Introduction

Monika Fludernik and Frank L. Schäfer

The subject of narrative in and in relation to the law has been one of the facets that occupied the graduate school "Factual and Fictional Narration" (GRK 1767), funded by the German Research Foundation (DFG) between 2012 and 2022. DFG-financed graduate schools run for two four-and-a-half-year periods. The interdisciplinary graduate school GRK 1767 arose from a previous graduate institution on "History and Narrative" and was designed to extend work done on narrative and history to other areas of factual narration. The director of the graduate school, Monika Fludernik, is a narratologist, and PIs from other disciplines are also working with a narratological methodology. Since the original set of PhD students were majoritatively based in literary studies, narratology being mainly a philological approach, the first cohort concentrated on the distinctions between fiction(ality) and fact(uality). At the mid-term evaluation of the graduate school, we engaged to concentrate more widely with factual narratives from a broader number of disciplines. Hence, the GRK 1767, which had already included PhD projects from history, psychology and philosophy in its first cohort, accepted and supervised also projects from media studies, linguistics, pedagogics, art history, ethnology and legal studies, besides continuing research in German medieval and modern studies, Romance literature, English medieval and modern studies, Russian literature and ancient and modern history.[1] The inclusion of narration in legal texts and narrative in the law was therefore a key aspect of the graduate school.

In May 2021, the graduate school organized an online conference with the title "Law and Literature from a Narratological Perspective," and this book is the proceedings volume of that conference. The major aim of the meeting and of this collection of essays was to cater to two quite different audiences. On the one hand, the volume introduces major tendencies of Law and Literature (based on models geared towards the British and American common law) to German legal scholars, focusing especially on the importance of narrative in law and illustrating the use of narratological concepts and categories. One of the major questions is the applicability of the common law analyses to the European legal system(s). It is for this reason that German papers were solicited to extend the reach of the volume to an audience of German legal scholars. On the other hand, the collection contains English-language essays from the

[1] See www.grk-erzaehlen.uni-freiburg.de.

anglophone tradition of Law and Literature, mostly though not exclusively from scholars working in English-language literature, where the approach has been current for several decades. It is hoped that the volume will therefore also convey some European perspectives of Law and Literature to an anglophone audience. In particular, the illustrations of how narrative 'works' in Dutch and Norwegian trials can help to broaden the understanding of narrative in the law beyond the anglophone world. Though we do not provide translations of the German essays, we have decided to offer two introductions, one in German and one in English, in order to address the two audiences, i.e. German legal scholars and anglophone colleagues working on Law and Literature.

Law and Literature has stereotypically been categorized as either 'law in literature' (i.e. the representation of law in literary texts, films and the other arts) or, as 'law as literature,' i.e. the analysis of literary aspects (e.g. metaphor) in legal texts and procedures (Ward 1995, 3–27).[2] As for law and narrative, there has in fact already been quite some work on narratives in law, not merely on the prominent fact of storytelling in jury trials by prosecutors and defense counsels in the framework of common law (Yovel & Mertz 2005, Farmer 2010, Burns 2012, Hjorth 2021), but also on the use of narrative in a variety of legal texts (Brooks & Gewirtz 1996, Sternberg 2008, Fludernik 2014, Olson 2014). Nevertheless, practitioners still see the need for more extensive analysis:

> Academic study sympathetic to "law and literature" has by now given considerable attention to narrative and its uses throughout the law, as institution and as praxis. Still, one looks in vain within legal doctrine, and in judicial opinions, for any explicit

[2] Law in Literature consists mostly in what Dolin (2007, 10) describes as "literary representations of legal trials, practitioners and language, and of those caught up in the law"; the approach is linked to the work of James Boyd White's *The Legal Imagination* (1973), Weisberg (1984) and Thomas (1987). Law as Literature, i.e. "the role played by narrative, metaphor and other rhetorical devices in legal speech and writing, including judgments" (Dolin 2007, 10), is represented by Hyde (1997), one of the early key texts in that vein. Many scholars also now propose a triple typology, adding "law of" to "law in" and "law as." "Law of" "typically investigates the dynamics of laws that regulate the production and circulation of literature, whether obscenity laws or copyright restrictions" (Anker & Meyler 2017, 8). Representative of this strain are Saint-Amour (2003) and Spoo (2013). Another tripartite division is undertaken by Jane Baron (1999) and Julie Peters (2005), who distinguish a "humanist" strand (e.g. represented by work by Martha Nussbaum), a "hermeneutic" strain, "study[ing] the techniques for meaning making within law" (Anker & Meyler 2017, 7), and, third, a "narrative" strand, which "emerged in part out of feminist legal studies and critical race theory's efforts to expose the historical subject of Anglo-American law as white, male, straight, and economically entitled" (7). Dolin (2007), on the other hand, presents nine types of analyses typical of law and literature. Her third category, "how the supposed freedom of literary expression is contained and regulated by the law" (2007, 10) corresponds to "law of", but she also adds types of research that focus on philosophical and sociological issues ("the circulation of legal ideas in literary culture, and vice versa in various periods and societies"; "the effects of social ideologies such as race and gender in legal language" – categories iv and v) and the performativity of the law ("the use of theatricality and spectacle in the creation of legal authority" – category vii) (10–11).

> recognition that "narrative" is a category for adjudication, that it is something that needs to be talked about and brought to bear analytically; that rules of evidence, for instance, implicate questions of how stories can and should be told. (Brooks 2017, 93)

Recent research on law and narrative has not only focused on metaphor (Hanne & Weisberg 2018, Fludernik 2019, Douthwaite & Tabbert 2022), but has in addition started to analyze and distinguish between a large range of different legal texts (Kayman 2002, Stern et al. 2020). Thus, the existence and use of literary strategies, fiction(ality) or fictivity[3] and narrative in legal writings needs to be examined separately for law codes, legal norms or private contracts.

In fact, legal texts pose a huge challenge for a narratological analysis since they contain so many different subgenres, for each of which narratological analysis is bound to arrive at distinct results. Besides law codes and case law, one can here additionally list executive ordinances, by-laws of public corporations, consuetudinary law and internal administrative directions as well as administrative deeds, individual contracts and general terms and conditions. The range of legal documents therefore includes all phases of the application of the law from the abstract level of statutes to that of concrete cases and of private agreements. By the same token, the initiative process of law creation offers rich material for narratological analysis. Thus, one can, for instance, analyze the history of particular law, as well as examine all types of processes that create new norms including contract negotiation papers. Moreover, one will have to analyze public and private decision-making processes such as trial procedures or arbitral tribunals; these combine the application of law with the creation of new laws since such procedures follow procedural norms but also prepare the way for legal decisions.

In addition to these sources, one could moreover include literature and criticism discussing the law from a present-day legal perspective but also such areas of fundamental thinking about the law as the philosophy of law or the history of law. Since the literature on the law that is currently in force focuses on law codes, it is rarely narrative and linguistically imitates the language, style and structure of these texts. Hence, in this respect there is little difference in narrative quality between legal texts that are in pragmatic use and scholarly legal literature. For texts in the areas of legal philosophy and history, on the other hand, their often chronological structure makes them more susceptible to narratological analysis.

It is quite obvious that the history of law generates texts that, belonging to history in the wider sense, allow themselves to be treated from a narratological perspective as does history in general. Like many other areas of the humanities,

[3] In German research on fiction(ality), a major distinction is draw between the ontological category of inventedness, i.e. non-existence (*fictivity*), and the authorial intention of producing a text that is to be read as 'fiction' (*fictionality*). For this kind of question in Law and Literature studies see, for instance, Stern (2017).

history provides a fertile ground for narratology, originally an approach that arose within literary studies or philosophy. Areas of the law that concern current law are much more difficult to approach from a narratological perspective since they are based on documents like textbooks, commentaries or judgments. These are bound up with peculiar qualities of the law, namely its normativity and deontic aspects. Legal norms impose obligations or prohibitions (commands or interdictions), they license particular actions, activities or operations or release from certain obligations. Legal norms share the property of being legally binding, which is as much as to say that they can be enforced against the will of the subject targeted by these norms. Legal norms thus differ from norms in society, which are negotiable and consensual, but also from norms and rules in narratology, for instance interpretative norms that allow one to pronounce on the fictionality or factuality of a text. One can therefore see that legal subdisciplines dealing with current law are able to generate narratives only to the extent to which their underlying norms already contain narratives or presuppose a narrative.

While literary studies regularly have recourse to narratology, this has so far not been the case within law. This is particularly true for German law, on which we will concentrate in what follows. However, German legal studies from early on were interested in the connection between law and literature. Modern law as an academic discipline started around 1800. In fact, German studies (*Germanistik*) as an academic discipline originated not in the literary studies but in the studies of German law. Thus, one can point to the work of Jacob Grimm (1785–1863) and his brother Wilhelm (1786–1859), especially their *Lexicon of German Law* and their famous collection of fairytales, as well as to the poet jurist Felix Dahn (1834–1912). In the approach of these proponents of German law, law and literature are either synthesized in their work, or the two perspectives come to stand side by side. Those who operated a synthesis of law and literature did so in two ways (see Schramm 2007). One group of authors focused on literary texts in order to gather material on legal cases and legal texts from the past. The category "law in literature" (Weisberg 1984, 1992; Posner 1988) has therefore been a familiar practice in the history of German legal writing since the nineteenth century. At the same time, German legal practice is much more rarely given to the category of "law as literature" (Levinson 1988, Hyde 1997), i.e. the analysis of law texts from a literary, stylistic or rhetorical perspective. This type of analysis requires a willingness to work in an interdisciplinary manner, having recourse to categories and analytical tools from other disciplines, and it would tend to reduce law to a subdiscipline of the humanities – a situation running much against the grain of traditional legal self-understanding of the law as imposing a normative order and therefore superior to other more variable disciplines.

Within German legal studies, only very little research has so far focused on law as narrative. This may seem surprising since the narrative turn has also affected law research and given rise to the frequent use of concepts like *master narrative* and *Narrativik* (a German quasi-synonym for narratology). Despite this, a concrete methodological application of the narratological approach and of narratological terminology has been rare. Among the few scholars who have been inspired by narratology one can point to Lüderssen (2002), Arnauld (2009, 2017; Arnauld & Martini 2015) and Stolleis (2008, 2015). More recently, Ruth Blufarb (2017) has integrated narratology into her work. Her research additionally tries to determine whether the narratological approach is suitable also for an application to legal purposes in the context of jurisdiction and judgments, which is as much as to say that narratology can be incorporated into juridical methodology and the deontic framework of law.

The comparative reticence of German legal studies towards narratology is not easily explained. One might surmise that this is due to the peculiar position of German legal science in Europe. Thanks to Germany's strong economic situation and owing to the sheer bulk of German law which is being generated, Germany's legal system and its case law have a disproportionally strong impact on neighboring European judicial contexts. At the same time, German legal studies are often focused on vernacular Germany and methodologically on the dogmatics of law, i.e. on the systems, concepts and doctrines of the law, and they are concerned mostly with contexts and discourses relevant to Germany alone. Comparative and interdisciplinary approaches (such as narratology would provide) are peripheral to German law's main business. It is therefore one of the aims of this collection of essays to not merely support the international discussions taking place between narratology and legal studies but to provide in addition a contribution to an interdisciplinary dialogue between law and literary studies within German legal research.

Internationally, Law and Literature has been a well-established subdiscipline within law schools and an interdisciplinary tendency in the humanities, especially in English studies. This trend has now found its way to Germany in the institutional setting of the SFB 1385 in Münster, a collaborative research center funded by the German Research Foundation. Two members of this center are contributors in this volume. While narrative (in the form of novels and films) is the most popular genre for Law and Literature analysis of literary texts (law in literature; see, for instance, Heinzelman 2010), specifically narratological approaches have been rare even in the United States. Particularly within law and literature work within the humanities, it is more common for narratology to be applied in tandem with other theoretical perspectives, a situation that is also mirrored in the development of what is now called Law and Humanities (Sarat et al., 2010 and Stern et al., 2020).

As for law as narrative, the anglophone tradition of Law and Literature[4] has for a long time recognized the centrality of narration to law. As Bruner already opined in 1990: "To sum up, law stories are narrative in structure, adversarial in spirit, inherently rhetorical in aim, and justifiably open to suspicion" (1990, 41). Previous reluctance to deal with narrative in the legal system were swept away by the "narrative turn in legal studies, whereby what was once considered a problematic quality of narrative, its potential to fictionalize, has now been recognized as a basic part of legal discourse and legal interpretation" (Olson 2018, 19; see also Brooks 2005). Olson cites Robert Cover's classic statement that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning" (Cover 1992, 95; qtd. Olson 19), highlighting the "ubiquity" of narrative in law and foregrounding what one could call "the literary dimensions of legal life" (Sarat et al. 2010, 3). Narrative thus takes a central position both in the representation of law in literature and in the analysis of legal life:

> Where studies of law in literature focus on literary (typically narrative, novelistic) representations of legal professionals, the use of legal forms and documents, legal settings or, more fundamentally, the pervasiveness of legal culture that literature both helps to constitute and critique, law as literature reads the law for its own narrative procedures and rhetorical functions. (Sarat et al. 2010, 3, fn. 6)

Law and Literature's focus on narrative has in fact raised a number of very different perspectives that include sociological, linguistic and cognitive facets. As Binder & Weisberg (2000) propose, narrative legal scholarship (or what Dolin 2007, 11 calls "legal storytelling or narrative jurisprudence"; her category ix) includes the following ten claims:

1. That human perception and thought inevitably rely on narrative.
2. That competing narratives may be told about the same events [...].
3. That legal argument and decision rely on the selective rendition of events in narrative form.
4. But that in this very selectivity, legal argument represses competing stories.
5. That the stories most often repressed may be those reflecting perspectives of subordinated groups.
6. That legal discourse denies that it "privileges" some stories over others.
7. That legal decision-making purports to achieve impartiality by applying rules that abstract away the very particularities of human experience that narrative emphasizes.
8. That by suppressing the concrete human consequences and meanings of legal decisions, rules make law morally obtuse.

[4] For surveys of the Law and Literature movement see, for instance, Ward (1995), Binder & Weisberg (2000), Dolin (2007) and Anker & Meyler (2017), especially Thomas (2017).

9. That the authority of rules depends upon implicit narratives linking them to the will of authoritative decision-makers and explaining how those decision-makers came to be authoritative.
10. That the inclusion of narratives, whether fictional or factual, in legal scholarship can morally improve the law, subvert its claims to impartiality, and advance the interests of subordinated groups.

(Binder & Weisberg 2000, 201)

Many of these claims will be recognized in the essays that follow. For instance, claims (2) to (4) are central to the arguments of Jeanne Gaakeer and Frode Pedersen in their contributions. Claims (8) and (9) surface in Peter Schneck's essay, while (10) correlates with the arguments of Dominique Hipp in her contribution. This takes us to a brief introduction to the papers that follow. The contributions in this volume reflect the strong presence of Law and Literature in German English Studies (*Anglistik*), where the approach has had its widest impact via the influence from American Studies (*Amerikanistik*) and of course through the omnipresence of American law in popular culture.

Essays in this Volume

This volume starts with the contribution of **Ruth Blufarb**, who summarizes some of the major results of her PhD dissertation (for the resulting study see Blufarb 2017). She focuses on a discussion of the chances for an application of the narratological method in law studies and points out the limits of such an application. Situating Law and Narrative in the larger context of Law as Literature, Blufarb scrutinizes the possible transfer of the American Law as Literature research, based on the case law of American Common Law, to German culture which is based on the codification of law. In what follows, Blufarb sketches aspects of narrativity in German law and introduces the reader to major tenets of the Law as Narrative approach. She concludes by testing the validity of Law and Literature for the German legal system by discussing a number of facets and arguments such as those connected with the terms *narrative competition*, *stock stories* and *outsider scholarship*.

The following two contributions discuss ownership and copyright issues from both a legal and a literary perspective. **Robert Spoo** explains that the so-called *trade courtesy* in United States publishing is a nonbinding convention which in nineteenth-century America responded to the lack of copyright protection for foreign authors and their publishers. Publishers in the United States agreed to form a trust that would afford protection similar to copyright law, a protection that was however fictitious. Taking Charles Dickens as an example, Spoo shows how American publishers engaged with the fiction of the trade courtesy. **Peter Schneck** considers the question how authors could claim intellectual property, and how such claims find a parallel in discourses on the occu-

pation and settlement of land. Schneck's three case studies further demonstrate that the relation of property and identity, which is so pivotal in the American legal system, is poignantly represented in the novels he analyzes. Fenimore Cooper's seminal historical novel *The Pioneers* can be read as a *romance of property*, Schneck asserts, while Chesnutt's *The House Behind the Cedars* deconstructs Cooper's premise in the light of racial discrimination and the dispossession of African Americans. Finally, the postcolonial novel *The Descendants* by Hart Hemmings shows the restoration of indigenous peoples' property claims as it reconceptualizes the right to ownership.

Hans J. Lind explores the mutual interdependence of law and literature in that he charts how fictional literature has been discussed in British, American and German legal discourse since the trials of Oscar Wilde. Lind demonstrates that, although problematic moral content in literary works is now less frequently treated in court as evidence of an author's immorality, certain misconceptions regarding the way in which fiction should be assessed have lingered on in the legal sphere. Taking *drill* and other rap genres with their performative strategy of *realness* as his example, Lind shows that three aspects in particular – the assumption of unproblematic referentiality, the conception that the author is identical with the narrator or character, and the ignorance of legal representatives regarding intertextual allusions as a key feature of fiction – continue to persist in court rulings to this day.

The following two chapters are concerned with storytelling in trial procedures. Relying on a large number of examples, **Jeanne Gaakeer** demonstrates that the reconstruction of events in the reconstruction of a crime is based on interpretations that rely on widespread narratological conventions of storytelling. As a result, this narrative 'prejudice' can impede the establishment of the truth by involving assumptions that are stereotypical but not true to the facts. Gaakeer thus tries to alert legal professionals to the danger of stereotyping and easy recrimination. **Frode Helmich Pedersen** reasons along similar lines. His focus is on a Norwegian case study which shows that a conviction in a trial based on circumstantial evidence may easily be the result of stereotyping. Both essays speak to the issue of fictionalization arising from the use of narratives and from the need to employ narratives in order to comprehend events and the motives of the defendants.

The contribution by **Dominique Hipp** goes beyond the distinction between factuality and fictionality, a key concern of the graduate school. While Hipp's dissertation (Hipp 2020) explored offender narratives of defendants in trials concerned with crimes committed in concentration camps during World War II, her contribution to this volume examines the testimony of the Holocaust survivor Maryla Rosenthal in the first Auschwitz trial in Frankfurt. Taking a narratological rather than a procedural perspective on witness testimonies, she demonstrates the narrative and historical value of testimonial evidence. Thus,

it is no longer the credibility and plausibility of witness testimony that is of interest (as was the case for the offender narratives) but the subjectivity and representational character of the narrative. In other words, on the basis of her narratological approach Hipp now treats the testimony not as a documentary report but as an experiential rendering of suffering.

The contribution by **Arild Linneberg** extends the narrative approach by considering larger philosophical questions. As Linneberg demonstrates, Siegfried Kracauer at the beginning of the twentieth century already anticipated the idea later popularized by Hayden White that the narrative structuring of a legal (or, in the case of White, a historiographical) text has considerable impact on its interpretation. Linneberg revisits Kracauer's discussion of the relation between law and literature that had unaccountably disappeared from view among scholars of Law and Literature.

The following three contributions are concerned with questions of literary criticism in particular or approach problems from the perspective of literary studies. **Claudia Lieb** argues that nineteenth-century authors of literary and legal history elaborated on a notion of biography or life narrative that Christoph Martin Wieland and other novelists had placed at the center of their poetics. In the course of her chapter, Lieb delineates how the distinction between external and internal history was disseminated in interdisciplinary fashion, moving into the theory of the novel, historical scholarship and legal history. She is thus able to show that this key distinction defined both philological disciplines and legal German studies.

Claire Wrobel discusses Jeremy Bentham's concept of the panopticon, which features prominently in the studies of Michel Foucault and has therefore been widely disseminated. Wrobel compares and contrasts Bentham's utilitarian conception of criminal justice with the dystopian practices depicted in Margaret Atwood's novel *The Heart Goes Last*. Here it is less the specific architecture of Bentham's panopticon and more his social politics that take center stage. The chapter analyzes how Benthamite philosophy is reflected and radically distorted in Atwood's fictional world.

The contribution by **Klaus Stierstorfer** turns to Mahatma Gandhi, his life and his autobiography. Stierstorfer points to the crucial significance of the law and the (British) legal system for Gandhi's life and self-understanding and how they impacted on his autobiographical narrative. The chapter thus highlights how Gandhi as the dominant figure in Indian politics relied on a legal framework and saw himself as doing so.

Looking beyond narrative strategies, the contribution by **Ulrike Tabbert** discusses the visual representation of crime in painting and so addresses the question of how the wider public is influenced by legal cases and issues of the law. Apart from tabloid journalism and literature, it is especially movies that

have an effect on the public debate about the moral and political implications of crime.

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