THE LAW AS STORYTELLER

THE RETURN OF MARTIN GUERRE. By Natalie Zemon Davis.[1] Cambridge, Massachusetts: Harvard University Press. 1983. Pp. x, 162. $15.00.

Reviewed by Leigh Buchanan Bienen[2]

For me, the surprise of law school was that the law was full of stories. Between the sober brown and dark blue covers of those heavy casebooks were chronicles of greed and reports of the unchanging lust for power. No one had mentioned this. The law, which I had expected to be composed only of abstract principles and finely honed precepts, turned out to encompass an odd and assorted jumble of snapshots from history, snippets of lives of the great and the humble as they passed through the legal system on their way elsewhere.[3]

Criminal cases are especially rich in drama and narrative. They present stories raising fundamental questions of life and liberty. In *The Return of Martin Guerre*, Professor Natalie Zemon Davis recounts one such story, a sixteenth century tale that never would have been preserved had not the law assumed the role of storyteller. Davis draws substantially from legal materials, primarily the commentary of Jean de Coras,[4] an appellate judge in the case of Martin Guerre. The result is a historian's illumination of a perplexing legal story, one that illustrates both the richness and limitations of the law as historical record.

I.

Martin Guerre, a young peasant living in the small French village of Artigat, was married in 1538 to Bertrande de Rols, daughter in a prosperous village family.[5] The marriage remained unconsummated

[1] Henry Charles Lea Professor of History, Princeton University. Professor Davis was a consultant for the 1983 French film, *Le Retour de Martin Guerre*. *See* N. DAVIS, J. CARRIÉRE & D. VIGNE, LE RETOUR DE MARTIN GUERRE (1982) (film summary).

[2] Assistant Deputy Public Defender, Special Projects Section, New Jersey Department of the Public Advocate. Cornell University, B.A., 1960; State University of Iowa (Writers' Workshop), M.A., 1963; Rutgers-Newark School of Law, J.D., 1975.

For their continued support, I would like to thank the Department of the Public Advocate and its commissioner, Joseph H. Rodriguez, Special Counsel Michael L. Perlin, First Assistant Public Defender Thomas S. Smith, and Assistant Public Defender John M. Cannel. Special thanks to D. Watson, J. Wiggs, and R. Carroll.

[3] Several contemporary lawyers have recently written works of fiction that use the law for subject, setting, and scene. *See, e.g.*, J. CORRINGTON, THE SOUTHERN REPORTER AND OTHER STORIES (1981); J. MCPHERSON, ELBOW ROOM (1977).

[4] J. CORAS, ARREST MEMORABLE (1572), *reprinted in part in* TRIQUARTERLY, Spring 1982, at 86 (J. Ringold & J. Lewis trans.).

[5] Martin was probably 14 years old at the time of the marriage, and Bertrande may have been as young as 9 or 10 (p. 16).

for eight years because of Martin Guerre's impotence, and only after much humiliation and despair did Martin and Bertrande finally have a son (pp. 15–21). Shortly thereafter, in 1548, Martin Guerre was accused of stealing grain from his father. Ashamed, or perhaps fearing his father's wrath, the young man deserted his village, his farm, and his family. Eight years later, a man claiming to be Martin Guerre abruptly arrived in Artigat. Welcomed back to the community as Martin Guerre, the man resumed work on the family farm. He and Bertrande had a child and settled into an apparently happy marriage (pp. 24–50). Four years after his return, difficulties developed. The man decided to sell some of the family land. He asked the family for an accounting of the profits earned on the land during his absence. The request precipitated a heated quarrel over financial matters (pp. 50–54). The uncle, who had initially been somewhat skeptical about the veracity of the man's claim to be Martin Guerre, decided that the man was not in fact his nephew. The wife, Bertrande, and the uncle subsequently sued, alleging that the man was an impostor.[6] The state joined the suit, charging criminal fraud (pp. 62–63). The defendant was imprisoned and two courts considered the case at length.

At the trial in 1560, scores of villagers were called to testify on whether they believed the accused was indeed Martin Guerre. Although the witnesses were divided, the trial court found the prisoner guilty (pp. 63–72). The condemned man immediately appealed the judgment to the Parlement of Toulouse, the appellate court for the region (p. 72).[7]

On appeal, the accused defended himself brilliantly, answering questions about family history, his childhood, and his wedding, and bringing forth details that could have been known only to intimates of the family. He also pointed out the self-interest of his accusers: the uncle, as heir to Martin Guerre's family money, had a strong financial stake in the outcome and had in fact previously conspired to kill the supposed impostor. Moreover, he asserted, the wife's accusation had been coerced by the manipulative uncle. On the eve of judgment, however, when the distinguished judge and his court were prepared to reverse the conviction, the true husband appeared in court, hobbling on a wooden leg. Witnesses who had identified the impostor with absolute certainty now retracted their testimony. The court, saved from an erroneous ruling, sentenced the impostor to death (pp. 75–86).

From the outset, Davis discloses her view of the truth: the returned husband was an impostor named Arnaud du Tilh (pp. 34–41), his

[6] Davis notes that at one stage in the proceedings the uncle falsely presented himself as agent for Bertrande in order to initiate a formal inquiry against his supposed nephew (p. 58).

[7] The Parlement of Toulouse was established in 1444. The criminal chamber, called La Tournelle, was one of the Parlement's five chambers and consisted of a rotating group of 10 or 11 judges and two or three presidents (pp. 73–74).

pretense to a marriage with Bertrande was a fraud (pp. 42–50), and Bertrande's portrayal of herself as a woman honestly duped is ultimately suspect.[8] But Davis understands the law's vulnerability to life's tricks. Although she bases her conclusions on legal texts and commentaries, she warns that in cases of deception much may remain shrouded in mystery long after the legal proceedings have concluded.[9]

II.

The Return of Martin Guerre retells one of the law's most fascinating stories, one that would have faded into oblivion if the law had not recorded it.[10] But the law is limited as a means for faithfully recounting history. In writing their opinions, judges have always had the discretion to select or omit elements of the record, the power to shape the official version of the truth. The potential for distortion is great.[11] A judge is the lawyer *par excellence*, the advocate who must persuade his readers — other lawyers — that he has reached the correct result. Thus, a judge may recharacterize facts in an opinion ordering reversal or simply omit pertinent details.[12] In the Martin Guerre case, Coras went to great lengths to justify every aspect of the court's verdict and sentence (p. 90). His version is a story told by a sensitive and intelligent observer whose ordinary curiosity made him delve deeply into character, circumstance, and motive. Davis persuasively argues that the celebrated jurist was a humane and fair man,

[8] Davis notes that the "obstinate and honourable" Bertrande did not seem a woman easily deceived and that she must have recognized the impersonation by the time she received Arnaud into her bed. Davis concludes that "either by explicit or tacit agreement, [Bertrande] helped [Arnaud] become her husband" (p. 44).

[9] "Even for the historian who has deciphered [the story of Martin Guerre], it retains a stubborn vitality. I think I have uncovered the true face of the past — or has [Arnaud du Tilh] done it once again?" (p. 125).

[10] Davis notes the value of judicial opinions, court records, and other legal documents in "understand[ing] how villagers and cityfolk maneuvered within the [16th century's] tight world of custom and law" (p. 3). *See also* N. DAVIS, SOCIETY AND CULTURE IN EARLY MODERN FRANCE (1975) (describing prevalent French customs).

[11] One commentator has written:

> [I]f I were to hazard a guess I should say that it is not unlikely that these treatises [from the Parlement of Paris] were destined for the uninformed public, carefully concealing whatever might be unseemly if put into print, and thus preserving the arcane secrets of the legal profession. Whatever the case, it begins to appear that jurists' commentaries provide an unreliable substitute for archival research . . . .

Soman, *Criminal Jurisprudence in Ancien-Régime France: The Parlement of Paris in the Sixteenth and Seventeenth Centuries*, in CRIME AND CRIMINAL JUSTICE IN EUROPE AND CANADA 43, 44 (L. Knafla ed. 1981).

[12] Even the most distinguished jurists and legal scholars sometimes omit facts and details that contradict their conclusions. For example, John Henry Wigmore omitted highly relevant data from cited sources without indicating the omissions when the data in question contradicted the position he was arguing. *See* Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. W.L. REV. 235, 243–58 (1983).

and a fine storyteller, who was deceived by Arnaud du Tilh (pp. 94–103).[13]

Davis's book demonstrates three aspects of the law's role as storyteller: the law as reflection of particular societal concerns, the law as process that shapes the resolution of those concerns, and the law as dramatist. On each level, the book deepens our understanding of sixteenth century France, particularly as compared to contemporary American society. Coras referred to the case as one presenting "a new and, before [that] day, unheard-of kind of crime."[14] In twentieth century America, the acts committed could have been given any of several labels: fraud, impersonation, bigamy, adultery, theft, misappropriation of property, or forgery. None of these offenses would earn the death penalty today, although they could lead to both civil and criminal sanctions.[15] In announcing its sentence, the court enumerated both crimes and torts: "imposture, deception, assumption of a name and person, adultery, [abduction], sacrilege, enslavement, robbery and other such offenses."[16]

The question of identity gives the story of Martin Guerre its timeless quality.[17] The case posed a question to which the community felt compelled to respond: how does someone prove the truth of his identity in a society where there are no photographs, fingerprint records, Social Security numbers, computers, police records, or credit cards? We are not far in time from that society. The intricate blood-identification techniques that now make paternity testing a matter of 98% certainty are a new development.[18] In Arnaud du Tilh's case, such

---

[13] *See generally* 1 & 2 A. FELL, ORIGINS OF LEGISLATIVE SOVEREIGNTY AND THE LEGISLATIVE STATE (1983) (study of Coras — referred to as Joannes Corasius — and his jurisprudence).

[14] J. CORAS, *supra* note 4, at 88 (quoting Arnaud du Tilh).

[15] *Cf.* Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 HARV. L. REV. 931 (1984) (describing victim restitution statutes). When states enacted criminal codes in the 19th century, they often specified both a criminal penalty, such as imprisonment, and an alternative civil penalty, such as a fine. *See* Bienen, *Rape III — National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170 (1980) (discussing criminal penalties and civil remedies in the area of sex offenses).

[16] J. CORAS, *supra* note 4, at 100. The actual words in the Register of the Parlement were "imposture and false supposition of name and person and . . . adultery" (pp. 86, 148 n.9). The *TriQuarterly* version incorrectly translates the French word *rapt* as "rape"; the proper translation is "abduction."

[17] In her selected bibliography of writings on the Martin Guerre case from 1561 to 1982, Davis includes two novels, a play, and a 17th century Dutch account in rhymed couplets (pp. 127–31).

[18] These tests have only recently been deemed reliable enough to be admitted as evidence in paternity cases. *See, e.g.*, Keith, *Resolution of Paternity Disputes by Analysis of the Blood*, 8 FAM. L. REP. (BNA) 4001, 4001 & n.14 (Nov. 24, 1981) ("[B]lood tests excluding the possibility of paternity are to be accorded decisive evidentiary weight." (footnote omitted)); Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing*, 16 J. FAM. L. 543, 543 (1978) (describing a "revolution in paternity testing").

tests might have established beyond a doubt that the impostor could not have been the father of Martin Guerre's son.[19]

Cases in which a living person asks a court to affirm his identity are few. What if the same facts were brought before a court today? Could the impostor succeed, as he almost succeeded in the sixteenth century? Could a modern court authenticate identity in a case similar to that of Martin Guerre? In the final analysis, what is different today is the range of objective proof available to the law — the hospital's copy of an infant's footprint, other records retrievable from public and private institutions, the spectrum of scientific tests that serve as evidence. But questions concerning the admissibility and credibility of evidence remain. What remains the same, then, are the fallibility of human reasoning and recollection, and the tenuousness of the law's claims to dispel doubt with "evidence" of the truth.

Factfinding in the case of Martin Guerre rested on the medieval theory of proof, which accommodated only two forms of evidence: the direct testimony of at least two impartial witnesses and the suspect's own admission of guilt.[20] Thus, the evidence at the trial included testimony that the original Martin Guerre had a boot size much larger than that of the returning impostor and that Guerre "had extra teeth in his jaw, a scar on his forehead, [and] three warts on his right hand" (pp. 67–68). Some observers noted that the accused was shorter and stockier than Martin Guerre (p. 67), although Coras made a point of observing that age and experience can change a man greatly.[21] The many witnesses, relying on their individual memories, were evenly

---

[19] By contrast, one of the main tests at the trial and on appeal was that of family resemblance:

> There were also two observations made on the resemblance of Sanxi Guerre, son of Martin, and of the sisters of the said Martin, to the accused, which resulted in two very different proofs: by the first it was reported that Sanxi, son of Martin, did not resemble the accused at all, and by the second summary, that the sisters of Martin resembled the accused strongly.

J. CORAS, *supra* note 4, at 91.

Modern methods of identification are sophisticated and are often decisive in resolving legal questions. *See, e.g.*, N. MORLAND, AN OUTLINE OF SCIENTIFIC CRIMINOLOGY 18–29 (2d ed. 1971); F. SMYTH, CAUSE OF DEATH 176 (1980). Identifying paternity remains important in suits involving support, divorce, and custody. The state routinely asks welfare recipients to file paternity suits. The identification of an accused in a murder or rape case may depend upon physical marks left at the scene by the assailant, such as hair, blood, semen, or skin scrapings. In such cases each side will draw upon the latest laboratory methods to prove its version of the facts.

[20] *See* Soman, *supra* note 11, at 55.

[21] *See* J. CORAS, *supra* note 4, at 96. Despite this view, Coras noted that he had heard considerable testimony against the defendant:

> [A]ll these witnesses were almost in agreement that Martin Guerre was taller and darker, a man thin in body and legs, a little bent, carrying his head between his shoulders, the chin cleft and a little thrust forward, whose lower lip drooped a little, having small teeth, a large and flattened nose, an ulcer on his face, and a scar on the right eyebrow: whereas, the prisoner, however, is short, thick-set and strong of body, having a heavy leg, does not have a flat nose, nor is bent, nor has any of the said scars.

Id. at 92.

divided between those who were certain that the evidence proved that the accused was Martin Guerre and those who were certain that the same evidence proved him an impostor (pp. 67–68).

One might ask what difference it should have made to the state that a silver-tongued peasant almost succeeded in hoodwinking or gaining the complicity of a peasant wife. The answer is that to the state and the community this was no ordinary case of adultery. It was a bold challenge to the established social order, an order maintained by laws and customs concerning property and inheritance, both of which are intimately connected with the institution of marriage (pp. 46–47).[22] Moreover, it was a challenge that involved membership in the community — a challenge to which the law, however unprepared, had a responsibility to respond.[23]

Davis shows how the law can capture the richness of historical context. The story of Martin Guerre involved more than what ultimately happened to the principals. Davis admirably details the characters of the judges, the lawyers, and the litigants, and appropriately describes social and political life in sixteenth century France. For instance, she points out that Artigat was a town with no seignior (pp. 12–13). Had there been a seignior in the town, the matter might never have gone to the King's court at Rieux or been appealed to the Parlement of Toulouse (p. 13).

The legal customs of the day also shaped the trial of Martin Guerre. The proceedings at Toulouse lasted several months (p. 70) and combined both criminal and civil aspects. Bertrande seems to have been a nominal plaintiff (p. 58), but the entry of the King's attorney into the case added the dimension of a criminal proceeding (p. 63). The accused paid his witnesses' costs and his accusers paid theirs (pp. 64–66). The King's attorney issued a letter that was read aloud in nearby churches admonishing anyone who knew the truth about the case to come forward under threat of excommunication (p. 66). The accused did not have counsel. Although a lawyer perhaps could not have improved upon the brilliant defense mounted by the defendant, counsel might have delayed proceedings or appealed particular issues (p. 70).

Davis presents these details of legal procedure with little commentary; she is foremost a historian. Yet for the contemporary lawyer, these details represent a fascinating aspect of the book. The defen-

---

[22] *See generally* Davis, *Ghosts, Kin, and Progeny: Some Features of Family Life in Early Modern France*, DAEDALUS, Spring 1977, at 87 (discussing laws and customs).

[23] Davis notes that custom in the Basque area from which the Guerre family originally came prohibited the alienation of ancestral land except in cases of dire necessity (pp. 7–8). The impostor's attempt to sell a portion of the land might therefore have greatly disturbed the family (p. 52). The practice of selling land, however, was not uncommon in the part of France to which the Guerre family had moved (pp. 11, 52). Thus, the impostor might not have considered it very daring to attempt to sell a portion of the family land.

dant's representation pro se and the evidentiary limitations that governed the proceedings together suggest that the two sixteenth century courts probed the question of identity by reference only to the accused's assertions and the first-hand observations of others. There was no filtering of the testimony by professional advocates or experts. Using this method of inquiry, the first court convicted Arnaud du Tilh of "taking on the name and person of Martin Guerre and abusing Bertrande de Rols" (p. 71). On appeal on the merits, the same approach almost resulted in a reversal of that conviction.

Certainly the Parlement of Toulouse strove to learn the truth.[24] Criminal appeals in the sixteenth century were not a meaningless formality. As early as the reign of Francis I, half of the death sentences imposed by lower courts were set aside on appeal.[25] A twentieth century American court would probably not have been as thorough in its treatment of this kind of criminal case, even if a man were on trial for his life.[26] By contrast, the care taken by the sixteenth century Parlement of Toulouse is notable. Perhaps the quality of the legal process directly reflected the importance of the substantive issues addressed by the court.

Besides offering insights into the law as process, *The Return of Martin Guerre* presents the law as public drama: the trial captured the public imagination because it dealt with a matter of concern to the community. Although the court proceedings were apparently closed to the public, except at the announcement of sentence (p. 91), the case took on the character of a public spectacle. Perhaps sixteenth century courts had less competition from other forms of entertainment. But when has the public not been fascinated by crime? Even the judgment would have been good theater. In the sixteenth century,

---

[24] Parlements in 16th century France performed legislative and administrative functions and also acted as courts of appeal. In this latter capacity, Parlements had the power and the need to look closely at the facts:

> As early as the mid-fifteenth century, appeals [to the Parlement of Paris] were so widespread that royal edicts set limits on their use in order to prevent trials from dragging on interminably. Nevertheless it was established in principle that any sentence prescribing death, torture, corporal punishment, banishment or public penance could be appealed orally and directly to the Parlement, by-passing (for reasons of economy) all intermediate jurisdictions. The right to direct appeal was clearly expressed in the edicts of Cremieu (1536) and Villers-Cotterets (1539).

Soman, *supra* note 11, at 46 (footnote omitted); *see also* J. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 214–15 (1974) (discussing Parlements and appellate courts, and noting identical procedures thereof).

[25] Soman, *supra* note 11, at 47.

[26] *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972) (reviewing three capital punishment cases and remanding primarily on the basis of broad constitutional principles rather than particular facts). Even the original verdict in *Furman* rested on scant consideration of facts: it took the jury one hour and 35 minutes to find Furman guilty of murder and sentence him to death. *See id.* at 295 n.48 (Brennan, J., concurring) ("About Furman himself, the jury knew only that he was black and that, according to his statement at trial, he was 26 years old and worked at 'Superior Upholstery.'").

executions were public, and the hanging occurred in front of the house of Martin Guerre — the same house where twenty-two years earlier Bertrande's marriage bed had been placed (p. 92). The court ordered execution, but also required that the prisoner first repent and make public amends as he was led through the village with the hangman's rope around his neck (pp. 91–93).

Like all good drama, however, the stories in *Martin Guerre* conceal as well as reveal. The greatest deceiver in the case was apparently Arnaud du Tilh. His was a bold scheme brilliantly executed, and the volume of testimony given at trial is a tribute to his intelligence and persuasiveness. Ultimately, Coras found Arnaud du Tilh more clever than his accusers, a man who seemed to know more about the life of Martin Guerre than did Martin Guerre himself.

Did Arnaud du Tilh deceive only the court or did he deceive Bertrande de Rols as well? That the wife received the impostor into her bed for over four years without publicly expressing any doubt is a fact that has intrigued both sixteenth and twentieth century observers. Davis delves into the underlying question of the court's perception of women. The court declined to prosecute Bertrande for fraud, bigamy, or adultery; instead, it took her at her questionable word, certifying her supposed "good faith" because "the female sex was, after all, fragile" (p. 90).[27] Indeed, until Janet Lewis's twentieth century account,[28] there had been no female commentary on the story, and Bertrande's "fragility" was left unquestioned. Like Lewis, however, Davis postulates a Bertrande "with some independence of spirit" (p. 118 n.*), one who knew that Arnaud du Tilh was not her true husband but who deliberately chose not to expose the impostor (pp. 43–46). As regards Bertrande, then, the law's official version may tell us more about the men at court than about the woman whom they judged.

III.

The Return of Martin Guerre illustrates the law's role as preserver of culture. Court records are among the richest sources of family and social history (p. 3).[29] But the law is generally preserved in special language, accessible only to the initiate. Indeed, the secrecy of the law's cabals is part of its claim to authority. Costume and ritualized movement reinforce that claim. The truth often warrants less cere-

[27] The court also mercifully declared the child of Bertrande and Arnaud du Tilh legitimate (p. 89).

[28] J. LEWIS, THE WIFE OF MARTIN GUERRE (1941).

[29] *Cf.* R. FOGEL & S. ENGERMAN, TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY 8 (1974) (noting value of "wills and other legal documents of the estates of planters" for research on slavery); C. GOLDIN, URBAN SLAVERY IN THE AMERICAN SOUTH 1820–1860 (1976) (using legal documents and records as sources of economic and social history).

mony: Coras wrote his lengthy opinion in part to explain his near blunder. Yet despite — or because of — its formalism, the law creates a historical record that illuminates far more than the forgotten legal precepts that were nominally the subject of the court's attention. While justifying their conclusions, judges and lawyers often amass a record unselfconsciously and therefore honestly. We think we are performing other functions — defending indigent criminals, interpreting statutes, or settling minor family disputes in court. We need the historians to remind us: we are also the clerks making the record for later generations. *The Return of Martin Guerre* is such a reminder.