Special Issue – *Law's Pluralities*

The Perplexity of Judges Becomes the Scholar's Opportunity

By Jeanne Gaakeer[*]

Abstract

Benjamin Cardozo, a great promoter of the concept of the unity of form and content in law and literature, once wrote that "[t]he perplexity of judges becomes the scholar's opportunity." Cardozo's observation prompts my contribution on narratives in the law to this special issue on pluralities in the law because of the interrelation between law in academic theory and law in practice. My experience as a judge and an academic working in both the fields of law and literature, and law and humanities, allows me to provide a unique point of view. This Article argues the following: First, "to narrate is already to explain" as Paul Ricoeur wrote; the way in which the facts of a case are narrated largely determines the outcome of that case, therefore jurists need to develop and cherish narrative knowledge. Second, jurists should be imaginative about both the law and the people whose fates they determine when they use language to translate brute facts into the reality of the legal narrative. Third, this Article investigates and critically responds to literary theorists' various views on narrative and narratology, explaining which elements can be fruitfully incorporated into a legal narratology. I argue that jurists, while acting as authors and readers of legal narratives, all too often disregard what literary theory and the humanities more generally have to offer to legal practice, which is to highlight points of misunderstanding in our interdisciplinary literary-legal discussions. Here, too, scholarly opportunities remain to be seized for further clarification and theoretical elaboration of the bond of law and narrative.

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> "The perplexity of judges becomes the scholar's opportunity."[1]
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> "*Si bene facta notes, consultus, jura sequentur. Factum praecedens ordine jus sequitur*."[2]
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> "But what do you think of supporting a cause which you know to be bad? Sir, you do not know it to be good or bad until the judge determines it."[3]

A. The Facts of My Case

Benjamin Cardozo's succinct reminder—that theory and practice are intertwined in the law—prompts this article. Academic scholars receive opportunities to research new topics when it becomes apparent that judges need guidance in a specific area of law, particularly where judges delve into a myriad of precedent. Viewed differently, given that the process of adjudication itself—at least in civil law jurisdictions—is the most prominent feature of this intertwinement, it is important that legal practitioners provide theorists with topics that may go beyond the traditional focus of academic legal scholarship. Here is an opportunity for interdisciplinary co-operation as one aspect of the pluralities of the law—no doctrinal strings attached. It is one that can illuminate its foundation in the broader cultural framework of which law is only a part.

To continue from my own perspective and to add a caveat, as a judge in a continental European civil law setting, my practical roots are, first, in the idea of the textuality of law; as a consequence, I believe judges as readers and writers do well to be hermeneutically well-informed, with hermeneutics taken to be both an interpretive methodology and a philosophical mode of inquiry into text and human agency. This is the case because judges always try "to figure out" the variety of meanings of the narratives before them and deal with these in terms of their intended consequences.[4] Second, what judges do finds its foundation in the methodology of the dialectic movement between facts and legal rules and norms, or as the Roman maxim goes, *Da mihi facta, dabo tibi ius*—meaning "give me the facts and I will give you the law"—and its elaboration *Ex facta ius oritur*—translating to "the

[1] BENJAMIN NATHAN CARDOZO, THE GROWTH OF THE LAW 5–6 (1924).

[2] JUSTINUS GOBLER, IN LEGEM RESPICIENDAM EXPLANATIO (1543). "Wenn du, Jurist, die Tatbestände gut feststellst, dann wird Recht folgen. Der Sachverhalt geht in der Reihe vor, die rechtliche Beurteilung folgt nach." GUSTAV RADBRUCH, KLEINES RECHTS-BREVIER 58 (1954).

[3] JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON LL.D. 168 (1830) (asking Johnson's view).

[4] This is the main topic of Jeanne Gaakeer, *Configuring Justice*, 9 NO FOUNDATIONS 20 (2012).

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law arises from the facts."[5] Facts are often mistaken to be objective; however, the facts also need a hermeneut, and not a *iudex deductor*, who subsumes the facts under the rule as if the meanings of both were given *a priori*.[6]

Taken together, Cardozo's observation and my own reflections as a justice in a civil law jurisdiction bring me to the topic of narrative analysis and narratology as methods of gaining cultural access to law.[7] These are methods that literary and legal theory can share in order to possibly be incorporated in a judicial methodology. I must immediately add yet another caveat: I received my first training in literary theory, narratology included, in the late 1970s: Wellek and Warren's seminal *Theory of Literature* (1949) was still *de rigueur*; Todorov built on the Aristotelian definition of a story's elements as a beginning, middle, and end, and introduced the term "narratology;"[8] and Greimas and Courtès delineated the concept of narrativity as the organizing principle of any discourse; not incidentally, Greimas was one of the first scholars to apply semiotic insights to legal discourse, claiming that law as code is omnipresent.[9] All of these theorists paid homage to Vladimir Propp's seminal work on the morphology of fairy tales, *Morphology of the Tale*.[10] It was only when I became a judge that I began to understand much of what had—until then—remained purely theoretical, even in my own research on law and literature. Theory became practice when I had to make sense of, and assess, the narratives of authors and/or characters that stood before me as defendants in actual cases.

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[5] On the topic of what Karl Larenz, following Karl Engisch, in his Methodenlehre der Rechtswissenschaft called "das Hin-und-Herwandern des Blickes" (the wandering back and forth of the gaze). KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 204 (1991). *See also* Jeanne Gaakeer, *European Law and Literature*, *in* DIALOGUES ON JUSTICE 44, 15 (Helle Porsdam & Thomas Elholm eds., 2012); Jeanne Gaakeer, *On the Study Methods of Our Time*, *in* INTERSECTIONS OF LAW AND CULTURE 131 (Priska Gisler et al. eds., 2012). The original maxim *ex facta ius oritur* was coined by the Italian jurists Bartolus and Baldus in the thirteenth century. BARTOLUS DE SAXOFERRATO & BALDUS DE UBALDIS, DIGESTS D.9.2.52.2.

[6] The idea of the *iudex deductor* is closely connected to the positivist separation thesis of fact and norm that is guided by the view that judging is the unmediated application of objective(ly existing) legal norms to the (so-called undisputed) facts.

[7] *See* MIEKE BAL, NARRATOLOGY 227 (2009) (arguing that "narrative is a cultural attitude, hence, narratology a perspective on culture."). One of Bal's theses concerns the use of narratology for cultural analysis; she advocates differentiation with respect to the place of narrative in different fields.

[8] ARISTOTLE, POETICS § 1450b (1999) (explaining that an action of event should be whole, for example, "[a] whole is that which has a beginning, middle, and end".). Narratology is the translation of *narratologie*, the French term introduced by Tzvetan Todorov. *See generally* TZVETAN TODOROV, GRAMMAIRE DU DECAMERON (1969).

[9] ALGIRDAS JULIEN GREIMAS & JOSEPH COURTES, SEMIOTIQUE, DICTIONNAIRE RAISONNE DE LA THEORIE DU LANGAGE 249 (1979). Greimas and Eric Landowski applied a semiotic analysis to French commercial law of trusts and corporations. ALGIRDAS JULIEN GREIMAS & ERIC LANDOWSKI, ANALYSE SEMIOTIQUE D'UN DISCOURS JURIDIQUE, SEMIOTIQUE ET SCIENCES SOCIALES 79 (1976).

[10] *See generally* VLADIMIR PROPP, MORPHOLOGY OF THE FOLKTALE (Laurence Scott trans., 1958).

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In what follows, two views from the literary-legal perspective inform my argument. First, the ontological view that, as humans, one of our fundamental characteristics is to tell stories. Second, the epistemological view that humans use narrative to impose structure on human experience.[11] From the perspective of legal theory, I want to emphasize the need for conceptual clarity when it comes to the project of developing a legal narratology, or more modestly perhaps, of developing narratological insights that are geared to application in legal research and legal practice. Legal clarity is essential, given differences between legal systems and the specifics of their procedures, as distinguished according to subfields of criminal law, trade law, or administrative law, for instance.

From the perspective of narratology, too, much can be gained by exemplifying what the term "narrative" means in a specific context. Definitions of "narrative" and "narratology" abound,[12] but when it comes to topics for further investigation, many narratology studies do not include law as a possible field for exploration when dealing with the epistemological view of narrative. To name a few, definitions range from the abstract—as in Jan Christoph Meister's statement that "narratology is a humanities discipline dedicated to the study of the logic, principles and practices of narrative representation" or the succinct description by Wilhelm Schernus that "narratology is a theory of narrative"—to distinctions applicable to more concrete situations. These distinctions include Christy DeSanctis's division of three interrelated trends in the field: (1) The "narrative" or "story" (terms used interchangeably by DeSanctis) as defined against hard logic; (2) the actual practice of storytelling as distinguished from narrative theory as the study of the nature and process of storytelling, and; (3) the combination of these two trends, for example, the equation of narrative and storytelling with an emphasis on how narratives are received by the audience (ideally with an empathetic

[11] *See* JAMES BOYD WHITE, HERACLES' BOW 169 (1985)

> (One fundamental characteristic of human life is that we all tell stories, all the time, about ourselves and others, both in the law and out of it. The need to tell one's story so that it will make sense to oneself and others may be in fact the deepest need of that part of our nature that marks us as human beings, as the kind of animal that seeks for meaning.);

Jerome Bruner, *The Reality of Fiction*, 40 MCGILL J. LEGAL EDUC. 55, 58 (2005) ("[N]arrative is also our simplest mode of imposing a moral structure on experience" and "a principal function of narrative is to explore alternative versions of the human condition, 'possible worlds' as it were.").

[12] *See* Greta Olson, *Futures of Law and Literature*, *in* RECHT UND LITERATUR IM ZWISCHENRAUM/LAW AND LITERATURE IN-BETWEEN 37, 43 (Christian Hiebaum et al. eds., 2015) ("The term 'narrative' is often used in an undifferentiated fashion in work on the narrative properties of law to include a number of phenomena."). *See also* Wilhelm Schernus, *Narratology in the Mirror of Codifying Texts*, *in* CURRENT TRENDS IN NARRATOLOGY 277, 290 (Greta Olson ed., 2011) ("The disciplinary status of narratology appears unclear or at least somewhat uncertain.").

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reaction).[13] Yet, when Stefan Iversen discusses narratives in rhetorical discourse, which is in my view also a profoundly legal subject, he does not mention law as a topic for further investigation even though he poses the epistemological question about the reach of narrative effects within rhetorical discourse.[14] Further, when narratological studies mention the law, it is usually oriented to common law settings; obviously, the narratological findings that are applicable in common law settings cannot immediately be translated to civil law surroundings.

I aim to offer a modest preliminary investigation of narrative from a legal practitioner's perspective for the purpose of beginning to answer the question posed by Peter Brooks of whether law needs a narratology.[15] This is to ask whether it is important to develop a legal narratology that has a status as a legal methodology rather than making do with specific elements derived from literary narratology *per se*. Further, I ask what form—if at all—a legal narratology should take. I pose these questions because both the practice of law and of legal theory are—for obvious reasons—very much attached to the concept of the rule of law rather than the rule of men. The very idea of the role of narrative in judging when viewed from a traditional, doctrinal, and legal positivist perspective would seem to open the door to subjective elements that supposedly threaten logocentric reasoning and rationality, and cherished principles of law such as judicial impartiality, objectivity, and equality before the law.[16] This, too, is a specific viewpoint in and of itself as far as the "whatness" of law is concerned. My voice is that of a legal practitioner in the field of criminal law in a civil law jurisdiction who has immediate experience of narrative's failures and successes at various levels. This praxis-oriented perspective may help to inspire narratologists to turn to law—another aim of this article.

[13] *See* Jan Christoph Meister, *Narratology*, THE LIVING HANDBOOK OF NARRATOLOGY (Aug. 26, 2011) http://www.lhn.uni-hamburg.de/article/narratology; Schernus, *supra* note 12, at 281; Christy H. DeSanctis, *Narrative Reasoning and Analogy: The Untold Story*, 9 LEGAL COMM. & RHETORIC: JALWD 149 (2012). *See also* Derek H. Kiernan-Johnson, *A Shift to Narrativity*, 9 LEGAL COMM. & RHETORIC: JALWD 81, 81–82 (2012) (differentiating between story, narrative, and storytelling: Story and storytelling are limited to events and people, narrative is the broader term also used in legal reasoning, and narrativity is the latest flower on the terminological tree).

[14] Stefan Iversen, *Narratives in Rhetorical Discourse*, *in* THE LIVING HANDBOOK OF NARRATOLOGY, (Jan. 31, 2014) http://www.lhn.uni-hamburg.de/article/narratives-rhetorical-discourse.

[15] Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1 (2006).

[16] *See* Peter Brooks, *The Law as Narrative and Rhetoric*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 14, 16 (Peter Brooks & Paul Gewirtz eds., 1996) (warning that "[s]torytelling is a moral chameleon, capable of promoting the worse as well as the better cause every bit as much as legal sophistry.").

B. Law and Narrative

I. Reading for the Plot

Studying the field of narrative from the perspective of a judge has often made me feel as Monsieur Jourdan did in Molière's play *Le Bourgeois Gentilhomme*. As a judge, I have been reading for the plot all my judicial life. Yet, I am often perplexed and look for more guidance. At the same time, I suggest that the narrative turn in law needs more congruity and articulation as far as its focus is concerned, even though the pioneering works of the 1970s have now been supplemented by sophisticated views on how legal discourse is narratively organized at different levels. "The glaringly obvious fact," that legal theory and practice depend on tools of rhetorical and linguistic analysis, has still not yet been fully internalized,[17] not even in the various interdisciplinary subfields of Law and Literature. More importantly, narrative is not the panacea to all our legal woes. As Ruthann Robson and James Elkins have noted, citing narrative can both restrict inquiry as well as open it up, because narratives—similar to legal rules—do not come with built-in explanations: "Instead, [I think] narratives are particularized explorations of particular people (or non-human forms of existence) in particular situations, and at their best they illuminate the ambiguities, the contradictions, and the un-theorizability of life."[18]

This is an important point given that many intuitive notions of narrative are part of the law due to historical connections between law and narrative. For example, think of the etymological significance of the old terms to denote the function of advocate in Middle English, namely "narrator" and "counter," derived from the French *conter*—which means to tell a story and plead in a court of law.[19] Because jurists have told stories since time immemorial, one might argue against bothering with the intricacies of narrative. Viewed from a different angle, consider the late Cornelia Vismann's point about the German judge's traditional responsibility to convert the disputed *Ding*, that is to say, the disputed matter, into some "thing" that could be spoken about. She claims this development gained momentum with the spread of Roman law in Europe in the twelfth century and the subsequent theoretical development of an emphasis on punishment rather than damages in criminal law.[20] In other words, the matter under dispute evolves into a matter of fact to be adjudicated by means of judicial narration.

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[17] *See* PETER GOODRICH, LEGAL DISCOURSE 1 (1987).

[18] Ruthann Robson & James R. Elkins, *A Conversation*, 29 LEGAL STUD. F. 145, 172 (2005).

[19] *See Preface to* ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA (1965); ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 78 (1953).

[20] Cornelia Vismann, *Die unhintergehbare theatrale Dimension des Gerichts*, *in* MEDIEN DER RECHTSPRECHUNG 19, 20 (Vismann ed., 2011) ("Sie konvertieren das strittige Ding in eine aussprechbare Sache."). Compare the Icelandic term *Althing* and the German *Thingstätten* for the place where people gathered to render or receive justice.

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This historical fact also provides a good reason to focus on the judicial function as important for research geared to developing a legal narratology. On the view that to judge is to choose (and this includes the selection of what, at the end of the day, are called the facts of the case), the turn to literature, or more specifically, the turn to narrative[21] in the field of Law and Literature has redirected attention within legal discourse to a belief in the strength of the essentially human characteristic of the need to tell stories; it has also epitomized the link between human beings and their products in law and in literature as cultural artifacts. Importantly, this turn to narrative in law or, more broadly, the turn to interpretation in both the social sciences and law, functioned for a long time as an antidote to the one-sided focus on technicalities in legal formalism and positivism: It thus indicates a loss of faith in science. This first revaluation of narrative within jurisprudence did not, however, find its way into the courtroom, remaining entirely academic.

In narratology, one can see a comparable development in the fact that the early narratologists "privileged narrative in general over individual narrative."[22] Thus, it comes as no surprise that narratologists did not immediately treat legal topics as topics for consideration until recently. Or, as David Herman has put it, "In essence, the narratologists looked to language theory for model-building purposes."[23] Herman offers a list of topics, derived from Wellek and Warren, that might have already included law as a target field in the 1970s. For example, Wellek and Warren posit that narrative fiction is only one subtype of narratively organized discourse, "narrative's fusion of sequence and consequence"; from the legal perspective, this insight can immediately be connected to the problem of temporality in evidentiary settings; further, "the notion that the 'truth' of narrative fiction arises from the way its components hang together to form a *Kosmos* sufficient unto itself, whereas the truth of a historical account depends on the extent to which it matches, in some sense, the way the world is,"[24] can be translated into questions of veracity and verisimilitude in legal settings.

Another reason to focus on the work of the judge relates to the topic of temporality mentioned above: The judge was not present when the events, that would later be the facts of the case, took place. Hence, "this world of action," as Paul Ricoeur calls it,[25] in other words, the actions that occasion the lawsuit, can only be re-enacted before the judge by means of a variety of

[21] *See* Olson, *supra* note 12 (providing an overview of the "narrative turn").

[22] David Herman, *Histories of Narrative Theory (I), in* A COMPANION TO NARRATIVE THEORY 19, (James Phelan and Peter J. Rabinowitz eds., 2005).

[23] *Id.* at 31.

[24] *Id.* at 21.

[25] PAUL RICOEUR, 1 TIME AND NARRATIVE xi (Kathleen McLaughlin & David Pellauer trans., 1984).

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narratives that may differ as far as their story time and their discourse time is concerned.[26] This demands an understanding on the part of the judge of the temporal order of an action that is itself informed by other cultural and professional narratives, including the pre-understanding that we have of the order of an action that is based on "the pre-narrative quality of human experience."[27] Importantly, this understanding of narrative re-enactment entails a departure from the correspondence theory of language as an objective vehicle for communicating information, including, for law, the mimetic theory—the theory that facts are entities that can be transmitted by means of words as the encoded perceptions of those very same facts. In other words, facts, too, are largely products of our points of view. It is precisely because of this awareness of the influence of our conceptual frameworks on our valuation of the world that work needs to be done on the concept of narrative in legal surroundings.[28]

II. The Narrative Paradigm: Probability and Fidelity

Recently, I suggested that Walter Fisher's concept of the narrative paradigm, developed in the early 1980s, is undeservedly underrated in contemporary research.[29] It provides a good starting point for interdisciplinary discussions because Fisher's narrative paradigm can be employed in the interpretation and assessment of a text in which there are claims to knowledge, truth, or reality. This aim is intimately connected to the quest in law and elsewhere to determine "whether or not one should adhere to the stories one is encouraged to endorse or to accept as the basis for decisions and actions."[30] Fisher's work ties in with continental European philosophical hermeneutics insofar as it examines what occurs at the very moment

[26] Story-time is defined as the narrated time within the story or "the sequence of events and the length of time that passes in the story," and discourse-time, as "the length of time that is taken up by the telling (or reading) of the story." *See Anglistik der Universität Freiburg*, *Time Analysis*, UNIVERSITÄT FREIBURG, http://www2.anglistik.uni-freiburg.de/intranet/englishbasics/Time02.htm (Mar. 26, 2015).

[27] Paul Ricoeur, *Life*, *in* FACTS AND VALUES 121, 129 (Marinus C. Doeser & J.N. Kraay eds., J.N. Kraay & A.J. Scholten trans., 1987).

[28] Riffaterre's statement remains poignant that: "The narrative need not be judged true because it corresponds to an external image of the world, but because it is consistent with the linguistic usages current in a given social context, at a given moment in time." MICHAEL RIFFATERRE, FICTIONAL TRUTH vii–viii (1990).

[29] *See* Jeanne Gaakeer, *Futures of Law and Literature: A Jurist's Perspective*, *in* RECHT UND LITERATUR IM ZWISCHENRAUM/LAW AND LITERATURE IN-BETWEEN 71 (Christian Hiebaum et al. eds., 2015); Walter R. Fisher, *Narration as a Human Communication Paradigm*, 51 COMM. MONOGRAPHS 1, 2 (1984) (denoting narrative paradigm as "a dialectical synthesis of two traditional strands in the history of rhetoric: the argumentative, persuasive theme, and the literary, aesthetic theme."). Compare James Boyd White's emphasis at the start of *Law and Literature* that jurists should be able to bridge the difference, in themselves and when recognized in others, between the narrative and the analytical, or the literary and the conceptual. White calls this the difference between "the mind that tells a story, and the mind that gives reason," because "one finds its meaning in representations of events as they occur in time, in imagined experience; the other, in systematic or theoretical explanations, in the exposition of conceptual order or structure." JAMES BOYD WHITE, THE LEGAL IMAGINATION 859 (1973).

[30] Walter R. Fisher, *The Narrative Paradigm*, 52 COMM. MONOGRAPHS 347, 348 (1985).

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that something is said or written. It thus highlights the question of the relation between human action and communicative experience, the nature of the rationality of this experience, and the contents of its values.[31]

To Fisher, "people are as much valuing as reasoning animals."[32] To demonstrate this, his project draws on Aristotle's view of metaphor as developed in the Poetics and on the cognitive aspects of rhetoric in relation to reality. The representation of reality in literary works represents "not exactly our own world,"[33] but nevertheless bears a relationship to it at the very moment that we claim to recognize and understand the literary reality, because in doing so we make use, consciously or unconsciously, of the concept of mimesis as representation. The narrative paradigm aims to achieve a synthesis of argumentative reasoning and its literary-aesthetic counterpart. It does so by contrast with the rational-world paradigm of the natural sciences, in that it thrives on "symbolic actions—words and/or deeds—that have sequence for those who live, create, or interpret them."[34] As a paradigmatic mode of human decision-making, it is founded on "good reasons"[35] that are both medium and context dependent. The paradigm embraces a concept of stories as the symbolic interpretations of aspects of the world shaped by history, culture, and character in the sense of personal qualities.

So narrative "rationality is determined by the nature of persons as narrative beings—their inherent awareness of *narrative probability*, what constitutes a coherent story, and their constant habit of testing *narrative fidelity*, whether the stories they experience ring true with the stories they know to be true in their lives (narrative probability and narrative fidelity, it will be noted, are analogous to the concepts of dramatic probability and verisimilitude."[36] To Fisher, "Narrative probability refers to formal features of a story conceived as a discrete sequence of thought and/or action in life or literature (any recorded form of discourse); for example, it concerns the question of whether or not a story coheres or "hangs together," whether or not the story is free of contradictions" and "[n]arrative fidelity concerns the 'truth qualities' of a story, the degree to which it accords with the logic of good reasons: The

[31] *Id.* at 355 (expressing his indebtedness to Ricoeur, whose "recent writings inform and reinforce the narrative paradigm.").

[32] Walter R. Fisher & Richard A. Filloy, *Argument in Drama and Literature*, *in* ADVANCES IN ARGUMENTATION THEORY AND RESEARCH 343 (J. Robert Cox & Charles Arthur Willard eds., 1982).

[33] *Id.* at 347.

[34] Fisher, *supra* note 29, at 2.

[35] Fisher, *supra* note 29, at 7.

[36] Fisher, *supra* note 29, at 8.

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soundness of its reasoning and the value of its values."[37] His philosophical argument is an epistemological one, as can be seen from the phrase "they know in their lives." Furthermore, narrative rationality, so conceived, posits the concept of narrative as an independent meta- or master[38] discourse that can be put to use outside its original rhetorical surroundings.

The point about narrative rationality as "an account, an understanding, of any instance of human choice and action" alerts us to the question of mimetic re-presentation of human actions.[39] The importance of the topic of mimesis in its connection to the nature of fiction in the sense of referentiality in and outside literature cannot be emphasized enough for law. The following example represents this significance of mimesis here.

Foreigners seeking British citizenship must take a test involving a variety of questions, including the question "Where does Santa Claus live?"[40] Obviously, only one answer is possible to the positivistically inclined, namely that Santa does not exist. For others, however, the question alerts us to the problem that the value of literature for law is often quite diminished on the basis of literature's lack of a referential character. That is to say that, while the comparison of literature to fiction may not be a revolutionary notion in the humanities, in the legal community and it law itself, its wisdom has not yet been received. What the question British citizenship question also shows is that "[h]uman beings do not go to work on a raw, inert environment but on one always already 'textualized', traced over with meaning."[41] Or rather, we understand the fictional aspect of Santa Claus (as much as that of unicorns, mermaids or artificial legal persons such as corporations, for that matter) but nevertheless accept the truth-value of Santa Claus as a fact within the context of the narrative.

Something that has already been richly documented in narratological research with respect to the reader generally, for example, as the person who takes decisions a judge of a literary narrative, is that her own background is in need of critical attention in itself. This insight should be applied to the judge or justice. It is the judge who, after the act of reading and attaching meaning to what she reads, subsequently constitutes a new state of affairs as "reality" with at least a minimal presumption of the re-presentation of *wie es eigentlich*

[37] *See* Fisher, *supra* note 30, at 349. *See* James Phelan & Peter J. Rabinowitz, *Introduction* to NARRATIVE THEORY 3, 7 (David Herman et al. eds., 2012) ("Audiences develop interests and responses of three broad kinds, each related to a particular component of the narrative: mimetic, thematic, and synthetic."). This is to say that as far as the mimetic is concerned, the questions are, Is this world possible? Are these people possible, either hypothetically and conceptually?

[38] *See* Werner Wolf, *Narratology and Media(lity)*, *in* CURRENT TRENDS IN NARRATOLOGY 145, 156 (Greta Olson ed., 2011).

[39] Fisher, *supra* note 29, at 9.

[40] TERRY EAGLETON, THE EVENT OF LITERATURE 207 (2012).

[41] *Id.* at 171.

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gewesen ist—of how it really was, at the moment that the judge writes her decision.[42] As Fisher notes, we thus require both knowledge of agents in order to find which is reliable or trustworthy, and knowledge of objects in order to discover what has the quality of veracity.[43] This observation can be seamlessly transposed to the study of narrative in and for law.

C. *Dichtung oder Wahrheit*? Fiction or Verisimilitude?

I. Phronèsis and Good Judgment

We need to determine precisely how the narrative paradigm may be employed in texts with truth claims, the texts of law in court surroundings being prominent amongst them. Before I address this question from the perspective of criminal law in practice, I want to highlight some examples of hermeneutical and narratological scholarship that help guide the envisaged project of creating a narratology of European civil law.

Fisher's thesis about the determination, by means of the narrative paradigm, of whether or not to adhere to the stories one is encouraged to accept as the basis for decision making and action, combined with a foundation in good reason, is rooted in the Aristotelian tradition of emphasizing the quality of *phronèsis* or practical reason as one that is indispensable to good judgment.[44] The *phronimos*, or prudent man, is "able to deliberate well about what is good and advantageous . . . as a means to the good life in general."[45] *Phronèsis* is not only the virtue of knowing the ends of human life; it also encompasses knowledge of how to secure them.[46] It therefore includes the application of good judgment to human conduct and, as such, constitutes a form of "knowing how"—a *praxis* tied to the realm of what we would now call professional practice. Unlike *épistèmè* or theoretical knowledge, which is conceptual and propositional in nature and aimed at "knowing that," *phronèsis* pertains to the probable in the sense of provisional truths. Here, we find the connection to Fisher's narrative probability and fidelity.

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[42] *See* Richard J. Gerrig, *Conscious and Unconscious Processes in Readers' Narrative Experiences*, *in* CURRENT TRENDS IN NARRATOLOGY 37, 39 (Greta Olson ed., 2011) ("Readers' general knowledge is critical to narrative processing.").

[43] Fisher, *supra* note 29, at 18.

[44] Fisher, *supra* note 30, at 354 (noting that narrative rationality resembles, "Aristotle's view of phronesis, which recognizes a contingent world, the particularities of practical existence and the possibility of wisdom—a virtue that involves an interest in matters that transcend immediate circumstances."). *See* Gaakeer, *supra* note 4, at 24–27, for an extensive discussion of *phronèsis.*

[45] ARISTOTLE, THE NICOMACHEAN ETHICS, V.v.1, 1140a24–29 (2003).

[46] *Id.* at VI.v.3-4, 1140a32–1140b7.

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Perceptual and dispositional in nature, *phronèsis* is the capacity to see and act upon what the situation demands.[47] If we connect this to narratives as "the product of agency" in the sense that "they are the means by which someone communicates a story to someone else,"[48] then the argument follows that narratives can best be tested by exercising one's phronetic ability where the goal is to ascertain the degree of narrative rationality, not least of all because *phronèsis* has a "truth-attaining rational quality"[49] as its basis. The latter quality is connected to the cognitive-epistemological aspect of narrative—that is, as a form of knowledge, which is albeit different from the logos favored by the natural sciences.

II. Paul Ricoeur: The Connections Between Phronèsis and Narrative

To justify this argument, I find inspiration and justification in Paul Ricoeur's views on narrative. In a nutshell, his views on narrative are the following. To Ricoeur, the first connection between *phronèsis* and narrative can be found in the ability to understand and appreciate metaphor, which is defined as the ability to appreciate resemblances; the ability to effectively use metaphors constitutes the good *phronimos*.[50] A contemplation of similarities ideally leads to insight into what is deemed a likeness, and into for what reasons this likeness is perceived.[51] It requires imagination as "th[e] *ability* to produce new kinds by assimilation and to produce them not *above* the differences . . . but in spite of and through the differences."[52] Ricoeur states that metaphor "implies an intuitive perception of the similarity in dissimilars."[53] Obviously, such imaginative perception requires testing. Yet, to my view, the very concept of this quality of perception is linked to the imagination as it is conceived in the continental European hermeneutic tradition, in the sense attributed to it by Immanuel Kant in his *Critique of Judgment* (1790), for example, as *Einbildungskraft* or

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[47] *Id.* at VI.viii.9, 1152a26–28.

[48] GREGORY CURRIE, NARRATIVES AND NARRATORS 1 (2010).

[49] ARISTOTLE, *supra* note 45 at VI.v.3-4, 1140a32–1140b7.

> It [*phronèsis*] is not Science, because matters of conduct admit of variation; and not Art, because doing and making are generically different, since making aims at an end distinct from the act of making, whereas in doing the end cannot be other than the act itself: doing well is in itself the end. It remains therefore that it is a truth-attaining rational quality, concerned with action in relation to things that are good and bad for human beings.

[50] Paul RICOEUR, THE RULE OF METAPHOR 23 (1986).

[51] Paul Ricoeur, *The Metaphorical Process as Cognition, Imagination, and Feeling*, 5 CRITICAL INQUIRY 143, 146 (1978).

[52] *Id.* at 148.

[53] RICOEUR, *supra* note 50.

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imaginatio. And why is this the case? Because Kantian imagination is linked with the idea of metaphor as the connection or linchpin between two fields of meaning.[54] Through the individual's imagination, the texts she reads are recognized in their similarities, and these similarities are subsequently translated into specific images, mental pictures, and, finally, into a reflective judgment.

As transported to a legal context, the metaphoric contemplation of (dis)similarities adds something new to the reservoir of accepted meanings and can help provide insight into the jurisprudential development of law as well as the rule of law in both common law and civil law jurisdictions. I maintain this because Ricoeur suggests that "to understand a story is to understand both the language of 'doing something' and the cultural tradition from which proceeds the typology of plots."[55] To me, this idea of the cultural tradition suggests that if we translate Ricoeur's work into a legal typology and setting, the concept of understanding the story would include its procedural aspects as well as the evidentiary settings in specific jurisdictions.

1. Metaphor in Action

Understanding the way in which legal categories and concepts are coined and developed by means of such comparisons is but one example of where a perceptive attitude is crucial. Given the reciprocal relation between theory and practice in law, I believe that it is justified to suggest that insight into the ways in which metaphor works is important to the formation of legal concepts, the development of legal doctrine, and for success in legal practice. Thus, we should carefully consider the way in which the rule of metaphor works by means of analogical reasoning,[56] because the introduction of a new metaphor in a specific field, for example, when "the ship of state" is introduced in public law, entails the generation of new meanings; as a side effect, the original meaning may be suppressed if only for a time, given that meaning in law is dynamic, never static.

Allow me to provide just one example from Dutch criminal law on the development of the concept of theft. Article 310 of the Dutch Penal Code reads,

> A person who removes any property belonging in whole or in part to another, with the object of unlawfully

[54] Compare Kantian *imaginatio* as the faculty to bring about a synthesis between intellectual attitude, intuition, and deliberation, and thus, a link between the essential requirements for lawyers, for example, sympathetic understanding and necessary detachment, as set forth in Anthony Kronman, *Practical Wisdom and Professional Character*, 4 SOCIAL PHIL. & POL'Y 203 (1986).

[55] RICOEUR, *supra* note 25, at 157.

[56] *See* Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations Legal Discourse*, 20 LEGAL STUD. F. 7, 8–9 (1996).

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> appropriating it, is guilty of theft and liable to a term of imprisonment of not more than four years or a fine of the fourth category.[57]

Originally, the concept of property was understood to refer only to tangible objects. But in 1921, the Dutch Supreme Court ruled that electricity, intangible as it is, could also be viewed as property because it has an economic value. In 2012, the Dutch Supreme Court then faced the question of whether a digital amulet and a mask in the online computer game Runescape were also objects that could be unlawfully appropriated under the provision of Article 310.[58] The facts of the case were simple: A boy who was very wealthy in terms of Runescape paraphernalia was threatened by another boy into giving him the data from his Runescape account, allowing the coercive boy to transfer the digital amulet and mask to his own account. The Supreme Court ruled that the virtual character of the objects under consideration had real value for game players and that these objects were the fruits of a prolonged time investment in the game. Thus, digital objects were included in the concept of property. In view of these metaphorically-based mini-narratives concerning the status of digital objects, it becomes obvious that judges must have a pre-understanding of the order in which an action takes place, one that is based on "the pre-narrative quality of human experience" described above. This judicial pre-understanding is itself informed by other cultural as well as professional narratives on what may be good reasons for specific decisions.

2. Mimesis

To understand the temporal order of human action, Ricoeur offers a threefold model of mimesis. This Article, however, only summarizes its main elements. What matters to me here is to show that both law and narratology could greatly benefit from an enlarged appreciation of the iconic moment that philosophical hermeneutics provides when it illuminates similarities in both fields.[59] Ricoeur first distinguishes the stage of prefiguration that he calls *mimēsis*$_1$. This denotes the temporality of the world of action, or as jurists would call it, the brute facts that need to be named, understood, and weighed based on pre-understandings of the narratives of human actions. This hermeneutic trajectory represents a vicious circle, as Ricoeur admits, because if and when human life and action are thought of in terms of stories,

[57] THE DUTCH PENAL CODE (Louise Rayar & Stafford Wadsworth trans., 1997).

[58] Hoge Raad (Dutch Supreme Court), 31 January 2012, ECLI:NL: HR:2012: BQ9251. *See* DeSanctis, *supra* note 13, at 161 (providing an example of a "story of the evolution of the law," the case of *United States v. Martinez-Jimenez*, 864 F.2d 664 (9th Cir. 1989), which considered whether a toy gun counts under the relevant statute, for example, in the doctrinal development of the federal armed-bank-robbery statute on the use of "a dangerous weapon or device," because this counts as an aggravating circumstance leading to an increase of penalty. Another field where metaphoric insight is of great importance is in questions of intellectual property rights).

[59] *See* Gaakeer, *supra* notes 4 and 29, for an elaboration of this argument. For a general introduction to Ricoeur's views on narrative, see WILLIAM C. DOWLING, RICOEUR ON TIME AND NARRATIVE (2011).

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as "an activity and a desire in search of a narrative," then human experience is inescapably always "already mediated by all kinds of stories we have heard"[60] The circularity involved here should alert us to the task of acknowledging the human proclivity to stick to a story once it has been satisfactorily situated or when it has been told by ourselves in law and elsewhere; accordingly, for professionals in particular, there is a risk of maintaining bias.

The next stage is *mimēsis*$_2$, or configuration as the narrative emplotment of events.[61] As a form of composition, or *poiēsis*, it is connected to *phronèsis*: Because the activity of jurists is *poièsis*, they should cherish the imaginative challenge that unfolds in emplotment and ask what they themselves as professionals bring to it. Emplotment is grounded in *mimēsis*$_1$, and demands knowledge of the "meaningful structures, symbolic resources, and temporal character, of this world of action."[62] In short, emplotment is the operation that draws a configuration out of a simple succession and creates a story out of a number of events.[63] In law, the idea of pre-understanding is constituted equally by both law's institutional characteristics and the general foundational principles influenced by the cultural aspect of, what James Boyd White called, the invisible discourse of law.[64] Thus, we need to force ourselves to remain critical when considering the possible effects of this discourse on our view on, for example, narrative probability, in case we accept the basis of pre-understanding unconditionally.

Refiguration, or *mimēsis*$_3$, refers to the moment when the reader appropriates the text for her or his own world. Translated into law, the sole aim of emplotting in judicial *praxis* is to arrive at a decision.[65] The judicial configurational act constitutes the (re)structuring of reality[66] by means of a decision which is then followed up by a written judgment; after the

[60] Ricoeur, *supra* note 27, at 129.

[61] RICOEUR, *supra* note 25, at xi.

[62] *Id.* at 54.

[63] *Id.* at 54, 65.

[64] In *Heracles' Bow*, White distinguishes between legal vocabulary and law's "cultural syntax" or "invisible discourse": "Behind the words, that is, are expectations about the ways in which they will be used, expectations that do not find explicit expression anywhere, but are part of the legal culture that the surface language simply assumes." JAMES BOYD WHITE, *The Invisible Discourse of Law*, *in* HERACLES' BOW 169 (1985).

[65] *See* Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 745 (2004) ("The judicial decision or holding corresponds to the action required of practical wisdom.").

[66] *See* Karin Kukkonen, *Plot*, in THE LIVING HANDBOOK OF NARRATOLOGY (Jan. 25, 2014) http://www.lhn.uni-hamburg.de/article/plot (examining *mimēsis*$_3$ as "a refined grasp of the real world"); Michael Scheffel, Antonius Wexler & Lukas Werner, *Time*, in THE LIVING HANDBOOK OF NARRATOLOGY (Nov. 20, 2013) http://www.lhn.uni-hamburg.de/article/time (examining *mimēsis*$_3$ as

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ruling has been written, the world of the parties involved changes, as does the world of law in terms of what the decision adds to doctrine, if only to confirm it. In difficult cases, this re-structuring of reality may take the form of an unexpected jurisprudential paradigm shift. Thus when *mimēsis*$_1$ and *mimēsis*$_2$ interact, the stage of application has been reached; as a result, our earlier pre-understanding has also been changed by the act of configuration. This is why Ricoeur claims that "to tell and to follow a story is already to reflect upon events in order to encompass them in successive wholes," and "to narrate is already to explain."[67] In bringing together heterogeneous facts and circumstances that are woven into competing narratives of opposing parties, the judge draws on the written and unwritten sources of law that are themselves part of the stage of *mimēsis*$_1$ as much as they are the result of an earlier application, *mimesis*$_3$, if viewed as part of the dynamic process of law's development. The connection between narrating well and *phronèsis* as good judgment is imperative for the conclusion of the judge's narrative in the form of the decision to be deemed acceptable.

In literary theory, Ansgar Nünning and Michael Basseler take up the challenge provided by Ricoeur's model of mimesis, and they have looked for the ways literary works draw on pre-figured knowledge of the textual repertoire—for example, the stage of *mimēsis*$_1$—with the view that there is a reciprocal relationship between *mimēsis*$_1$ and *mimēsis*$_3$, because "on the one hand, literary life knowledge is directly linked to and shaped by extra-literary forms of life and ways of living," while "on the other hand, life itself is shaped by literary representations."[68] This is an argument on the plane of narrative knowledge with which I wholeheartedly agree. Simultaneously, I maintain that broadening the scope of the application of Ricoeur's model is necessary if we are to take up the interdisciplinary task of thinking through the implications of developing a legal narratology. In law as much as in literature, the construction of narratives is based on the idea that there are acceptable, or at least feasible, renditions of what happened, if only at the moment in which they are transmitted in court and elsewhere. Therefore, the

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> the recipient's activation of the narrated actions and his or her realization of the 'synthesis of the heterogeneous' manifested in *mimēsis*$_2$. Subsequently, this activation may influence and change the reader's actions, including the models that determine his image of himself and of the world in which people act, and may become the subject of another narration, another 'synthesis of the heterogeneous.').

See also Michael Scheffel, *Narrative Constitution*, in THE LIVING HANDBOOK OF NARRATOLOGY (May 16, 20110) http://www.lhn.uni-hamburg.de/article/narrative-constitution [explaining that "*mimēsis*$_3$ (refiguration) concerns the recipient's realization of the *mise en intrigue* manifested in *mimēsis*$_2$." This realization influences "his image of himself and of the world in which people act."].

[67] Paul Ricoeur, *Narrative Time*, 7 CRITICAL INQUIRY 169, 178 (1980); Paul Ricoeur, *The Human Experience of Time and Narrative*, 9 RES. IN PHENOMENOLOGY 17, 24 (1979). *See also* EAGLETON, *supra* note 40, (suggesting that this is done in "an always-already 'textualised' environment.").

[68] Ansgar Nünning & Michael Basseler, *Literary Studies as a Form of "Life Science,"* NEW THEORIES, MODELS AND METHODS IN LITERARY AND CULTURAL STUDIES 189, 197 (Greta Olson & Ansgar Nünning eds., 2013).

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phase of configuration of *mimēsis*$_2$ that Nünning and Basseler conceive of as the presentation of alternative forms of knowledge and life in the literary work, and as a test case in the form of an alternative fictional world that reflects as much as challenges the actual world, now finds its legal counterpart. Refiguration or *mimēsis*$_3$ opens up new horizons of expectancy in law as to what will, to return to my example above, be categorized under the concept of theft. Refiguration changes the interpretation of a chain of precedents when arguments rejected earlier are suddenly deemed feasible. In common law and civil law alike, a phase of determinative judgment follows the reflective effort to seek the relevant legal norm to apply to precisely the case at hand. This phase of judgment ends the process of the parties' dialectical argument. Reflective judgment as such is, moreover, not limited to the end of a trial. In the sense that a decision becomes an authoritative precedent, the act of judging in a specific case does not exhaust the meaning of the act itself.[69] In short, any text of law can potentially be de-contextualized and re-contextualized. This process then requires attention to what the circumstances demand, and for this act to be satisfactorily executed, imagination and *phronèsis* are both required.

3. Consequences for Law and the Humanities: Two Examples

3.1 Peter Brooks

Law and Humanities studies have made a significant point: Jurists should be imaginative about both the law and the people whose fates they determine when they use language to translate brute facts into the reality of a legal narrative. If the way jurists narrate the facts of a case, and more specifically, the order in which the jurists narrate, determines the outcome of a case to a large extent, then jurists need to develop and to value narrative knowledge, for no small reason because the events that did not become "the facts" may be of equal importance.[70] This has also been Peter Brooks' consistent argument. He defends the epistemological view on narrative when he claims that "narrative appears to be one of our large, all-pervasive ways of organizing and speaking the world—the way we make sense of meanings that unfold in and through time."[71] He is, however, also critical of this process as it

[69] PAUL RICOEUR, THE JUST 130 (2000) (noting especially Chapter 8, *The Act of Judging*, at page 127).

[70] The Honorable Justice I.D.F. Callinan, AC, *Symposium: The Power of Stories: Intersections of Law, Literature, and Culture: Stories in Advocacy and in Decisions: The Narrative Compels the Result*, 12 TEX. WESLEYAN L. REV. 319, 323 (2005) ("It is . . . not only the way the actual facts are narrated that determines the case, but also the order in which they are narrated and the facts that are omitted.").

[71] Brooks, *supra* note 15, at 14. *See* ANTHONY G. AMSTERDAM & JEROME S. BRUNER, MINDING THE LAW, 110, 115, 117 (2000) (differentiating between "endogenous theories of narrative" [the central claim of which "is that narrative is inherent either in the nature of the human mind, in the nature of language, or in those supposed programs alleged to run our nervous systems"]and "a second sort of theory" that argues "that narratives and genres of narratives serve to model characteristic plights of culture-sharing human groups," the latter being the form to which legal narrative tends to conform).

unfolds in legal practice because—while law always concerns competing stories—competing stories may deliberately mislead.[72] Further, Brooks warns us not to forget that law "is a social practice which adjudicates narratives of reality, and sends people to prison, even to execution, because of the well-formedness and force of the winning story."[73] His lament is that, "if the ways stories are told, and are judged to be told, makes a difference in the law, why doesn't the law pay more attention to narratives, to narrative analysis and even narrative theory?"[74] These considerations lead to a quest guided by the question, "Could one say that law needs a narratology? What would be its elements?"[75]

Brooks's methodological emphasis resembles that of Ricoeur. This can be seen in Brooks's remark that: "Narrative plots appear to be a certain formal organization of temporality, and need to be seen in their structuring cognitive role: a way of making sense of time-bound experience."[76] His definition of "narrative glue" as "the way incidents and events are made to combine in a meaningful story," as well as in his argument that "[t]he substance of this narrative glue depends in large part on the judges' view of standard human behavior, on what words and gestures are to provoke fear, for instance,"[77] ties in with what Ricoeur claims about the mediation of human experience through prior narratives. On this view, the *doxa*, i.e. that which is commonly believed, that Brooks finds in Roland Barthes's definition—arguably, however, Aristotle discovered this long before him—as "that set of unexamined cultural beliefs that structure our understanding of everyday happenings"[78] has to be incorporated in this "narrative glue." In other words, "[t]he 'facts' take on their meaning only within and by way of a thoroughly perspectival narrative."[79] Such perspectival narrative should depend on its specific procedural surroundings—for example, within an adversarial or inquisitorial setting as well as on the basis of a set of expectations constituted by a judge's professional culture.

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[72] Brooks, *supra* note 15, at 3–4 (discussing Robert Burns's view that "the bedrock of human events is not a mere sequence upon which narrative is imposed but a configured sequence that has a narrative character all the way down." (citing ROBERT BURNS, A THEORY OF THE TRIAL 222 (1999))).

[73] Peter Brooks, *Narrative in and of the Law*, *in* A COMPANION TO NARRATIVE THEORY 415 (James Phelan and Peter J. Rabinowitz eds., 2007).

[74] Brooks, *supra* note 15, at 3.

[75] *Id.* at 24.

[76] *Id.* at 24.

[77] Brooks, *supra* note 73, at 417.

[78] *Id.* at 418.

[79] Brooks, *supra* note 15, at 10. *See* AMSTERDAM AND BRUNER, *supra* note 71, at 110–11, for the comparable view that law lives on narrative so that "the administration of the law and even much of its conceptualization rest upon 'getting the facts.'"

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On the basis of these theoretical considerations, Brooks analyzes Justice Benjamin Cardozo's opinion in *Palsgraf v. Long Island Railroad Company*, and he criticizes Cardozo's statement of facts with respect to Helen Palsgraf's injuries: "Cardozo, like many judges, only appears to tell the story of the event under adjudication. He recasts the story events so that they make a legal point, rendering it a narrative recognizable in terms of legal principle."[80] In other words, Brooks blames Cardozo for stacking the deck by beginning the opinion with the doctrine of foreseeable harm and then, in a Procrustean exercise, telling the story to fit the doctrine, thus introducing narrative coherence *ex post facto*. The point made here about the construction of a story is a salient one when it comes to developing a general theory of legal and/or judicial narratology. Yet, Ayelet Ben-Yishai quite rightly suggests that:

> What Brooks finds problematic—"only appears to tell the story"—I regard as instructive. Narrative analysis is indeed as important an analytical tool for legal studies as Brooks claims it is. However, I argue that its importance lies not in revealing how legal stories *should* be written, but rather in revealing the judicial, historical, political and social stakes in their having [been] written the way they were.[81]

This important observation pertains to the direction interdisciplinary narratological research should take. More specifically, this suggests that a diachronic analysis of law's story within specific national jurisdictions needs to be developed and then used for comparative purposes. To my knowledge, this research has not yet been taken up.

3.2 Monika Fludernik

Brooks's suggestions have, however, already been taken up in narratological studies in a different way. Monika Fludernik points out that the effect of the narrative turn in literary theory, since Roland Barthes, has been that "narrative theory needs to come to terms with the

[80] Brooks, *supra* note 73, at 419; Brooks, *supra* note 15, at 14. I would also like to point to Justice Rehnquist's opinion in DeShaney v. Winnebago County Department of Social Services [DSS], 489 U.S. 189 (1989), on the question of whether the DSS, who knew that four-year-old Joshua DeShaney was repeatedly beaten by his father, was responsible for his ultimate brain damage since they failed to intervene: "The facts of this case are undeniably tragic," an opening statement followed by a cold enumeration of reasons why DSS was not responsible, one that Justice Brennan in his dissent refers to as "the Court purport[ing] to be the dispassionate oracle of the law, unmoved by 'natural sympathy.' . . . But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts," as, for example, Rehnquist's narrative is driven by doctrine.

[81] AYELET BEN-YISHAI, COMMON PRECEDENTS 22, 39 (2013) (emphasis in original).

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deployment of its concepts in nonnarratological contexts."[82] One such contemporary extension of the term "narrative" has been in legal studies that "narratology is now held responsible for explaining narrative in general—and this includes . . . narrative representations in . . legal contexts . . . . "[83] Fludernik engages with Brooks's analysis of *Palsgraf* in terms similar to Ben-Yishai.[84] Along with her observation that "Brooks highlights the problems with narrative reasoning. Narrative presumes a logic of events that may not happen in real life. [W]e . . . may base our judgments on fictions that have no purchase on what really was the case[,]"[85] Fludernik's analysis underlines a salient point for the development of a legal narratology: Namely, cultural acculturation may render jurists oblivious to their choices with respect to the facts; however, it also alerts us to another problem, namely what indeed is meant by "real life" or "what really was the case?" Not only may views of the facts and the case differ depending on one's disciplinary background, but differences in substantive and procedural law as well as accompanying theories of evidence are also constitutive.

Fludernik's discussion of law as code renders this point poignantly clear. As she rightly claims, code is "a much more difficult area of the law, where narrativity has traditionally been regarded as non-existent."[86] In her analysis of the New York Penal Law Section 10—which defines offenses, violations, felonies, and crimes—for example, she writes: "Note that the definition of the transgression is related not to a particular act but to the punishment imposed." To a jurist this is not at all notable, because the addressee of a statutory provision in a criminal code is not the individual citizen but the judge, at least in civil law jurisdictions. Yet, this is likely not different in common law jurisdictions in which sentencing is the judge's prerogative after the jury's decision on whether or not a defendant is guilty. Fludernik concludes that: "[In other words,] transgression of the law is not defined as an issue of morality but as an issue of bureaucracy and of the imposition of rules that need to be obeyed."[87] From the point of view of legal theory, this remark about transgression not being defined because a moral issue seems to refer to a view, inspired by a conception of natural law, of the interrelation between law and morality, whereas, paradoxically, in its reference to bureaucracy, it seems to imply a view of judging as an automatic application of a given

[82] Monika Fludernik, *Histories of Narrative Theory (II)*, *in* A COMPANION TO NARRATIVE THEORY, *supra* note 22, at 46.

[83] *Id.* at 50.

[84] "One of the key features of such narratives is not (only) cultural preconceptions about ranges of causality, but the various narrators' deliberate (or perhaps sometimes unintentional) selection of circumstances, that is to say their neglect or repression of other important evidence," Fludernik, *A Narratology of Law?*, 1 CRITICAL ANALYSIS OF L., 87, 88 (2014).

[85] *Id.* at 89. *See* Edwards, *supra* note 56, for an early, path-breaking account of the concept of narrative reasoning.

[86] *Id.* at 92. *See* Olson, *Narration and Narrative in Legal Discourse*, in THE LIVING HANDBOOK OF NARRATOLOGY, *supra* note 13 (last visited on December 15, 2014), arguing that "the legal code represents a form of narration involving if-plot."

[87] Fludernik, *supra* note, 84 at 102; Fludernik references the N.Y. Penal Law § 10.00 et seq. (2009).

set of rules, the outcome of which is known beforehand. Furthermore, it does not take into consideration the difference in law and legal theory between norms and rules. The norm is thou shalt not steal," the codified rule tells us, "[b]ut if you do, this is what will happen to you, if and when your act is discovered and there is enough evidence to convict you."

While I fully agree with Fludernik that "crime is necessarily agentive and therefore can be conceived of as a narrative,"[88] I also remain puzzled by her contention that "more contemporary law codes are deliberately non-narrative; they suppress the narratives that abound in the courtroom and outside it and try to transform the defendant even before conviction into the anonymous representative of a category."[89] As Aristotle observed early on, and as twentieth-century hermeneutics from Heidegger to Gadamer and Ricoeur later endorsed, the statutory rule is necessarily always general, because the legislator cannot think of all of the possible situations to which it might apply. Thus, the legal rule finds its meaning only in its application in the individual case. Furthermore, the fact that the addressee of the rule is the judge who must determine its application does not mean that "the stories that have been told in court" are "denarrativized . . . once the sentencing project takes over."[90] Rather, a general division of tasks occurs in the legal process. To be clear: This is not to quibble or take an esteemed colleague to task, but to offer a cautious reminder that attention needs to be paid to the *quidditas* issue, that is to the "whatness" of law or any other discipline. Interdisciplinary co-operation is urgently needed to undertake this task, or we run the risk of forgoing the chance to implement highly relevant observations in the project of outlining a judicial or legal narratology. In other words, European jurisdictions deserve the kind of careful and considered narratological analysis that Fludernik has performed on American statutes.

D. The Pathologies of Legal Narratology

I. The Influence of the Master Narrative

On the basis of the conceptual framework provided by Fisher, Ricoeur, and Brooks, we can fruitfully engage in interdisciplinary law and narratology research on the theoretical plane concerning topics noted above, such as narrative rationality, emplotment, and narrative glue. This is especially the case if we connect these topics to the requirement that judges possess narrative intelligence and deliberative judicial *phronèsis*—the situational knowledge Ricoeur suggested. Why? From a methodological point of view these are the elements that inform the hermeneutic movement from the facts to the legal rule and from the legal concept to the judicial decision, always a back-and-forth. They guide the way in which the judge

[88] Fludernik, *supra* note, 84 at 108.

[89] *Id.* at 109.

[90] *Id.*

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develops her own "perspectival narrative"[91] that in turn allows her to engage in the decision-making process. Put differently, judicial emplotment and application when taken literally as *ad plicare*—the folding of the fact and the legal rule into a reciprocal union in order for a new meaning to unfold—requires a narratology. First of all, this process is guided by one's interpretive framework. Second, because of the similarity between narrative and legal interpretation, they do not constitute the application of the abstract rule to the story of the case, but involve a judgment about probability, verisimilitude, and truth on the basis of one's whole knowledge of the world.[92] Third, throughout the process, judges act as those who bring about a reversal of fortune, a *peripeteia* for others, and they may fall short of the necessary quality of recognition, the *anagnorisis*, of what is indeed the truth in a specific case. This is especially true because judicial "narrative understanding is retrospective."[93] Nothing can be done if parties to a case negligently fail to incorporate relevant elements in their narratives. Because judicial fact-finding is always performed *ex post facto*, judges need to be fully informed on the functions and effects of narrative to the greatest extent possible.

For narratological research to actually impact the law, some pitfalls need to be avoided. From a jurist's point of view, the first of these is the false dichotomy frequently made between common law and civil law reasoning. It is certainly the case that common law reasoning has an affinity for the concept of narrativity because it is normatively based on precedent of the stories heard before the case at hand.[94] Yet, it is often ignored that civil law reasoning also includes precedent as a source of law; precedent, however, is given less weight than in the common law context. Here we find a comparable rather than a dissimilar situation. This point is emphasized for interdisciplinary reasons: In discussions with scholars from other humanities disciplines, there is often the misconception that civil law reasoning is mere syllogistic rule application deductive in nature; it supposedly moves from abstract codified legal norms to a decision about a specific case.[95] In contradistinction to common law reasoning, civil

[91] Brooks, *supra* note 15, at 10.

[92] Aristotle claims in POETICS that plots are subject to the laws of probability and necessity; *see also* Halliwell's Introduction to POETICS, *supra* note 8, at 12. In the situation of a criminal trial, Ricoeur writes that "[t]he application consists both in adapting the rule to the case, by way of qualifying the act as a crime, and in connecting the case to the rule, through a narrative description taken to be truthful," RICOEUR, REFLECTIONS ON THE JUST 55–56 (2007). *See* Francis J. Mootz III referring to Gadamer on human experience as interpretive, "within legal practice we can understand a binding norm only within a practical context: understanding and application are a unified pact," *see* Foreword to the *Symposium on Philosophical Hermeneutics and Critical Legal Theory*, 76 CHI.-KENT. L. REV. 719, 721 (2000). *See also* Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1 (1991); JEROME BRUNER, MAKING STORIES, LAW, LITERATURE, LIFE (2002).

[93] Brooks, *supra* note 73, at 425.

[94] *See* Norbert Meuter, *Narration in Various Disciplines, in* THE LIVING HANDBOOK OF NARRATOLOGY, *supra* note 13.

[95] *See* François Ost, *Towards a Critique of Narrative Reason*, *in* LIVING IN A LAW TRANSFORMED: ENCOUNTERS WITH THE WORKS OF JAMES BOYD WHITE 37, 38 (Julen Etxabe and Gary Watt eds., 2014), on one of the disqualifications of narrative for law:

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law reasoning supposedly espouses the idea of law as a mere set of codified propositions.[96] As shown in this Article, from a hermeneutical point of view, this is hardly true.

At the same time, a second pitfall may entail the risk of overlooking procedural differences between common law and civil law systems as often happens when scholars use the word "law" loosely. For example, in discussing storytelling at the appellate level in civil cases in U.S. courts, a contradistinction needs to be made to most civil law systems as well as to U.K. courts of appeal where a second level of consideration of both questions of law and fact occurs; this includes hearing defendants and (new) witnesses and sentencing. By contrast, in the U.S. system, the facts can be considered only to the degree that they have already been mentioned in the appellate brief. The appellate judge reviews the factual and evidentiary context of the verdict against which an appeal is brought. The same risk can be found on the substantive law level when differences between civil law and common law jurists' mental pictures involved when dealing with legal concepts may cause us to act like ships passing through the night. To give one example, in nineteenth-century English common law, when, in order to start a lawsuit, the writ system evolved into a "cause of action" system,[97] old classifications, such as trespass, evolved into torts. Torts are actions *ex delicto*, whereas the writ of *assumpsit* (damages) was brought under the heading of contract, that is, an action *ex contractu*. By contrast, a civil law jurist thinks more in terms of rights, and in the Dutch system, civil damages to be paid in case of an *onrechtmatige daad*, a figure that is often (all too loosely, which is precisely the point) translated as torts, are not thought of as arising out of contract.[98] Thus, Stephen Paskey is correct when he suggests that the dichotomy between rule-based reasoning and narrative reasoning is a false one—

> [a] modern one, going back to the philosopher David Hume. It stems from the great divide between facts and norms, between describing and prescribing, between the "is" and the "ought," and from the prohibition which goes with that—that is, that it is forbidden to pass from one to the other. In this case the disqualification of narrative is a double one: as well as being denied any role either in positing a fact or prescribing a norm, in consequence of the first repression, it is also denied any role as a mediator between these two ontological realms, since any possibility of a logical passage from one to the other is prohibited.

[96] *See* Greta Olson, *De-Americanizing Law-and-Literature Narratives: Opening Up the Story*, 22 LAW AND LITERATURE 338, 352 (2010), "legal reasoning proceeds through a process of deduction from abstract norms of codified law to the particular case at hand." *See also* Olson, *supra* note 12. *See* HELLE PORSDAM, FROM CIVIL TO HUMAN RIGHTS, DIALOGUES ON LAW AND HUMANITIES IN THE UNITED STATES AND EUROPE 174 (2009), "Civil law starts with certain abstract rules, that is, which judges must then apply in concrete cases."

[97] "[A] cause of action" being a factual situation that one person stated in order to obtain a remedy against another person.

[98] For these examples I draw on GEOFFREY SAMUEL, A SHORT INTRODUCTION TO THE COMMON LAW 55–56 (2013).

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the legal rule can also be read as a story and, more specifically, as a stock story. Of course, stock stories differ depending on the specific rule and the legal system.[99]

A third pitfall is that in the criminal context, most civil law countries have an inquisitorial approach that favors a process of verifying evidence, with written evidence gathered before the case comes to trial. At this stage the falsification principle is honored more in the breach than in the observance, even though the aim is to arrive at the substantive truth. This is markedly different from an accusatorial approach because evidentiary standards and processes differ. Yet, unlike professionally appointed judges who have to legitimize their decisions by stating legal grounds as well as the grounds for conviction,[100] the common law jury represents a black box: It provides no reasons for its decision.[101] Furthermore, in a system where the search for the truth is laid more prominently in the hands of the involved parties and lay people—in other words, in a system that includes cross-examination and the jury—the judge's role is more passive. Plea-bargaining also strengthens the idea of a partial truth. On this view, we may safely assume that the rhetorical and discursive strategies that contribute to narratives in court may differ depending on the respective legal system in which they occur. I specifically use the word "strategies" here. When it comes to determining

[99] Stephen Paskey, *The Law is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMM. & RHETORIC: JALWD 51 (2014). *See* on the level of story contents, Fotis Jannidis, *Character*, in THE LIVING HANDBOOK OF NARRATOLOGY, *supra* note 13 [retrieved 16 February 2015] on story skeletons, *e.g.*, the betrayal story in divorce stories.

[100] The greatest Dutch legal theorist of the twentieth century, Paul Scholten, once observed:

> The judge does something other than observing in favor of whom the scales turn, he decides. That decision is an act, it is rooted in the conscience of he who performs the act. That which is expected of a judge is a deed. It is not without meaning that in our judicial decrees, after much thinking and weighing, after sometimes infinite "re-weighing" of that which is advanced pro and con, the words "delivering judgment" are inserted before the dictum. After the long chewing-over of the deliberations, there is this word, which demands attention for the decision and thereby defines its nature—[and] then the ruling itself: short and decided. It is the task of the judge to deliver judgment. I think that there is more than merely observation and logical argument in every scientific judgment, but in any case, the judicial judgment is more than that—it can never be reduced to those two. It is not a scientific proposition, but a declaration of will: this is how it should be. In the end it is a leap, just like any deed, any moral judgment is.

PAUL SCHOLTEN, GENERAL METHOD OF PRIVATE LAW (originally 1931), DIGITAL PAUL SCHOLTEN PROJECT, UNIVERSITY OF AMSTERDAM (2014).

[101] *See* Richard Lempert, *Telling Tales in Court*, 13 CARDOZO L. REV. 559 (1991), for an account of a study on the difference in the rate of guilty verdicts depending on whether (mock) jurors were presented with information in story order or in witness order: 78% of guilty verdicts were made on the basis of story order.

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what facts are legally relevant, opposing narratives may for obvious reasons focus more on explaining away contradictory evidence, and this may lead to ignoring other, equally, or even more relevant facts.[102] In situations in which forensic evidence such as blood samples, DNA tests and so forth are lacking, this pattern proves even more problematic, for example, when the basis for judging is narrow to begin with.

Greta Olson takes up the *quidditas* issue and notes that jurists' notions on narrative "are insufficiently critical and lacking in theoretical acuity."[103] No doubt this applies to my own argument so far. She urges us not to use the term "narrative" for all kinds of phenomena that must be properly differentiated if the narratological project for law is to be successful. To repeat a list of definitions provided by Olson which she, however, also recognizes as contested within narratological studies: "Narration" is the term used to describe the act of relating;[104] "story," when used in a legal setting, denotes the facts and/or the sequence of events,[105] whereas the term "discourse" should be taken to refer to the form of the telling.[106] "Narrativity," then, "denotes the degree to which a text or object possesses qualities that elicit thinking structures that help to explain it as a narrative,"[107] while "narrativization" refers to "the procedure in which a text is processed in someone's mind in response to its narrativity, or story-like qualities."[108] These are very helpful distinctions, and we need to focus more on the specific forms of the narrative structures in texts and procedures of the law.

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[102] *See* Clive Baldwin, *Who Needs Facts, When You've Got Narrative?* 18 INT'L J. FOR SEMIOTICS L. 217 (2005); Richard Sherwin, *Law Frames: Historical Truths and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994).

[103] Olson, *supra* note 12, at 37.

[104] *See* Olson, *supra* note 86, that "narration plays a central role in legal discourse . . . and that legal narration in the narrow sense as the act of telling a story is a contestation of narratives such as witness testimony, defense and prosecution statements." Note that again the Anglo-American common-law settings is the default.

[105] *See* FLORIS BEX, ARGUMENTS, STORIES, AND CRIMINAL EVIDENCE: A FORMAL HYBRID THEORY 12 (2011), "[t]he *facts of the case* often denote the events or states of affairs that are assumed, at least for the moment, to have happened or existed."

[106] Olson, *supra* note 12, at 44, discourse includes "[the] perspective from which the story is told, for example, the often non-chronological order in which events are told, and how directly or indirectly it is related. Discourse, or the form of the telling, is typically used in contradistinction to 'story' (what happened)." *See* CURRIE, *supra* note 48, at vi, for the distinction between "the story told," *for example*, events and characters, and the vehicle of telling, *for example*, narrative, so that "narratives convey stories."

[107] Olson, *supra* note 12, at 44. *See* Fludernik and Olson, *Introduction*, *in* CURRENT TRENDS IN NARRATOLOGY, *supra* note 12, at 15, referencing Marie-Laure Ryan who differentiates "[b]etween text originally composed as a narrative and a text that has qualities which allow its recipient to read it as a narrative,' *for example*, the difference between a text 'being a narrative' and its 'possessing narrativity.'"

[108] Olson, *supra* note 12, at 44.

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To tie the above arguments together and illuminate the theoretical considerations, turning to criminal law helps elaborate on the interdisciplinary requirement that more work be done on a narratological-legal theoretical plane. This should then serve as a basis for research on legal practice that would also include empirical research.

II. Pathologies of Narrative in Criminal Law

1. Choices

"To judge" is "to choose": Between events and human acts considered legally relevant facts or not (in civil law systems without juries, it is the judge who decides what the relevant facts and circumstances are); between stories plausible in a legal context and those that are not;[109] between narratives to which a legal value can be attached, or not, and for what reason, because at the end of the day the judge as narrator tells the world how she interprets and evaluates what others have told her;[110] and between the consequences of different choices. What weight should be attached to specific facts? What pieces of evidence should be valued as sufficient proof? The success of this evaluative and interpretive process depends on the quality of the judge's phronetic discernment.[111] If we follow Kant in his *Critique of Judgment*, the first stage of any judgment is the imaginative one, which includes reflecting upon what is "not there."[112] This is to acknowledge what may not have risen to the surface among the available materials and arguments as much as what has been simply overlooked or missed because of how judges are influenced by different cultural, personal, and professional backgrounds.[113] The latter is important given the weight of judicial

[109] *See generally* W. LANCE BENNETT AND MARTHA FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981) on "story grammar" in a legal context; BERNARD JACKSON, LAW, FACT AND NARRATIVE COHERENCE (1988) and MAKING SENSE IN LAW (1995); WILLEM A. WAGENAAR, PETER J. VAN KOPPEN AND HANS F.M. CROMBAG, ANCHORED NARRATIVES: THE PSYCHOLOGY OF CRIMINAL EVIDENCE (1993), the premise of the theory of anchored narratives is that a "good story" in criminal law is not only compatible with the evidence but also "anchored: in our general knowledge of the world around us."

[110] *See* Uri Margolin, *Narrator*, *in* THE LIVING HANDBOOK OF NARRATOLOGY, *supra* note 13 [retrieved 10 February 2015].

[111] *See* Fludernik and Olson, *supra* note 107, at 5, on the subject of cognitive narratology that addresses "how narratives reveal the phenomenology of perception . . . how they control the decision-making processes by which we intuit how stories are most likely to turn out."

[112] *See* Linda H. Edwards, *Once Upon A Time In Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 913 (2010) ("Stories are true or false, depending not so much on what they say as on what they omit and what they imply."). *See* Philip N. Meyer, *The Darkness Visible: Litigation Stories and Lawrence Joseph's* Lawyerland, 23 SYRACUSE L. REV. 1311, 1314–15 (2003) (on the "subtext of a case," the stories of the parties that matter to them but are filtered away in the course of the legal proceedings. It should be noted that in Kant's *Critique*, the second stage is reflection on the *sensus communis* that is to be taken into consideration in judging. As important as this is for legal decision-making, it falls outside the scope of this article.).

[113] *See* Kim Lane Scheppele, *Telling Stories*, 87 MICH. L. REV. 2073 (1989) (that all that courts have is stories; Cicero's *De Inventione* already deals with the topic of the plausibility of narrative; the topic of how to influence the judge's mind and decision has been with us since Aristotle.).

narrativization and research in cognitive narratology. This is even more the case when broadening the scope to include the visuality and mediality of law, because focusing on what Kenneth Chestek calls the "judicial sweet spot" by means of narrative, can easily be translated to persuasion by means of images in order to activate judicial narrative empathy.[114] Psychological proclivities to which we are all prone, such as cognitive dissonance,[115] belief perseverance, and confirmation bias,[116] may easily lead to serious errors of judgment and a miscarriage of justice when a judge explains away as incorrect anything inconsistent with the story. In hindsight, this confabulates and creates the illusion that there were all kinds of good and conscious reasons to decide as she did. After all, chunks of evidence always diverge, and the environment is always dialectical. Obviously, a judge's past experience with specific people and situations leads her to construct trait patterns with respect to stereotypical behaviors that she applies to future situations. The prejudice trap always looms large.

Let us turn to another aspect of judicial "choosing." The awareness of the constraints brought about by legal principles and rules of procedure is all too easily forgotten in the focus on legal narrative; for example, consider *Nullum crimen, nulla poena sine lege*, or the principle that human conduct is punishable only when there is legal basis, such as in a codified rule designating it as a crime.[117] The wording of the criminal charge—the allegations with respect to the defendant's actions at a certain point in time and in a certain place—guides the search for relevant facts and circumstances, and these points in turn all have to be established. In short, what matters is the legal qualification of the criminal act: The qualification of facts such that they fall under the provision of a specific article of the criminal code and the modality of the deviation from the legal norm as exemplified in the (codified) rule that is the point of reference. The search for this qualification governs the act of reading.

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[114] *See* David Herman, *Cognitive Narratology*, *in* HANDBOOK OF NARRATOLOGY 30 (Peter Hühn et al. eds., 2009); David Herman, *Cognitive Narratology*, *in* THE LIVING HANDBOOK OF NARRATOLOGY, *supra* note 13 [retrieved 1 December 2014] (on the focus of cognitive narratology "[. . .]mental states, capabilities, and dispositions that provide grounds for—or, conversely, are grounded in—narrative experiences."). *See* Fludernik and Olson, *supra* note 107, at 10 ("Frames, and particularly scripts, for example, culturally recurring sequences of actions or processes, are even more important to narratology, since they concern ingredients of plots"); Kenneth D. Chestek, *Judging by the Numbers*, 7 J. OF THE ASS'N OF LEGAL WRITING DIRECTORS 1, 34 (2010) ("Focusing on the story of the case is the most likely route to finding that sweet spot where a deep frame is activated (becoming the foundation of persuasion) without it being so obvious that the reader's natural defenses are triggered."). *See* Gerald Prince, *Reader*, *in* THE LIVING HANDBOOK OF NARRATOLOGY, *supra* note 13 [retrieved 16 February 2015], and Catherine Emmot and Marc Alexander, *Schemata*, *in id.* [retrieved 16 February 2015]) (on how texts guide the production of meaning and gap-filling done by readers.). For narrative empathy, see Suzanne Keen, *Narrative Empathy*, *in id.* [retrieved 15 February 2015].

[115] *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

[116] *See* the seminal article by Amos Tversky and Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

[117] The idea was first brought forward by CESARE BONESANA, MARCHESE BECCARIA, DEI DELITTI E DELLE PENE (1764 trans. Edward D. Ingraham, OF CRIMES AND PUNISHMENTS (1778)).

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Thus, once you have ‘‘named” the fact, you’ve “got” it. This is important to note because criminal law is a highly specific mode of regulating human behavior in a social context that aims at restoring the social balance disrupted by the criminal act.

To complicate legal-narratological matters further from an epistemological point of view, we find in the jurist reader-narrator a subject who, in establishing the facts of a case, not only describes the world as she finds it, but also the world on which she shall pronounce judgment. Knowing subject and known object converge. It is this specific form of agency that guides the dialectic movement between fact and legal rule that, as noted above, forms the constitutive structure of legal thought and methodology. It is the reason why law is like literature, as James Boyd White has consistently argued since the publication of *The Legal Imagination* in 1973.[118] That the referential world of criminal law, as the legal translation of the pre-legal reality[119] is constituted by criminal law, opens up a field for interdisciplinary research. Such research includes, for example, the question of whether or not this pattern implies a return to a descriptive view of language. It also comprises research on how legal narrative represents reality on the view that the interpretive process constitutes the move from the ambiguous to the unequivocal, and research on sequentiality within the narrated story, for example, narrated time and narrative time.[120]

2. Suggestions

What else should we keep in developing the interdisciplinary project of a narratology of law? I would like to offer some suggestions that are by no means exhaustive. First of all, the pre-trial and the trial stage of the proceedings need to be differentiated. In the pre-trial stage of police interrogations, narratological research should focus on plot and narrative constitution as well as narrative coherence.[121] The most important reason for doing so is because it is not

[118] *See* Richard Weisberg and Jean-Pierre Barricelli, *Literature and Law*, *in* INTERRELATIONS OF LITERATURE 150, 162 (Jean-Pierre Barricelli and Joseph Gibaldi eds., 1982) (“The legal process, like the literary, moves from an experience in life towards a narrative re-creation of that experience.”); *see* Mônica Sette Lopes, *Clarice Lispector and Forgiveness*, *in* DOSSIER LAW AND LITERATURE, DISCUSSION ON PURPOSES AND METHOD 43, 46 n.3 (M. Paola Mittica ed., 2010) t)hat when Clarice Lispector told her law professor that she opted for criminal law, he replied “You became interested in the literary part of Law,” referring to CLARICE LISPECTOR, CADERNOS DE LITERATURE BRASILEIRA (2004)).

[119] I adopt this term from BEN-YISHAI, *supra* note 81, at 43.

[120] *See* Hühn, *Event and Eventfulness*, in THE LIVING HANDBOOK OF NARRATOLOGY, *supra* note 13 [retrieved 10 February 2015].

[121] I draw on Cleanth Brooks and Robert Penn Warren’s definition of plot as “[t]he structure of an action as it is presented in a piece of fiction, not the structure of an action as we happen to find it out in the world but the structure within a story. It is, in other words, what the teller of the story has done to an action to present it to us,” as cited in Scheffel, *supra* note 66, at par. 3.1. Scheffel defines narrative constitution as “the composition of narratives.” Kukkonen, *supra* note 66, distinguishes between plot as a pattern yielding coherence to a narrative and plot as authorial design. *See also* Melissa H. Weresh, *Morality, Trust, and Illusion*, 9 LEGAL COMM. & RHETORIC: JAWLD 229, 251 et seq. (2012), for an account of how “[p]ersuasive narrative relies on three psychological properties:

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immediately obvious to the reader who it is who has structured the order of the actions in the recorded action, and how they did so. The leading narrating voice is that of the interrogator, but the written record does not always give information on the form, length, and circumstances under which the interrogation actually took place. The interrogator is the one who selects what goes into the record. If the record does not show the questions asked and is presented as a first-person narrative,[122] or if the record consists of only selected legally relevant passages and the narrative is presented as a unified whole, the judge-qua-reader cannot know whether the story suggests a linearity of events and a chronology where there in fact was none, or whether parts of the defendant's account were left out, and if so, for what reasons. Were these elements justifiably left out because they were not legally relevant or because they were not what the police wanted to hear? The judge cannot check the gaps if there is no audio(-visual) recording.[123] The record invites the judge to accept the narrative account as real, as having evolved organically, and as Aristotle claimed in *Poetics*, as subject to the laws of probability and necessity, noted above.[124] Yet, all too often the record is a form of "hint fiction," a short story that may or may not be true (but how is the judge to know?), suggestive of a larger, complex story, and this makes the judge's decision based on the *facta probanda* even more difficult.[125] This point must be made to highlight procedural differences that are dependent on jurisdiction; for example, it matters a great deal whether the written file forms the basis of the trial proceedings or whether all witnesses are questioned by the judge(s) in open court.

The same consideration applies to the trial stage with regard to witness testimony and the need to be able to recognize perjury and equivocation strategies. It also applies to victim

coherence, correspondence, and fidelity," with coherence as "[a] matter of the story corresponding to what a judge and a jury knows about what typically happens in the world and not contradicting that knowledge."

[122] *See* Brooks, *supra* note 15, at 7, for the related example of Justice Potter Stewart in *Bumper v. North Carolina*, 391 U.S. 543 (1968), lamenting that: "The transcript of the suppression hearing comes to us . . . in the form of narrative; *for example*, the actual questions and answers have been rewritten in the form a continuous first person testimony. The effect is to put into the mouth of the witness some of the words of the attorneys."

[123] On gaps and the assumption that in the real world, as opposed to fictional narratives, there are no gaps, *see* Sten Wistrand, *Time for Departure?*, *in* DISPUTABLE CORE CONCEPTS OF NARRATIVE THEORY 15 (Göran Rossholm and Christer Johansson eds., 2012); s*ee also* Marie-Laure Ryan, *Cheap Plot Tricks, Plot Holes, and Narrative Design*, 17 NARRATIVE 56 (2009), on "plot holes" and "cheap plot tricks" in stories used to cover up problems of linearity, chronology, and logic.

[124] *See also* ARISTOTLE, ART OF RHETORIC 159 (2006), I.xv. 17, 1376a, "In regard to the confirmation of evidence, when a man has no witnesses, he can say that the decision should be given in accordance with probabilities, and that this is the meaning of the oath 'according to the best of one's judgement.'"

[125] A *factum probandum* is a fact that is the subject of proof; a *factum probans* is the fact from the existence of which that of the *factum probandum* is inferred. *See* BEX, *supra* note 105, at 12 for the inclusion in the "facts of the case" of "propositions the truth of which is unknown," for example, the "*facta probanda*," and the "*facta explananda* [as]"that which has to be explained".

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impact statements, including aspects connected to their scope.[126] Similarly, it applies to whether or not the defendant testifies in court which also depends on procedural factors. What is the value of a confession story, troubling as it may be in the pre-trial stage, as Brooks has noted?[127] Should a confession affect the judge's valuation of the evidence and ultimately her conviction, which, taken together, form the basis of her ruling?[128] If conviction and proof are dissociated as in legal systems with a jury not formally required to justify its decision,[129] the valuation of narrative takes place in a situation markedly different from the one in legal systems—such as the Dutch one, where proof and judicial conviction are the two pillars on which the judgment rests, or the French one, in which the *conviction intime* is accepted in the Court d'Assises as justification for the judgment. Thus, as Elaine Scarry warns us: "The confession . . . may eliminate the need for dispute and adjudication. And this should make us worry."[130]

In the competition of narratives in the trial,[131] conceived of as a fact-finding process, narrative competence is presumed. But what if the defendant remains silent? Either because the defense lawyer advised it or because she or he is unable to tell the story of what happened in an adequate manner? How, then, is the battle of competing stories to recognize this voice? In the trial stage, criminal law's specific truth conditions and procedural constraints, including the rules of evidence,[132] have their own impact on the stories that are

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[126] Brooks, *supra* note 15, at 17. With respect to scope, is a victim impact statement literally just that, for example, only about the impact of the crime on a victim's life? Or is the victim allowed to say something about evidence and sentencing? And if so, how would this influence the judge?

[127] *See* Brooks, *Storytelling without Fear?*, *in* LAW'S STORIES, *supra* note 16, at 114; BROOKS, TROUBLING CONFESSIONS (2000). Brooks discusses the circumstances in which confessions are obtained and calls confessions 'troubling' when the defendant's rights (such as the right not to incriminate oneself) are (deliberately) violated.

[128] *See* Brooks, *supra* note 73, at 416, "'Conviction'—in the legal sense—results from the conviction created in those who judge the story[,]"; Brooks, *supra* note 16, at 18; BEX, *supra* note 105, at 79, "one of the main dangers of stories is that a coherent story is judged as more believable than an incoherent story, regardless of the actual truth of the story."; WAGENAAR ET AL., *supra* note 109, at 40, that a good story is more likely to be believed to be true than a weak story.

[129] *See* AMSTERDAM AND BRUNER, *supra* note 71, at 118, for a hilarious story of a jury verdict gone wrong: "A jury in Alabama was called to try a poor farmer charged with stealing a mule from a rich one. The jury's first verdict was: 'Not guilty, provided he returns the mule'. The judge refused to accept the verdict. . . . The jury . . . rendered a second verdict: 'Not guilty, but he has to return the mule.' The judge again rejected the verdict . . . the jury came back with a third verdict, which the judge finally accepted: 'Not guilty, let him keep the damn mule.'"

[130] Elaine Scarry, *Speech Acts in Criminal Cases*, *in* LAW'S STORIES, *supra* note 16, at 165–74.

[131] Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1595 (1989), "A trial is also a *narrative* competition."

[132] *See* Brooks, *supra* note 73, at 417, reflecting on the O.J. Simpson case,

> All the "rules of evidence"—including the famous "exclusionary rule" barring illegally seized evidence—touch on the issue of rule-governed

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told. The presumption of innocence confers an individual's right to a fair trial.[133] But what if the narrative strategy the defense lawyer employs backfires? Obviously, a defendant needs a lawyer to translate his or her view of the facts into legal terms. The story needs to cohere with the semantic demands of the legal qualification of his act on the basis of the charge, but also stay clear of them at the same time. Summarily, if defendants honestly try to tell their stories in their own words, they do not always understand the legal consequences.[134] Viewed differently, another narrative problem area arises. While an appeal to the right to remain silent may not be used as proof, a defendant who fails to offer an explanation for an incriminating witness statement will find that this circumstance can and will be used against him or her.[135] Thus, a failure in litigation skills and narrative strategies may trigger a judicial conviction and *libido puniendi*; this factor needs to be reckoned with, especially in those cases without a clear jurisprudential tradition such as charges for terrorist acts.[136]

When the panel of judges in a felony case finally has to decide about the value and force of the evidence laid down in competing stories, still another complication may arise as far as narrative is concerned. It arises from Genette's question of "*Qui parle*?" The narrative perspective of the judicial decision is that of an impersonal, omniscient third-person narrator whose authorial voice speaks with authority. The agency of this voice pretends not to be

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> storytelling. The judge must know and enforce these rules. And when stories are culled from the trial record and retold on the appellate level, it is in order to evaluate their conformity to the rules. Appellate courts are not supposed to second-guess the "triers of facts" in the case, but to judge the framework in which the verdict was reached."

In Europe, the term that is generally used is "fruits of a poisonous tree".

[133] "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law," states Article 6 of the EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS. It rests on classical principles from Roman law: *nemo tenetur prodere se ipsum* (no one is obliged to incriminate himself); *nemo tenetur edere contra se* (no one is obliged to speak against himself); and *nemo tenetur se accusare* (no one is obliged to accuse himself). As a legal right this right is indissolubly connected to the rule of law in a democratic society in the protection that it guarantees against unlawful intrusions into people's lives. As a prohibition against putting pressure upon a person suspected of having committed a crime, it refers to the deference for the defendant in criminal proceedings when it comes to respecting human dignity in the sense of both the free will and physical and mental integrity. See the Miranda rule in American law, *Miranda v. Arizona*, 384 U.S. 435 (1966).

[134] The point is made by the late Willem J. Witteveen in his analysis of Pirandello's short story "The Truth": this is the story of the farmer Tararà who kills his wife after he catches her in bed with another man; he admits that he knew about the affair but did not act on this knowledge until his wife dishonored him by having sex in the marital home. Willem J. Witteveen, *De waarheid, onschuldig opgebiecht*, *in* VERBEELDINGSMACHT 277 (Witteveen and Sanne Taekema eds., 2000).

[135] *E.g.*, Eur. Court H.R. *Krumpholz v. Austria*, Final judgment of 18 March 2010, Application no. 13201/05. Note that when the witness statement is that of an expert, the narrative relevance and the credibility are often judged higher.

[136] I adopt the term *libido puniendi* from Mirjan R. Damaŝka, *The Competing Visions of Fairness*, 36 N.C. J. INT'L L. & COM. REG. 365, 369 (2011).

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that of individual persons; judging, however, is a human activity, and this third-person-narrator mode conceals several first-person narratives. What, then, if a panel of judges finds that it cannot get its set of first-person narratives to cohere with one another? Where common law and supra-national European courts offer the solution of having concurring and dissenting opinions, rendering poly-narration acceptable, there is no such problem for the individual judge as narrator. If a panel of judges has to speak in one voice, that of "the Court," and opinions differ, writing a decision as a judicial narrative of compromise becomes a very difficult task indeed.

E. Coda

As this Article has argued, narratives legislate meaning in many different ways: This ranges from the influence of narrative probability and fidelity to the influence of resemblance and representation, and extends from the pre-trial stage to the verification of evidence. Because these narratives are always evaluated against the background of one's local knowledge of a specific legal system and a specific set of legal practices,[137] narrative intelligence is a prerequisite for judges. While no judge can plead innocence for disciplinary parochialism, my argument here has been that we should work not to privilege one discipline—law or narratology—over the other. In order to honor law's plurality in terms of narrative, we must try to engage in truly interdisciplinary work in case we run the risk of methodological shallowness and end up on an intellectual compost heap. As this Article has argued, such interdisciplinary and theoretical work on law and narratology is best begun by addressing specific jurisdictions; it should then move on to address comparative aspects of common-law and civil law legal systems.

Building on this basis, viable research combining theory and practice shall follow, and it will include empirical research on legal practices. Whether investigative efforts will lead to a full-fledged legal narratology that also addresses the specificity of legal systems, and the various types and procedures of law practiced within them, remains undecided. Yet, hope remains for the fruition of legal narratology if Cardozo's dynamic view of law is kept in mind: "Law never is, but is always about to be." [138]

[137] MARIA ARISTODEMOU, LAW AND LITERATURE, JOURNEYS FROM HER TO ETERNITY 3 (2000), "narratives are not neutral: they investigate but also suggest, create, and legislate meanings."

[138] BENJAMIN NATHAN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 126 (1921).

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