship but also collaborate fruitfully with scholars in other disciplines. Individuals in all of these roles might also find ways to tell their own personal stories—stories that involve their families and their careers, their dreams and their fears.

To tell one's own stories, one must confront other stories. Because modern society is rife with messages, lessons, and stories, no storyteller writes on a blank slate. Some stories come from traditional family and religious sources; even more come from popular political figures, the mass culture, and especially the commercial culture. A willingness to tell stories about these other stories helps one to tell the kinds of personal stories that create a greater contentment and wholeness. Stories of the dominant ideology, such as the Horatio Alger myth, can be containing and repressing if unchallenged. When confronted and challenged, they can become stories against which one crafts more personal and genuine tales.

Narratives are never merely descriptive or fanciful; they are also explanations.[63] Storytellers, whether individuals, businesses, or government institutions, select characters and events, place the events in sequence, and imply that the sequencing is normal, comprehensible, and desirable. Stories, as a result, establish a complex normative environment. If we wander through shopping malls whenever time allows, we may too fully have accepted the promise of advertising stories that commodities lead to happiness. If we think the Russians want to kill us, we may have internal-

62. Recent scholarship recognizing the storytelling aspects of lawyers' and judges' work includes William M. O'Barr & John M. Conley, Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives, 19 Law & Soc'y Rev. 661 (1985); Douglas W. Maynard, Narratives and Narrative Structure in Plea Bargaining, 22 Law & Soc'y Rev. 449 (1988); Thomas L. Shaffer & James R. Elkins, Solving Problems and Telling Stories, *in* Legal Interviewing and Counseling in a Nutshell, 2d ed., 22–45 (St. Paul, Minn., 1987); Kathryn Holmes Snedaker, Storytelling in Opening Statements: Framing the Argumentation of the Trial, 10 Amer. J. Trial Adoc. 15 (1986).

63. Wright, *supra* note 13, at 126–29; Arthur Danto, The Analytical Philosophy of History 137 (Cambridge, England, 1965); Fredric Jameson, Ideology, Narrative Analysis, and Popular Culture, 4 Theory & Soc'y 543 (1977).

ized a "red menace" tale of the military-industrial complex. If ennui is our condition, we may desperately need new, moving, and coherent stories. A complex narrative matrix is fundamental to our explanatory, normative order.

Skills and perceptions recognized and learned in the stories of the law are especially useful in appreciating the full range of stories. Instead of sealing off the legally trained from other mindsets, instead of suggesting that lawyers think only like lawyers, legal education, if it includes the development of narrative sensitivities, could actually put lawyers profoundly in touch with their normative world. "Once understood in the context of the narratives that give it meaning," wrote Robert Cover in one of the most important legal essays of the twentieth century, "law becomes not merely a system of rules to be observed, but a world in which we live."[64] Understood in this way, the stories of the law are extremely valuable restatements that give us not a mere summary of doctrine but a critical awareness of the human condition in modern society.

64. Robert M. Cover, Supreme Court 1982 Term—Foreward: *Nomos* and Narrative, 97 Harv. L. Rev. 4, 4–5 (1983).