Narrative in the Legal Text: Judicial Opinions and Their Narratives

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Abstract: The law’s most familiar and characteristic mode of written expression, the judgment, lacks two of the key ingredients that contribute to the lure of literary narrative—namely, the drive, fueled by uncertainty and anticipation, that propels readers on towards the conclusion, and the pleasure of observing and reflecting on others’ mental states, which accounts for a considerable part of fiction’s cognitive appeal. The absence of these features should alert us to the questionable premises underlying any treatment of the judgment as simply one more form of narrative, whose fundamental similarity to novels and films can be taken for granted. Using a few fundamental concepts in the study of narrative, involving the definition of plot and the power of the “reality effect” (whose analogue, I propose, is the “legality effect”), this chapter asks what we can learn about legal decisions by considering them as a distinctive kind of narrative, rather than summarily lumping them together with literary narratives.

Narrative is essential to numerous aspects of legal practice and writing, from pleading and negotiation to the interpretation of evidence and conflict resolution. Indeed, one of the earliest senses of narrator in English, dating from the thirteenth century, refers to a pleader or serjeant-at-law tasked with reciting a party’s statement. Yet the law’s most familiar and characteristic mode of written expression, the judgment, lacks two of the key ingredients that contribute to the lure of literary narrative—namely, the drive, fueled by uncertainty and anticipation, that propels readers on towards the conclusion, and the pleasure of observing and

reflecting on others’ mental states, which accounts for a considerable part of fiction’s cognitive appeal. Once we recognize that the judgment’s narrative qualities lie elsewhere, we can gain a fuller understanding of the features that make legal decisions generically distinctive, and of their similarities and differences with literary narratives.

That the study of narrative continues to play such a minor role in legal scholarship is surprising, not only because of the work of critics like Peter Brooks, but also because many of the key concepts in narratology bear on familiar debates among legal theorists. For example, scholars have long argued over the meaning of subjectivity and objectivity in legal analysis and decision-making, and have drawn on a wide variety of other disciplines to shed light on these issues, but have never, to the best of my knowledge, considered whether narrative understandings of subjectivity in language could have anything to contribute to this discussion. One might think that the textual and linguistic manifestations of subjectivity could shed light on how judges actually describe and apply objective and subjective standards. This absence is all the more remarkable because the “reasonable person” is the most conventional means of expressing those standards; if that figure were not such a familiar part of the legal landscape as to be taken for granted, the personification would itself alert us to the need for narrative inquiry.

When formulating standards, the law almost never resorts to personifications, relying instead on abstractions like *palpable error*, *originality*, and *rational basis*, which strive for objectivity by shunning the human element in their mode of assessment. Legal commentators routinely acknowledge the oddness of the personification by referring to the reasonable person as a

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3 The concept of subjectivity in language was originally formulated to describe “the capacity of a speaker to posit himself as a ‘subject,’” which “creates the category of person.” Emile Benveniste, “Subjectivity in Language,” *Problems in General Linguistics* (Princeton, 1971), 224. Thus the very use of the “reasonable person” as the instrument for representing a standard helps to show why Benveniste’s concept might have legal significance. For classic discussions of its implications for narrative, see Ann Banfield, *Unspeakable Sentences* (RKP, 1982); Monika Fludernik, *The Fictions of Language and the Languages of Fiction* (Routledge, 1993).
“character,” but have not taken the seemingly obvious step of asking how this figure resembles and differs from the characters that populate literary narratives, nor what the narrative functions of characters might tell us about this one.

Again, although counterfactuals play a significant role in the scholarship on legal argumentation and the modeling of legal logic, the narrative study of counterfactuals has yet to inform this area of research. The corpus of textual examples that display the use of counterfactuals in law consists mainly of material taken from cases, not material used in legal advocacy. Without resort to narrative concepts, these two kinds of sources appear identical, but a quick glance shows that they are radically different. Consider Worldwide Volkswagen Corp. v. Woodson, in which the U.S. Supreme Court refused to extend the reach of constitutionally permissible “long-arm” jurisdiction to situations in which the defendant’s products would foreseeably find their way into another jurisdiction:

If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, see Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507 (CA4 1956); a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey, Reilly v. Phil Tolkan Pontiac, Inc., 372 F.Supp. 1205 (N.J.1974); or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there, see Uppgren v. Executive Aviation Services, Inc., 304 F.Supp. 165, 170-171 (Minn.1969). Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.

Taken at face value, each could invites the reader to entertain the possibility featured in the ensuing scenario, serving precisely the future-oriented, hypothesis-posing function that the legal commentary on counterfactuals typically explores. In fact, the text does no such thing: the citations serve, rhetorically and narratively, to foreclose the option in question by pointing the reader to a case that has already rejected that possibility. We might consider this pattern in terms of Gerald Prince’s work on “disnarrated” events—“events that do not happen, but nonetheless

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are referred to (in a negative or hypothetical mode) by the narrative text.” For present purposes it is sufficient to note that Prince associates certain uses of disnarration with realism (the story rejects far-fetched possibilities to underscore the accuracy of its representations) and with the conditions of tellability itself (the disnarrated is excluded because it would not have generated a plot worth reading).\(^5\) That explanation suggests, by way of analogy, that the Court’s disnarrations do not simply refer to what has been repudiated, but also heighten the desirability of the chosen path, which slots the doctrine into a plot that leads somewhere in a legally plausible world. Of course, disnarration sometimes gestures towards genuine possibility, as Prince also notes, and it is only by contrasting these effects that we can appreciate the different functions of hypotheticals in advocacy and in legal decisions, rather than treating them all as equivalent.

The two examples given so far, of the reasonable person and the counterfactual, suggest two ways of considering how legal opinions incorporate narrative features. First, narrative logic informs various doctrines and the processes of legal decision-making generally, and thus routinely finds its way into judicial opinions. Second, in mundane ways that can nevertheless have great significance, judicial decisions follow certain narrative conventions and use narrative techniques that manipulate the reader’s access to what the judge conveys. Much of the existing research on law and narrative—not all of it expressly presented under that heading—addresses the narrative logic of law writ large, where the “legal” of “legal narrative” includes doctrines, processes of analysis, and modes of interpretation. Exploring the temporal paradoxes of retrospective prophecy, Peter Brooks has shown how the narrative logic of a completed search can foreclose other possible stories about what the search yielded, and has considered the

interpretive, evidentiary, and doctrinal manifestations of this logic. Relationally, David Velleman has argued that the satisfaction created by a fitting conclusion can beguile us into crediting a story, leading us to accept too readily that it has achieved its explanatory aims. Several recent discussions have considered the ways in which the perspective of the omniscient narrator underpins certain aspects of the law of search and seizure, and bears on the principles of statutory interpretation. Again, the integrated pattern of an internally consistent and adequately developed story informs various accounts of “narrative coherence” as a criterion for legal fact-finding and analysis: paraphrasing Stanley Fish, we may say that the most successful trial narrative or interpretation of a precedent will be the one that does the most work in explaining and assigning meaning to the details vying for legal significance. The defendant who can ascribe the stray footprint at the crime scene to a rival will do better than the one who can only say, “I was framed.”

Although the pervasive influence of narrative logic throughout the law has generated a certain amount of critical interest, the narrative features of judicial decisions have received much less attention. Some research on narrative features in courtroom discourse has touched on related issues, offering linguistic analyses of testimony and legal argumentation with respect to

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particular features such as narrative person, express versus implicit markers of attribution, and the like. Those discussions usually focus on speech, not writing, and they rarely consider the significance of these narrative devices in relation to legal doctrine, as I propose to do here. One way to assess the significance of these techniques would be to offer a series of illustrations showing how perspective, tense, deixis, and narratorial visibility, for example, bear on the doctrinal analysis in legal decisions. Limitations of space make it impossible to attempt that approach here, so I focus instead on two highly influential concepts which, though perhaps new to those unacquainted with the field, are easily explained: Barthes’s theory of the “reality effect” and Todorov’s account of the minimal requirements for a plot. This focus allows me to show what can be achieved by drawing on some of the most basic ideas in the study of narrative, requiring no technical knowledge.

The discussion proceeds in three steps. First, I explain more fully why we cannot treat legal decisions as holding the same kind of narrative appeal that makes film and fiction so absorbing. To make it easier to see what kinds of narrative qualities we find in judicial opinions, I suggest that we may consider them as including two related stories: the story about the events leading up the litigation (the factual story) and the story of its doctrinal resolution (the legal story). That move will, by itself, open up various possibilities for the work of narrative concepts to do—suggesting, for example, that the legal story is populated by different actors (doctrines and judges), which may in turn raise questions about first- and third-person narration in that context, involving matters such as the narrative markers of tense, focalization, and

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11 To be sure, the analytical section often includes stories about how certain doctrines or statutes were created or modified; those narratives would also reward study, but I focus here on narrative features of the analysis in general, regardless of whether it includes doctrinal biographies.
proximity that distinguish certain actors. I leave a fuller treatment of those issues for another day, however, and turn in the next part to Barthes’s elaboration of the reality effect, which provides a valuable means of distinguishing the signals of realism in the trial decision (and any appellate decisions), as against those in the various narratives that inform the dispute during the stages preceding the written adjudication. Finally, I take up Todorov’s account of the plot, which can also help us understand the relations between the two stories that the judgment tells. Along the way, and building on the example just given of counterfactuals, I develop the idea of an economy of narrative energy that governs the adjudication process. Most of the features that make law narratively compelling belong to the pretrial and trial stages; the ensuing written decisions transpose some of those features into the legal analysis, where their ability to immerse us in the story is purged away, but certain of their other functions remain. Scholarship on law and literature often refers vaguely to narrative in ways that invite us to think of legal decisions as sharing the same kinds of narrative traits that we find in fiction and film. The argument here is that decisions do indeed use narrative in distinctive ways, but many of those functions differ markedly from the functions they serve in imaginative works, and which make imaginative works compelling. One implication is that exponents of “law as literature,” a routinely invoked means of studying “law and literature,” assume a more direct analogy between legal and literary texts than is warranted in light of their narrative features, and that more attention to their narrative differences would help to clarify what this line of research has to offer.

I. Narrative and the Trial Decision

Judgments are not the only legal texts that display narrative features. Pleadings and affidavits, usually intended as fodder for a written ruling, are also imbued with narrative
qualities. Certain narrative traits can be discerned in statutes, codes, and treaties.\textsuperscript{12} Out of this array, however, judicial decisions are the likeliest to be read widely (rather than merely described or summarized), and they seem to display the closest affinity with narrative genres like film and fiction, as numerous examinations of law and literature attest. What those discussions rarely consider are the ways in which legal opinions frustrate and even refuse narrative desire. In literary studies, scholars have devoted a considerable amount of attention to the features of narrative that audiences find most compelling, and that account for the experience of feeling immersed in a story—the narrative designs that shape the plot and stage the characters to draw the reader into the world of the fiction. When a threat looms to disturb the story’s equilibrium, we speculate about what will happen next, or may prefer simply to lose ourselves in the succession of events. As observers of human behavior, we enjoy thinking about the characters’ mental lives, and we try to understand (and perhaps to anticipate) their feelings and responses as they manage the difficulties that the plot reveals.\textsuperscript{13} Fiction and film strive incessantly to enlist our participation in the imaginative enterprise—through techniques that are specific to each medium, such as free indirect discourse and shot/reverse shot, and also through techniques that are common across narrative forms, such as the careful husbanding and disclosure of information, and the arrangement of perspective to align us with a particular character or to show us how that character appears to others.

Legal decisions do not provoke this kind of response. Narrative forms inevitably carry with them certain means of managing pace, perspective, and the ordering of events, but that does not mean that the result will inevitably elicit the audience’s imaginative participation. Judges

\textsuperscript{13} Peter Brooks, Reading for the Plot; Richard Gerrig, Experiencing Narrative Worlds; Victor Nell, Lost in a Book; Alan Palmer, Fictional Minds.
hardly ever use narrative strategies to secure the reader’s involvement in the events or the characters’ mental lives. The example from *Worldwide Volkswagen*, above, is typical: it refers to a series of events but makes no effort to immerse us in them, and even works to prevent that effect.\(^\text{14}\) As to the narrative magnet that relies on uncertainty and anticipation, judgments lack this feature altogether. We usually know how the decision will end, because the judge announces the result in advance, or because the text has been packaged with accessories that summarize the holding and its consequences for the parties. Even when those features are absent, uncertainty about the result does not create the immersive experience that we associate with novels and movies, an experience borne not only of lack of knowledge about the endpoint, but also of the tensions, surprises, and revelations that make the conclusion worth anticipating.\(^\text{15}\)

This is not to say that the outcome is irrelevant to the reading experience, but rather that legal decisions focus our attention on method rather than plot. Taking the need for support as their primary consideration, judges write with the anticipation of a skeptical reader who will test each step in the analysis. That attitude of readerly vigilance demands a kind of attention that militates against the immersive experience of fictional narrative, the experience of being “lost in a book.” Thus, regardless of its importance for a particular reader (e.g., one of the parties), or for any reader’s understanding of the legal analysis, the outcome does not play the same role that a novel’s conclusion does in the experience of reading fiction. Legal decisions may satisfy the formal requirements of a plot in certain respects, but that does not mean that they will hold the reader’s interest for the same reasons, or in the same fashion, as a work of fiction.

\(^{14}\) On the rare occasions when they do, the efforts are usually inept and the results disastrous: e.g., CJ Roberts’s effort to write hard-boiled prose in his dissent from denial of cert. in *Pennsylvania v. Dunlop.*

What applies to the decision as a whole also applies to the facts of the case—the part that commentators most often discuss in narrative terms. The factual recitation, no matter how extensive and detailed, serves to focus and contextualize the legal analysis that follows, not to provide the pleasures of an engaging story. Accordingly, the facts are presented with that goal in mind. As commentators often stress, this means the facts are selected in light of the theory that will resolve the case. Just as important, but less often noted, is that the mode of delivering the facts also reflects that goal. The recitation of facts therefore admits no space for the techniques that foster readerly engagement with fictional plots—techniques that offer unmediated access to a character’s state of mind, or that hint at an upcoming setback long before describing it directly, to give readers an opportunity to speculate about how the protagonist will react. Indeed, the basic distinction between *sjuzet* and *fabula* seems unproductive as a means of examining the factual narrative, because judges almost invariably set out the events in their chronological order, leaving no gap between the facts as narrated and the facts as they occurred. A reader who seeks out intriguing details among the facts of a case, and who looks forward to seeing how they will figure in the denouement, will almost certainly be disappointed.

To be sure, the part of the decision that elaborates facts has changed significantly in the last century and a half: before the mid-nineteenth century, courts tended to give those details only sporadically and elliptically, and often without sequestering them in a section at the outset. But while that has served to isolate the factual narrative, allowing it to develop certain generic features, the result has not been to make the presentation narratively compelling. Scholars have noted that during the nineteenth century, Anglo-American law became increasingly concerned

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16 I will suggest below that this distinction may nevertheless have some use; for now it is sufficient to observe that judgments do not ordinarily propose any such distinction in chronology.
with exploring mental states as a means of solving various doctrinal problems; although trial advocacy and the trial process (including the rules of evidence) may have changed in ways that reflect the impact of these developments, they did not lead judges to borrow or imitate novelistic devices for representing consciousness when setting out the facts. Indeed, scholars who have sought to understand the legal decision in terms of literary genres have refrained from analogizing literary and judicial methods of representation, opting instead to focus on questions of rhetoric and structure.

If legal decisions offer so few of the pleasures that entice the enthusiasts of procedurals, thrillers, and courtroom novels, then why describe law as a narrative enterprise in the first place? First, trials and the conflicts that precede them have precisely the qualities that make for compelling narratives. Second, the lack of narrative allure does not mean that judgments are non-narrative, but rather that their narrative qualities achieve other purposes.

The trial narrative, in its various manifestations—including the literary genres just mentioned, along with the “dying confessions” and “true reports” of earlier eras and the “story behind the case” of more recent vintage—readily displays the features that typically make narratives absorbing. The questions surrounding an as-yet unresolved conflict, for which the verdict will be an endpoint, easily arouse the narrative desires that a written decision would frustrate. An awareness of the power of a well-told story has informed the lore of trial advocacy for centuries. A recent handbook reiterates the wisdom that the best advocate is one who “tells you a story, a story that’s easy to follow and engages your interest.” Another, from the beginning of the last century, could recommend that lawyers study “the masters of narration,” who teach

“the art of telling a story.” A century earlier, a commentator evaluating the talents of leading practitioners observed that an effective barrister would “mak[e] a witness tell a long, complicated story, full of minute details, with regularity and clearness.”¹⁹ All of these examples reflect the understanding that the trial process is essentially a narrative process.

Indeed, the trial is a complex narrative phenomenon, with more or less narrative continuity depending on the participant’s perspective: the flow of any given witness’s testimony may be punctuated by the questions of the lawyer conducting the examination and the objections of the opposing counsel, who may succeed in cutting off a developing narrative array and leaving it entirely stranded. Just as the lawyers seek to capitalize on the narrative potential of their client’s case and witnesses, they seek to undermine the power of the narrative being organized on the other side. For the jurors and others in the audience, including the parties themselves, the flow of the testimony may be interrupted by private conferences between the judge and lawyers. Perhaps the best-known way to recapture and concentrate the narrative potential that some of these participants glimpse only intermittently is to assemble the materials in a fictional retelling of the trial, with a narrator who has access to all of these partial perspectives.²⁰ Nor is this way of managing conflict and point of view limited to courtroom fiction: Alexander Welsh has argued that the trial is associated with a plot and a forensic approach to evidence that played a vital role in the development of the novel, most notably in Henry Fielding’s Tom Jones (1749).²¹ Other scholars, such as Jonathan Grossman and Lisa Rodensky, have shown how nineteenth-century fiction adapted and extended these ways of staging and resolving conflict.²² Legal decisions are

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²⁰ For a bibliography of these fictionalizations, see Steve Haste, Criminal Sentences: True Crime in Fiction and Drama (Diane, 1997).


chock full of material with narrative potential, and they follow a trial process that often features dramatic conflict, but they pointedly refrain from exploiting that narrative potential.

Judgments focus instead on method because a case is always a case of something, and while that something is open to respecification on appeal (and indeed until later courts have finished deciding what the holding was), at each juncture the court will concern itself with how the litigants’ story fuels the legal one. A case of something is a member of a class, an example on its way to a place in a larger constellation that forms a rule, doctrine, or category, or that may become discernible as one of these. The potential legal uses, rather than the particular details, account for the case’s significance, from the judge’s point of view. However compelling the details may be while the trial is pending, when it comes to writing out a rationale for the result, the judge’s concern is to anticipate the uses that others—including laypersons, lawyers, and judges—will make of the legal story. Catherine Gallagher has suggested that one of the novel’s founding justifications involved the claim that made-up characters, though highly individuated and compelling to readers for that reason, could exemplify truths about general categories of persons. The legal decision furnishes a telling contrast, in which the individual example inevitably tilts towards the generalization, allowing particular details to remain only insofar as they provide the necessary background information that clarifies the nature of the conflict. The facts are meant to demonstrate a general proposition, to exhibit an abstraction. That exemplary

23 Indeed, Donald Polkinghome contrasts plot-based forms of explanation against this form, noting that in the latter, “[t]he power of explanation … comes from its capacity to abstract events from particular contexts and discover relationships that hold among all instances … irrespective of the spatial and temporal context,” whereas in the former, “explanation … is [always] contextually related.” Narrative Knowing and the Human Sciences (SUNY Press, 1988), 21.

24 Thus the judge, no less than the lawyers, presents a potentially adversarial narrative, “construct[ed] … [in] anticipation of one or more alternatives,” and open to being “contest[ed] … from a direction not anticipated by [the] narrative’s author.” James Phelan, “Narratives in Contest; or, Another Twist in the Narrative Turn,” PMLA 123 (2008), 168.

and demonstrative function bridges the story of the parties and the story of the law, accounting for how that first story is narrated and how the legal conclusion brings both stories to an end.

II. The Reality Effect in Law

As we have seen, the narrative appeal that the lawyers strive to exploit diminishes in the course of adjudication. The movement from conflict to litigation to resolution tracks a process in which the participants select certain details to describe to their lawyers, the lawyers select certain details to present in court, and the judge selects certain details to set out in the judgment—each time in accord with the generic conventions of the purpose at hand, which is to say the conventions of pleadings, affidavits, oral testimony, and legal decisions. Barthes famously observed that the unmotivated detail, the detail that cannot be “assign[ed] … a place in the structure,” creates the “effect of the real”: “such notations … seem to be allied with a kind of narrative luxury, lavish to the point of offering many ‘futile’ details and thereby increasing the cost of narrative information.”26 Yet we revel in those details, Barthes explains, because by “denot[ing] what is ordinarily called ‘concrete reality,’” they testify to “what really happened” and hence their apparent futility reinforces the story’s realism: “‘concrete reality’ becomes the sufficient justification for speaking.”27 In the legal pattern just described, the reality effect dwindles because the details become increasingly motivated at each step, as the legal rationales come increasingly to control every aspect of the presentation, such that it would be a generic flaw if the decision included unmotivated details, or lacked sufficient details to motivate the

27 Id. 146.
The hostility towards useless details in legal writing finds expression in the demand for narrative coherence, mentioned earlier; hence, in the course of the trial, a theory of the case that can redeem some of Barthes’s “futile” details will be preferred to one that cannot, and to that extent those details may find their way into the decision, now with their purpose fully evident.

In a sense, any detail that appears at the threshold of legal visibility is potentially motivated; after all, the client’s very reason for consulting a lawyer is to consider the advisability of suing, and that purpose informs whatever the client has to say. But that narrative of events nevertheless exhibits some of Barthes’s luxury, because the details have not yet been professionally edited with the aid of doctrinal logic, whereas the judge’s decision, shorn of that luxury, erases the stray marks punctuating the pleadings and evidence, selects the cognizable claims and supporting arguments, and organizes relevant detail to suit the legal framework being imposed on the case. The abundance of “futile” details at the earlier stages does not stifle narrative pleasure but enhances it. When the detail is presented, its futility is not yet apparent, and it can incite the kind of speculation about plot and character that makes fiction enjoyable. A lawyer’s trial narrative, despite the craft that goes into shaping it, remains experimental and tentative: no one knows which of the details on offer will survive the objections and proof contests that might eliminate them, nor which of the remaining ones the judge will include in the factual summary.

The increasing focus on matters of policy and doctrine, as a case is transformed from live dispute to written resolution and then travels up the appellate ladder, suggests a kind of economy of narrative energy in the adjudicative process. In the earlier stages, when it remains unclear

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28 For an instance of the latter, consider Justice White’s complaint that a draft opinion was “as unsatisfying as … a bad mystery novel” because the analysis had not paved the way for the proposed doctrinal solution: “[W]e learn on the last page that the victim has been done in by a suspect heretofore unknown, for reasons previously unrevealed.” Quoted in Richard K. Sherwin, “Law Frames: Historical Truth and Narrative Necessity in a Criminal Case,” 47 Stan. L. Rev. 39, 66 (1994).
which facts will matter, there is a proliferation of narrative energy as the parties enlist witnesses, gather documentary evidence, and consider the various storylines that may result in a legal victory. Some alternatives, and the details that would have supported them, get rejected before the trial, and others are excised in the course of the trial as the judge applies exclusionary rules, the opposing counsel’s evidence forecloses certain options, and the lawyers make strategic decisions on the fly. These details carry with them narrative arrays that a newspaper report might contemplate, if the trial attracts sufficient attention, or that might figure in the kind of fiction that Barthes describes.

As the adjudication begins to find textual expression, this energy starts to diminish. Once the judge has reduced the dispute to writing, most of the teeming narrative energy will be purged from the facts, in a text that selects and presents them according to the logic described at the beginning of this section. On appeal, the facts may be further pared away. Trial decisions, for example, typically include enough facts to support any of the alternative theories that might justify the judge’s view as to the resolution, whereas appellate decisions, zeroing in on a particular doctrinal issue, can be sparer of the operative facts. As narrative energy is leached out of the dispute’s factual arena, some of it migrates to the legal analysis, though in a significantly altered form. The active agents in that section, which perform the work and may come into conflict or undergo change, are primarily doctrines, not human actors. The judges themselves may figure as both narrators and actors, depending on whether they present the result as compelled by law or deliberately chosen after weighing the alternatives. The narrative energy on display in the analysis is typically subdued, by contrast with the energy that circulates before the trial. Thus the economy does not simply transpose narrative energy from one arena to another: much of it dissipates.
The same process that eliminates the unnecessary details ushers in the possibility of an analogue to the reality effect, which we might call the “legality effect.” If the reality effect in fiction indexes the text’s veracity, by the same token it indexes the narrator’s reliability or authority. The text that can record more information than the narrative needs is a text with access to that wealth of detail, and hence is a text produced by someone who knows more than the page records. (One could, perhaps, imagine the reality effect in the hands of an unreliable narrator, but if so, the seemingly unnecessary details could immediately be assigned “a place in the structure,” by making us look askance at the narrator, and to play that role they must be presented in a way that prompts us to doubt their accuracy.) If the reality effect testifies to the narrator’s comprehensive knowledge about the world of the fiction, the legality effect may serve a parallel function in the analytic part of the judgment.

Despite the earlier suggestion that the unneeded legal detail is regarded as a generic flaw, legal analysis often abounds in unneeded details, of which dicta would be the most obvious example. In addition, trial and appellate courts often recite far more doctrine than the case at hand requires, giving mini-lectures in a particular area of law rather than homing in on the legal issues at hand.29 These gestures are indeed greeted as “increasing the cost of narrative information,” but one may guess that just as novelists include “futile” details with full awareness of their futility, judges are equally conscious of the demands of the form and are equally deliberate in their efforts.30 In the early modern period, when the common law was understood as having a separate existence, independent from the judges’ pronouncements, such material might well have been taken to serve a precisely analogous purpose, elaborating doctrinal points whose unnecessary inclusion in a judgment underscored the text’s legal veracity and the judge’s

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29 Distinguish between dicta and other “unnecessary” information?
comprehensive legal knowledge, affirming his status as an “oracle of the law.” Indeed, English lawyers do not seem to have distinguished between a decision’s holding and dicta until the seventeenth century, nor is it clear that the distinction was widely shared then.\(^{31}\) Although contemporary lawyers do not hold the same views about the law’s source, the same implications concerning knowledge and authority may nevertheless apply. Formulated in narrative terms, the legality effect reinforces the judge’s status as an omniscient narrator with respect to the actors who populate the analysis—namely, the legal doctrines. That effect reinforces the conventionally omniscient mode that governs the legal analysis, a mode akin to the confident omniscience associated with the Victorian novel, except that the judicial narrator often appears as an active force within the frame rather than presiding invisibly above it.\(^{32}\)

**Legal Analysis and Plot**

To make sense of the legal analysis in narrative terms, it will help to contrast it against the narrative of facts.\(^{33}\) One of the most significant generic features of the judgment involves the role of tense and plot as they bear on the factual summary and the ensuing legal analysis.

Commentators examining the workings of judicial opinions have rightly emphasized the

\(^{31}\) Duxbury, *The Nature and Authority of Precedent*, 67, gives an example from 1600 and another form 1674. The decisions and treatises from that era do not, however, display anything like a systematic effort to recognize that distinction.

\(^{32}\) For an excellent discussion suggesting that we too readily associate the Victorian novel with this kind of “godlike” omniscience, see Cristina R. Griffin, “Omniscience Incarnate: Being in and of the World in Nineteenth-Century Fiction” (Ph.D. Thesis, UCLA, 2015).

\(^{33}\) The requirement that U.S. federal trial courts must separate fact and law, formalized in 1935 in Fed. R. Civ. P. 52(a)(1), was borrowed from Equity Rule 70½, promulgated in 1929; see 281 U.S. 773 (1929). Scholarship on the two rules’ histories has examined standards of review in law and equity, but has not investigated judicial writing practices before these rules were adopted. A discussion from the late 1940s, however, suggests that trial judges often failed to comply with Rule 52; see “The Law of Fact: Findings of Fact under the Federal Rules,” 61 *Harv. L. Rev.* 1434, 1434-36 (1948).
importance of the end-driven structure that guides the judgment’s narrative trajectory, but what has not received sufficient attention is that the judgment includes at least two overlapping narratives, with a conclusion that terminates both of them. The judgment consists of a story about the parties, narrated in the past tense, which gives way to a story about the law, narrated in the present tense. The litigants’ story is ultimately assimilated to the legal one, meaning that the legal result resolves their conflict, but also that their conflict may become an event in the legal story, which is precisely what it means to say their dispute is a case “of something.” This way of presenting and using the facts/analysis structure links the legal decision to other forms of case study—particularly the research article in the social sciences—and the treatment of narrative here may also have implications in that context.

Returning to the sjuzet/fabula distinction, we might conclude that it may be of service after all, in a modified form. It is not that we need to rearrange the events in the recitation of facts, so as to apprehend them in their proper order; rather, we need to recognize that the decision’s highly stylized version of the facts replaces the litigants’ versions, and replaces them without proposing any means of retrieving them. The written judgment bears a similar relation to the trial itself, as has already been suggested—and as we would see by comparing the trial transcript with the judge’s decision. As to the facts of the case, the point is not that we have any means of recapturing them in an unprocessed form—the litigants have, after all, been telling their own highly motivated stories from the outset—but simply that if sjuzet refers to the effects of narrative artifice, then the legal artifice so clearly on display in the judgment similarly indexes its

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basis in some rawer material. Unlike the fictional narratives that encourage the reader to reconstruct the underlying story, however, the judgment proposes no such process. Because of the way that facts are distinguished from law in common-law jurisdictions, the story of the events is largely insulated from revision in appellate re-narrations: appellate courts have little scope for changing the substance of the facts, but may of course redescribe them or give them different emphases to endow the supervening legal analysis with more persuasive force. Insofar as the facts recede on reiteration, that is not because the court has the power to find different facts, but because they are being attached to somewhat different stories about the law. The content of the factual narrative may remain much the same, even as the legal lens of the new story refracts that narrative and gives it a different meaning, thereby changing it even if the recitation is simply taken verbatim from the lower court.

The legal story may be a relatively static one in which the doctrines easily dispense with the litigants’ conflict, or a more dynamic one in which a doctrine is pitted against others or undergoes some kind of modification to resolve a novel problem. Frederick Schauer has described this contrast as marking the difference between precedent-based and analogy-based reasoning: “[I]n the case of precedent the choice of source decisions is … not a choice at all …. [w]hereas in the case of analogy the lawyer or judge is looking for assistance in reaching the best decision.”

This distinction between modes of judicial reasoning maps nicely onto Todorov’s account of the conditions required for the “minimal complete plot,” which starts with a “stable situation which is disturbed,” passes into a “state of disequilibrium,” and eventuates in a new equilibrium that is “similar” but “never identical” to the first one.

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(precedent-governed) legal story fails to yield a plot, because the legal equilibrium remains the same throughout. Indeed, for the most easily resolved disputes, federal appellate courts issue unpublished “Memorandum Dispositions”; their terse style makes the law’s application entirely perfunctory and they often dispense with the facts. These decisions would, on Todorov’s account, be entirely plotless.

In the vast majority of trial and appellate judgments, the text delineates a complete plot for the litigants’ tale but not for the legal analysis that resolves it. We can appreciate the force of Todorov’s observation by considering it in relation to E.M. Forster’s often-quoted observation that a plot brings out the causal relations that would otherwise be a mere sequence of events. Forster’s view would seem to find a plot even in the static analysis that relies entirely on precedent, because every analytical treatment involves a set of causal relations: a doctrine causes a party’s claim to succeed or fail. The facts are run through a machine that operates on them to produce a legal result. One might say that Forster’s explanation allows the analysis to achieve the status of a plot vis-à-vis the facts, but Todorov’s remarks show why it is useful to consider the plot of the analytical section by itself. That inquiry suggests that the relation between precedent and analogy is indeed a narrative relation. Because it does not pose any prospect of a threat to the doctrine’s stability, the decision grounded in precedent simply offers a demonstration of how the precedent operates. Such decisions usually find only a limited readership beyond the parties themselves. The cases that most of us are familiar with, because they are anthologized in casebooks and treatises, and reported as news, feature the more complex legal story, in which both phases of the judgment have a complete plot. In legal advocacy, the fully plotted story is to the deficient one as the leading case is to the illustrative examples that fill out a string citation.

39 Forster, Aspects of the Novel, 130.
Moreover, the decisions that record a changing legal equilibrium also tend to carry other narratively significant features, because when judges perceive a need to modify the law, they ineluctably locate themselves as narrators in relation to the doctrines, principles, and policies that inform that perception. (Consider, for example, the habit of U.S. Supreme Court Justices to align their holdings with the prior decisions of “this Court,” and to distinguish or reverse a decision by referring to it as “that case.”)

The distinction is evident, for example, in the judges’ authorial practices: whereas the more widely read appellate cases make a point of identifying the judge who takes primary responsibility for the opinion, the “Memorandum Dispositions” often do not identify a particular member of the bench as the author, but instead are credited as “per curiam” (by the court).\textsuperscript{40} That practice is appropriate to the sense of narrative agency that governs the analysis when the precedents themselves are adequate to the task; the judges are simply “bound by precedent.” Conversely, one of the narrative features that comes into play when “the judge is looking for assistance” (as Schauer puts it) is the mark of the visible narrator. Insofar as they can exercise choice about better and worse analogies, judges not infrequently acknowledge that they are weighing those choices. A first-person narrator does not necessarily sacrifice any narrative authority; however, such visibility tends to bring an array of deictic markers, both spatial and temporal, indicating the narrator’s proximity to some doctrines and distance from others, with the result that the narrator becomes open to challenge in a way that an unlocatable narrator is not. When the doctrines are the only characters in sight, there is not even the chance of a threat to narrative authority; the law itself is the narrator. Conceptually, though not linguistically, a text issued in this fashion recalls Ann Banfield’s “unspeakable sentence” of textual narration: neither

\textsuperscript{40} Lemon, \textit{Handbook}, 44.
one can be ascribed to a human speaker.\textsuperscript{41} In Banfield’s account, “language has … solved the technical problem of silencing the speaker and his authority”;\textsuperscript{42} we may discern the same effect when the judge finds that the law supplies all the authority the decision requires. When a judge enters the text and becomes a visible agent in the analysis, narrative authority is not automatically jeopardized, but the reallocation of agency at least creates the conditions in which such a possibility becomes thinkable.

\textsuperscript{41} Ann Banfield, \textit{Unspeakable Sentences: Narration and Representation in the Language of Fiction} (RKP, 1982).
\textsuperscript{42} \textit{Ibid.} 274.