The Case of Lauris Kaplinski: A Guide to a Semiotic Reading of Incitement of Hatred in Modern Criminal Justice

Vadim Verenich, *University of Tartu*

ABSTRACT

Criminal justice is the area of law where we are closest to an overview of the semiotic processes through a succession of organizational contexts. We start with the first call to the police and conclude with the criminal trial or appeal. The main stages in the process may be characterized as (police) investigation, the exercise of prosecutorial discretion by public officials, and the trial. The attention of legal philosophers and semioticians alike has been directed primarily toward the last. However, it is important to draw attention also to the earlier stages, and to the possibilities that exist of fitting them within a single semiotic framework of analysis.

A case study may assist us in understanding the legal construction of "incitement to ethnic or racial hatred," the relevant judicial reasoning, and the way in which its narrativized rendition differs from the social conceptions. The case is taken from the Criminal Chamber of the Supreme Court of Estonia (3-1-1-117-05, Criminal Chamber's decision [10 April 2006], the acquittal of Lauris Kaplinski, charged under sec. 151 "Incitement of hatred" of the Penal Code of Estonia).[1] The inquest verdicts on that case gained considerable media and public attention in 2005–6 because of public interest in a suspect, Lauris Kaplinski, a son of the famous Estonian writer and poet Jaan Kaplinski.

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1. The text of judgment is available at http://www.nc.ee/?id=11&tekst=222487132.

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Let us now reiterate the reconstructed account of what happened, taken from the police dossier. Lauris Kaplinski was prosecuted under section 151 of the penal code, being accused of writing in 1991 the text "Our Fight" (which was aimed at Jews, Christians, and Democrats), deliberately provoking hatred of a social group, and calling for armed terror, if needed. From 1995 to 2003, the text was distributed through the University of Tartu server to the public that had free access to the server at the Institute of Botany and Ecology (University of Tartu). The defense police indicted Kaplinski for incitement to social hatred and violence. According to the prosecutor's summing up of the facts, the text "Our Fight," being written as a code of conduct, publicly incited hatred, violence, or discrimination on the basis of nationality, religion, and political convictions. The incitement to hatred was expressed as follows: (1) "The easiest and the most reliable way to get rid of dissenting opinions is to annihilate those people who share these opinions"; (2) "the more random the choice of people and objects to be destroyed, the more difficult for them to develop a strategy of resistance"; (3) "because Christianity should be banished from Estonia, the only way to achieve that purpose is to eliminate all Jews and Christians and destroy all churches"; and so forth.

The defendant, Kaplinski, pleaded not guilty, offering a counternarrative and leaving gaps for imaginaries and "constitutional freedom of speech" to step in. From this point onward, Kaplinski's story became a hegemonic account that provided the court with an alternative defense story of what happened. According to Kaplinski's controversial claims, he considered his website (where the aforementioned text was placed) as a comprehensive uncensored medium for Kaplinski's literary self-expression (Kaplinski claimed that he is an adherent of the ancient Estonian *maausk* [earth religion]). Kaplinski deemed the detached analysis of the website's constituent parts to be incorrect because the most controversial expressions cited in the formal accusation were taken out of context. Kaplinski also said that by writing such provocative text, he intended to shock readers and make them think about political controversies. The text was supposed to be an ironical account of Estonian history. Kaplinski also said that he assumed Internet users would not take his call for violence seriously and literally as incitement to hatred. This statement, made by Kaplinski during the police interrogation, was later confirmed by the testimonies of witnesses. These statements were important because, like elsewhere, the legal context of processing the evidence gives an explicit preference to firsthand witness accounts (as we will argue below, a legal narrative in the trial of court is materialized in a form of oral testimony).

On March 18, 2005, Kaplinski was acquitted of inciting hatred by the Tartu County Court. The court agreed with the prosecutor's arguments and found that the design and structure of Kaplinski's website indicated a desire to create a provoking narrative. The county court established that Kaplinski maintained, between 1995 and 1996, his own website on the Tartu Institute of Ecology and Botany's server. The structure of this website was subdivided into sections: "Terror," "Horror," "Heresy," and "Anarchy." The section "Terror" included, inter alia, a text entitled "Our Struggle" (created between 1991 and 1993). The court also accepted the experts' opinions prepared during the criminal investigation by linguistics and psychology experts. According to these opinions, the text could have included an explicit incitement to hatred and violence on the basis of nationality, religion, and political convictions. However, the court did not establish the fact of material injury to the public interest. The county court also found that Kaplinski's intention to upload his text to the university's server did not mean that Internet users would associate this home page with the University of Tartu, which is why Kaplinski's act could not be regarded as a violation of the public reputation of the university. The state prosecutor appealed against this ruling, and on June 13, 2005, the District Court of Tartu found Kaplinski guilty of incitement to social hatred. He was fined 32,000 Estonian kroons.

One might expect the National Court of Estonia to be reluctant to overturn the ruling of the district court on a matter so important for constitutionally granted freedom of artistic expression, since the actual character of this protection is very different from that accorded political hate speech. In our expectation, freedom of expression has a special importance in the semiotic context of legal discourse: freedom of expression in the European semiotic space is, to the contrary, valued as an egalitarian right to embody criticism, doubts, media provocations to raise the public attention, sarcasm, humor, art, and controversial messages—still staying under the framework of truthful knowledge as a higher value. Moreover, the right to free speech is a symbolic figure central to the US rhetoric of citizenship. American literature, political debates, and even popular culture are, evidently, oversensitive to the almost mystical promise of the First Amendment. That is not to say that a European citizen tends to undermine freedom of expression. Free speech in Europe does hold a high symbolic status; in comparison to the United States, though, free speech is equivalent to the "freedom from discrimination" (Belausau 2010, 181). In fact, recasting the issue of striking a balance between two fundamental rights (freedom of expression and protection from the incitement to hatred) in terms of a narrative leads one to

ask the question regarding its narrative "typification."[2] Indeed, Lauris Kaplinski claimed that his writings aimed to explicate widespread political stereotypes by creating a typification of intellectual rebellion.

Filling the Gaps in Legal Arguments: The Concept of Incitement to Hatred

On a purely semantic reading of Kaplinski's case, we could assume that Kaplinski's behavior could fully qualify as incitement to hatred: the content of the material published on Kaplinski's website seems to meet all the requirements to be qualified as incitement to hatred, and, of course, there was no doubt that his case was covered by section 151 of the penal code. Although the reasoning of the national court for the decision in that case and its justification are based on fundamental principles of the constitutional law, this does not answer the most important question: Why was this case regarded as a legally "hard case," such as to require a cassation decision?[3] As we all know from lessons in jurisprudence, in "easy cases," what justifies cases is lawyers' capacity to formulate the case in one of two major forms of syllogistic argument (either alethic[4] or normative forms, with different factual claims for its classes—major premises, minor premises, and conclusion), which applies deductive logic to the facts and the law: the judge simply applies to the case in question a general legal rule (expressed either in a legislative rule or in a precedent). To use terminology adopted in Estonian legal philosophy, the decision in the particular case is subsumed within the general norm. Positivists argue that there exists within any legal system at any given time areas of logical "empty space" between the determined easy cases—in such "empty" areas, the judge creates rather than applies law.[5] In these hard cases, there are neither clearly applicable norms nor legally right answers; in these areas of "gaps," the judge creates rather than applies law. The former, determined easy cases are covered by the clear center ("core") of the norm, while the hard cases are usually located on the very debatable fringes of the rule ("penumbra"). Apparently, more problematic is the issue of whether these empty logical spaces with fuzzy boundaries could be explained as gaps in legal regulation or as defects in the administration of justice and, last but not least, by a lack of the relevant court practice. In more precise wording, hard

2. Narrative "typification" means that in evaluating the evidence, we make comparisons with socially constructed images of particular actions (Jackson 1996).

3. *Cassation* here refers to the abrogation of a law by a higher authority.

4. The adjective *alethic* refers to the various modalities of truth, such as necessity, possibility, or impossibility.

5. There is a delicious irony that the idea that the role of judges is to make law has been incubating in American legal philosophy for at least two hundred years. Because statutes and common law rules are often too vague and obscure, it is often inevitable in "hard cases" for a judge to create new law.

cases almost always indicate either a moral or political defect in law, or a gap, by which nearly all legal scholars understand incompleteness in positive law, which is perceived as the absence of actual legal provisions (Alchourrón and Bulygin 1971, 110–13). Since we cannot find genuine legal gaps in the regulation of hate speech, in spite of apparent conflicts concerning values, we can conclude that this intrinsic conflict should be evaluated according to special principles of judicial reasoning.

Indeed, in Estonian legal practice, only a few cases are brought to court because the decision to prosecute racial hate crimes may only be made by the prosecutor *propio motu*[6] and—as the Estonian authorities have indicated since the second report of the European Commission against Racism and Intolerance (ECRI)—only four cases have been brought to court under Article 1514: three of them had been resolved and the one other was still pending at the time of writing the second ECRI report. Furthermore, there has been one recorded breach of Article 152, but the case was not brought to court. ECRI notes that according to the criminal code, a first-time breach of these articles is considered to be a misdemeanor. It will only be considered a crime if it causes substantial damage to the other person's rights or interests or to public interests. Such an act is, therefore, only punishable by thirty days' imprisonment or a fine if it does not cause "substantial damage." In this regard, ECRI notes that hate crimes are not always severely punished and is worried that this may send the wrong message to those who are inclined to commit such crimes. Among other things, while welcoming the above-mentioned amendments to the criminal code, ECRI pointed further to the actual gap in legislation by noting that there was still no provision in this code that prohibits organizations that promote racism or racial hatred.

The modern current of legal positivism seems to accept the existence of integrating instruments *praeter legem* (such as customary laws, the general principles of law and equity) used to fill the gaps in the legal system, where customary law and the general principles of law and equity serve as rules to guide a decision (Combacau and Sur 2004, 57–58). However, critics of positivism set out to deny that any such logical spaces (not regulated by legal standards) exist, because, on the one hand, rational arguments may be constructed about matters neither explicitly stated in the case nor implicitly inferred from text, and, on the other hand, the possible dispositions could exhaust the logical space even if the case is not decided. Since a legal decision is not necessarily

6. The term *proprio motu* is used to refer to a decision by the prosecutor to initiate an investigation on the basis of information on crimes.

deducible from formal law alone, we can assume that closure of gaps in the formally ordered rule of law (legal provisions and judicial precedents) is still possible due to specific sign relations between its elements or, in special terms of second Peircean semiotic trichotomy, due to specific modes of relationships or expressions ("Firstness," "Secondness," "Thirdness"), which are represented by different types of signs (icons, indexes, and symbols). Peirce writes:

> In every genuine Triadic Relation, the First Correlate may be regarded as determining the Third Correlate in some respect; and triadic relations may be divided according as that determination of the Third Correlate is to having some quality, or to being in some existential relation to the Second Correlate, or to being in some relation of thought to the Second for something. . . . A *Representamen* is the First Correlate of a triadic relation, the Second Correlate being termed its *Object*, and the possible Third Correlate being termed its *Interpretant*, by which triadic relation the possible Interpretant is determined to be the First Correlate of the same triadic relation to the same Object, and for some possible Interpretant. A *Sign* is a Representamen of which some Interpretant is a cognition of a mind. (*EP* 2, 290–91, 1903)

The European Court of Human Rights has identified a number of forms of expression that are considered offensive and contrary to convention. In the case Féret v. Belgium (application no. 15615/07), the court ruled that Féret's comments had clearly been liable to arouse feelings of distrust, rejection, or even hatred toward foreigners, especially among less knowledgeable members of the public.[7] His message, conveyed in an electoral context, carried heightened resonance and clearly amounted to incitement to racial hatred. The modern doctrine rests upon the notion that each society is entitled to a certain latitude in balancing individual rights and collective interests, as well as in resolving conflicts that emerge as the result of diverse moral convictions. However, according to the legal doctrine of the European Court of Human Rights (ECHR), when the invitation to the use of force is *intellectualized, abstract, and removed* in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail (cf. Ceylon v. Turkey [application no. 23556/94], 1999).[8] An interesting development of

7. Arrêt de la Cour européenne des droits de l'homme (deuxième section), affaire Féret c. Belgique, requête n°15615/07 du 16 juillet 2009 (Judgment by the European Court of Human Rights [Second Section], case of Féret v. Belgium, application no. 15615/07 of July 16, 2009).

8. Case of Ceylon v. Turkey (application no. 23556/94); Judgment, Strasbourg, July 8, 1999.

this doctrine can be found in the case of Handyside v. United Kingdom (application no. 5493/7),[9] where the applicant was convicted on obscenity charges. The court, in this important judgment, did not find a violation of Article 10 of the EHRC, stating that freedom of expression "is also applicable to those ideas and information that offend, shock, or disturb the State or any sector of the population . . . the view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far reaching evolution of opinions on the subject."

Onder Bakircioglu cited this case as an example of a "margin of appreciation" in relation to the implementation and interpretation of human rights law (2007, 716). This doctrine becomes relevant whenever a case requires the evaluation of the weight of the conflicting interests at stake. The doctrine has its roots in the French Conseil d'Etat jurisprudence and in the administrative law of civil law jurisdictions: the margin of appreciation doctrine has been later transplanted to the jurisprudence of other international human rights mechanisms. The decision of the Supreme Court of Estonia and its interpretation of Article 151 of the amended Estonian Criminal Code (prohibiting incitement to hatred or violence based on, among others, ethnicity, nationality, race, color, origin, or religion) have evident parallels in the practice of ECHR and its interpretation of Article 10 of the EHRC. According to both, only that hate speech that carries a foreseeable risk of leading to violence as a consequence of its communication should be prohibited. Thus, the juridical output is determined solely by the process of communication, which in turn depends on more than linguistic factors. It depends, as is well known, on its context—the concrete life situation in which the communication occurs.

Narratological Strategy

These different methods of narrative analysis seem to agree that the basic unit of the case matter is an account of what happened; the account itself is an explanation for a happening and can be directed to an event in which the account-giver has been a participant and/or to his or her specific action. The most general category of an account is "narrative." Whereas various interdisciplinary attempts have been made to explain the transformation of plain talk into coherent discourse, both linguists and semioticians have in different ways endorsed the role of narrative as a structure that assists us in making sense of

9. Handyside v. The United Kingdom; December 7, 1976, application no. 5493/72 (European Court of Human Rights).

texts as a coherent whole ("discourse"). Yet, by using problematic narratological concepts in law, we could put ourselves in danger of amateurishness, which is the plague of interdisciplinarity: a lawyer writing about narratives without literary competence, or a literary scholar/linguist writing about law without "acquaintance with the law." Another danger is the attractiveness of interdisciplinarity to weak scholars as a method of concealing their own methodological weakness.

While keeping these dangers in mind, let us briefly turn to some applications of narratology in certain legal practices as a basis of understanding the full significance of the narratological paradigm in legal studies. In a criminal case, prosecution and defense lawyers attempt to induce an identification by jurors with a narrative that both raises a sense of lack and suggests appropriate signifiers that can be applied in constructing a coherent sense of what happened. In a civil process, there is a similar situation (in simplified form, which allows us to omit analysis of civil process): the plaintiff asserts that the defendant has an obligation to perform an action or refrain from it and asks the judge to order the defendant to perform an action or refrain from it, while the defendant asks to reject the petition. The juror begins to take up the discursive subject position suggested by the lawyer and, insomuch as the juror does, becomes a constituted subject. Drawing from the insights of narratology, we are going to make it perfectly clear that the real complexity of Kaplinski's case is that it includes very complicated layered narrative structures. First of all, the object of criminal investigation and subsequent indictment was a corpus of short stories (narratives) written by Kaplinski. Second, we observe narratives (rather artificial) in courtroom interaction that consists of erotetic speech interactions between different trial subjects (the speech behavior of the witness, the counsel, the judge, etc.), and each of these speech behaviors/interactions/acts could be reconceptualized as narratives. Through a close reading of the forms of argument deployed in Kaplinski's case, it is possible to discern the extent to which it is the nested narratives that give both narrative fictions and the evidence presented at the trial their plausibility and coherence, and enables a degree of authority with which the complex narrative is invested to be imputed with ideological significance.

Thus, examining the narratives in trial and the narratives of trials that are put to work in legal discourses can show not only the burden of proof (who has to prove and what to prove) but also how the whole process of persuasion and sense-construction works. First of all, it goes without saying that the central action, the setting of narratives as well as contradictions between narrative

elements, may concern any part of the circumstances that are important for the judicial evaluation of the case. Second, the process of fact finding and adjudication could be described as a contradiction in terms of the relation between two narratives: the one about the "facts" and the one about the "law." There is also a contradiction in the question of whether there are other related stories that may influence the evaluation of the central action. The fourth issue, translation, describes the same as the third, but here the related stories have an impact on the trial itself. Finally, we can invoke the principle of semiotic ordering in relation to a radical account of "narrative coherence," which has been offered by Bert van Roermund (1997). Although van Roermund's account of narrative coherence is puzzling at first glance, it appears to be very appropriate in dissecting the model of fact finding in judicial discourses. To begin with, van Roermund rejects MacCormick's distinction between normative and narrative coherence (which MacCormick [1980] defines as an account of the way in which we assess what are real probabilities) and regards narrative coherence as the very principle of the relation between facts and norms. In this respect, van Roermund's approach is also distant from the epistemological assumptions of evidence scholarship that mainly emphasize the importance of coherence as a check on reliability and plausibility. In the court evidence scholarship, the paradigmatic choice of concepts related to the field of evidence is an endless effort to systemize the terminology of the judicial evaluation of facts, which oscillates between the basic concepts of the law of evidence, exploring the binary tropism in the conciliation of categories in the theories of evidence (proof, truth, evidence, relevance, probability, credibility, reliability, common sense, rationality, practical reason, belief, stock of knowledge, cognitive competence, cognitive consensus, criteria of relevance, criteria of significance, materiality, efficiency, narrative coherence; Twinning 2006, 136). Yet, as has been shown by van Roermund, only individual cases enter the legal system by way of narrations, but events (legal facts) are generated by "the narrative data." Legally relevant facts are instituted by legal discourse as well as a narrative of what happened (or could have happened) in a certain case or type of cases. However, the narrative accounts of the same event (of what could happen) by a defendant or a prosecutor are different from the account of the event as given by the court in justifying its decision. As a consequence of contradictory claims and competing story interpretations, the question of guilt has to be decided "beyond a reasonable doubt" by the judge/jury through a paradigmatic choice between opposites, as in case of the verdict in a criminal trial. As Lynch and Bogen (1996, 171) explain: "The binding force of the accusatory narrative operates

on at least two fronts: the various references to dates, places, and activities hang together in a coherent narrative, while at the same time the references implicate and bind to the scene as constituted by those particulars."

Thus, the legal process ultimately depends on the capacity of the courts to arrive at satisfactory findings of facts: but in cases of circumstantial evidence, there may be a combination of circumstances, none of which would raise a reasonable conclusion. From the narratological perspective, one may well regard the issues as points where two competing narratives differ from each other: the winning story will be, on the other hand, identical to the narrative created by the judge, at least on those points of difference from the prosecutor's accusatory narrative. "Conviction"—in the legal sense, the verdict that results when a court of law finds a defendant guilty of a crime—results from the conviction created in those who judge the story. The subject positions created within the text set out who and how individuals are to be referenced or constructed by the penal code individually; the text refers to the offender, the victim, an authorized commission officer, and the clerk of the court. The directions made to the latter two individuals are fairly clear procedural statements regarding legal process, and as such, it should come as no surprise that an offender and victim assume the central roles in legislation concerning criminal punishment. But what is puzzling is that a *judicial figure*, as an individual, does not directly appear in this section of the text. The power or "performatory" source of judicial decision is attributed to the court in this instance (Corcoran 2005, 274–75). So it is that a greater attention to the narrative forms given to the law might serve to clarify what it is that achieves conviction. But these cases, nonetheless, can go on to appeals courts, which are not supposed to second-guess the jury on the story it accepted but to make sure that the rules of storytelling—including what is permitted to be told—have been properly followed. Stories at the appellate level become exemplary; they involve an elucidation of the rules. This is of course especially true at the level of the supreme court, where the individual case must be fitted into the controlling narratives of constitutional interpretation, made illustrative of the basic principles of the rule of law and the social order. "It is so ordered," the supreme court opinion typically concludes, by which we may understand that the court has delivered a final narrative of order and, more generally, that its narrative "orders" or gives to events their definitive shape and meaning. However, even if the supreme court is of the opinion that the court fails to mention certain relevant facts, and that it lacks logical coherence, nothing is usually said about the correctness of the argumentation itself.

One way of putting this argument into the contextual reading of Kaplinski's case is to analyze "the narrative data" and "facts" that are the subjects of qualifications in Kaplinski's case. As was claimed earlier, the main purpose of criminal trial discourse in general, and in offenses in particular, is to logically construct and legally confirm the existence of some causal relation between the suspect's actions and a certain harmful result (which is especially important to causal crimes like sec. 151 of the penal code). To win a case, the prosecution needs to persuade the jury (in the adversarial system of criminal trials) to accept its standpoint (if it succeeds) in convincing the jury that this causal relation is incontestable, and the defense succeeds if it can convince the judge to doubt the certainty of the causal relation (Kaplinski's activity and public injury) stated by the prosecution.

In Estonian legal discourse, the expressions of causality are used at two levels: at the level of the occurrence, they aim at describing the "cause-effect" relationships between events, actions, and intentions, and at the semiotic/hermeneutic level of the interpretation, these expressions are used to establish a semiotic interpretative link between legally constructed meanings of what was intended and what could happen or happened. Among other things, for the prosecution, it was necessary to demonstrate that the persuading strategy of a prosecutor is based mainly on previous legal practice and to support the common test employed by the court in freedom-of-expression cases in which incitement to violence was an issue. The test is based on the communicative force of incitement to violence—if the writings published by the offenders supported or instigated the use of violence, then their conviction would be justifiable in a democratic society only if the incitement were such as to create a clear and present danger. The purposes and audience of advocacy in the court are less problematic than that of the prosecution: its main task is to persuade the court to decide in favor of the client with respect to previously defined issues of law and/or fact and/or disposition.

The multilayered complexity of legal discourses is best reflected in Greimas's methodology of narrative research. In order to understand the peculiarities of narratological perspectives on "legal discourses," it is mandatory to overview the range of approaches provided by so-called Greimassian narrative semiotics.

Greimassian Narrative Method as Applied to the Analysis of Stories of Law

One of Greimas's greatest contributions to semiotics, and the main advantage of his method, is that it bypasses traditional points of interpretative authority

(which is, in particular, a very important issue in different theories of legal interpretation), such as authorial intention, interpretive strategies of exegesis, or reader's response (*visée*). He concentrates instead on the text, which is treated as a construct that realizes meanings made possible by an underlying structure or grammar. Greimas (1971) claims that the plot of a story is a semiotic structure, which is homologous to that of the sentence and therefore open to a similar kind of analysis. What matters most in this type of analysis is the formal representation, and thus the understanding of surface and deep structures of narratives. Narratives, like sentences, depend upon structured sequences, and the overall action of a narrative involves subjects and predicates, as do individual sentences. That understanding appears to be essential for law and legal discourse because law, like any discourse, is a discourse within the master social discourse; there are legal meanings and social meanings for a given sign within the deep structure of language. The main problem here is that according to Jackson (1988a, 250–61; 2010, 22), we cannot fully identify a "deep structure of law" following a Chomskyan model in terms of structural characteristics of systems that make the legal system recognizable as such and allow us to both generate and recognize well-formed legal rules. However, on the other hand, Chomskyan deep structures may well be relevant to law, insofar as narratives of law can differ widely on their surface and law makes uses of narratives structures that spring from the same deep structure of cultural signification. The "deep" narrative grammar consists of a finite number of basic semantic units, which combine in a finite number of ways to create a story-generating mechanism. One could identify deep and surface structures as "phenotext" and "genotext," names that were introduced by Kristeva (1969, 224). The term phenotext refers to the text as a fact or an appearing in its concrete manifestation or material form. The generated meaning becomes part of the depth of the sign/discourse, that is, its genotext, which corresponds to the process of generating the signifying system (the production of signification).

The narrative structure imposes constraints upon the motives of the narrator or those of the audience, as much as the imposition of legal frames moves litigant narratives away from more emotional and relational stories toward accounts organized around theories of cause and effect and responsibility that respond to the requirements of legal rules. At the same time, "narrative grammar" is conceived as the interrelation of the "deep structures and surface structures," which is generally independent of the particular forms in which particular types of narratives are expressed. The narrative grammar is thus seen as a transference of the grammar of sentence (relation between predicates, etc.) to

discursive structures larger than the sentence (Jackson 1997, 55–56). A special importance in the process of transference of modal values (rights, duties, permissions, and powers) is attributed to the legislator as an actant itself operating at the same syntagmatic level. "Legal grammar" and "narrative grammar" are essentially different levels of analysis, and, by virtue of this fact, the legal grammar of procedural law is amenable to analysis of narrative grammar in substantive law (Greimas and Landowski 1976, 95).

Legal grammar and lexicon are autonomously constituted/produced by the legal institution, and it is by means of legal grammar and lexicon that a legal institution instantiates a semiotic object within a particular legal discourse. In ancient systems of law, the legal system (with their specific rules of engagement and language) was instantiated by the intervention of the divine will. For example, Leone (2001) shows that the semiotics of the giving of the Law is best represented in Exodus. The voice of God, his divine finger, the hand of Moses, and the two stone tablets are the most important elements of this narration, which Christian civilization has variously interpreted.

The initial impetus of narratology then is to bracket the surface of discourse and its contents on the underlying structure. It was Greimas who abstracted Propp's typology of thirty-three narrative functions (Propp [1927] 1968) into a complex grammar of narrative that allegedly represents the universal deep level that lies behind all meaningful discourse and action. The existence of universal structures of significance and meaning may thus be interpreted as the omnipresence of natural and universal epistemological values. We believe that Greimas himself, rather than leaving to his followers to speculate as to what his basic idea means, would claim that the conception of the semionarrative level, forming part of the "basic structure of significance," should be regarded as representing the general concept of narrative that underlies the conceptions present in the *different genres of narrative genres.* At the same time, the surface level has both narrative and figurative components (the narrative component includes utterances about certain events), organized in a temporal sequence (contract-performance-recognition). Two additional components (action = purpose, and intelligibility) are supplied to this sequence to make of it a purposive set of elements.

Drawing on Greimassian structural semiotics and his narrative grammar, Jackson (1988a, 1988b, 1994) sought to identify social knowledge as a particular stock of narratively constructed patterns, against which the individual perceives (encodes), memorizes (stores), recalls (retrieves), and enunciates (communicates) individual events. In an account of the processes of legal adjudication,

Jackson (1996, 1997) argues for the application of narrative models (including narrative typifications of professional behavior) to the pragmatics as well as the semantics of both fact and law construction in the courtroom. The heuristic analysis of courtroom discourse has contributed to a deeper understanding of the complex facets of narrative, examining many discursive and sociolinguistic aspects together—ranging from more informal settings, such as small claims courts through plea bargains and motions, to full-blown trials in more formal courtrooms. Moreover, this type of analysis assumes not only that facts are constructed within the trial but also that the legal rules themselves can be conceived of as socially constructed narratives. In distinguishing different types of narratives used in the courtroom interaction, Jackson has repeatedly argued that the "story in the trial" (the actual event of crime) is mediated through the "story of the trial" manifested in a collection of narrative encounters in the courtroom discourse. Different participants in a trial internalize different forms of narrativized pragmatics and different stories of who tells the truth and how that truth is perceptible and then internalize them in different ways (Jackson 1995, 160; 1997, 33–36; 1998, 263). That is, alongside the semantic level of legal discourse (story in trial), the pragmatic level is constructed on the basis of certain narrative patterns (becoming, thus, the story of the trial). A parallel account of the pragmatic dimension of legal discourse to that of the semantic dimension of legal discourse is both possible and necessary; that is, a theory of normative justification views the construction and transmission of modalities within the context of the "narrativization" of pragmatics. Thus, if we would consider the example of any abstract case brief that reduces a judicial decision to an argument of deductive logic stated in a form of categorical normative syllogism, then, from the perspective of narrativized pragmatics, we would be able to conclude that the normative syllogism is the form of argument most calculated to persuade that audience, for whom the use of such formal argument represents the narrative typification of good justificatory behavior.

Indeed, the Western tradition of jurisprudence explicitly advocates the use of syllogistic reasoning in justification of judicial decisions. However, the classic method of deductive syllogistic reasoning in law is an inaccurate rendition. At a deeper level of discourse, major and minor premises of the syllogism conceal a constructed narrative; syllogistic reasoning attempts to match two preeminent narratives for the purposes of establishing a coherent narrative. Another category of narrative typification in law according to Jackson (2000) is the narrative image evoked by the rule to justify the use of that rule in order to resolve the dispute. He offers some examples of biblical laws, whose meaning

should be understood in narrative rather than in semantic terms. For example, the image of typical thieving presented in the Book of Job (Job 24:14, 16) indicates that nocturnal activity was the primary image of acting like a thief. In the seventeenth and eighteenth centuries, technical intricacies of the common law of larceny were understood in terms of the relationship of different factual constellations to the collective image of acting like a thief (Jackson 1979). Another more recent example of narrative image is a narrative typification of legal speech's modalities, associated with particular narrative themes and stereotypes ("normal crime," etc.). This model proves to be useful in the usual playground of legal narratologists, that is, in the discourse of witnessing. Given the dominance of specific narrative stereotype, the style of the witness's speech behavior directly affects the ways of how juries makes sense of the speech behavior of the witness, but it usually counts for little when it comes to justifying cases. The underlying narrative stereotypes are, however, very important in the process of decision making in the courtroom, especially on a thematic level of constructing meaning below the "deep level." Here, "narrative typifications" (used in order to attribute specific meaning to raw sense) serve as a kind of communicative paradigm, being relative to particular social groups ("semiotic groups").

Jackson further argues that provisional schematization of the narrativization of the pragmatics of courtroom behavior (the giving of testimony by a witness and the arguments of counsel on points of law) might be divided into four sections. The first section is that of internal psychological processes, prior to any particular act of enunciation; these internal psychological processes (inner narratives) are better expressed by relational narratives that follow more everyday storytelling conventions. The second section is the act of enunciation itself, viewed strategically from the viewpoint of the enunciator. The third section is the meaning of the act of enunciation, as perceived by its addressee. This section also has been addressed by those researchers who have explored the relationship between written legal narratives and the "recontextualization" (i.e., enactment or translation) of these texts in court (Hirsch 1998; Philips 1998) and by those who have examined how attorneys serve as metaphorical translators who shape for their clients the meaning of "lawyering" (a set of legal narratives), sometimes missing what clients view as the central point of their stories (Cunningham 1992). In other words, clients provide lawyers with legal problems, and lawyers must construct or adopt a narrative of law out of competing notions that form the resources of legal reasoning. This is possibly the most important achievement in the narrative approach, since it is generally thought that story-

telling is indeed a central skill of advocacy in trials, especially in appellate trials and pleas in mitigation.

However, it is an exaggeration to identify the whole legal practice with the construction of narratives, because not all arguments by advocates involve explicit storytelling. Despite this obvious observation, the profound insight about the work of lawyers as a narrative endeavor is quite often reduced to a simplistic scheme in which the lawyer simply articulates a client's case in a juridical manner designed to appeal to the pathos of adjudicators (Mootz 2011, 5). Both prosecutors and defense lawyers attempt to create a speaking subject—a juror, who in adjudicatory proceedings experiences the discursive construction of facts in the different contradictory renditions of what happened.

In order to better reconceptualize how the narrative of what happened in adjudicatory proceeding in semiotics terms, Milovanovic (1992, 197–200) draws from a semiotic theory of cinema, describing the story and sense-construction in trial through the basic concepts of *montage* and *visée.* Just as a film director, who (at the montage stage) is faced with the task of transforming the sequences of images into a few basic representations that should evoke the feelings of the spectator or auditor, the whole object of the lawyer is to manipulate a sequence of narrativized facts in such a way as to create the desired effect in the juror's consciousness and to appeal to the juror's feelings, creating stories that seek to invoke from the facts particular imageries (montage): one of guilt and culpability by the prosecutor and one of innocence and diminished culpability by the defense counsel (Milovanovic 1992, 198).

An earlier generation of theorists (most notably Jackson) seems already to have expressed similar ideas when they dealt with the pragmatics of court trial in terms of a more properly semiotic thematic. But for Jackson (1996, 395), the jury is the "audience" in a very real sense: the whole performance observed by the jury is actually managed to the strategies of counsel/prosecutor, who seek to persuade the jury to make opposing sense of the performance. Thus, counsel and prosecutor are not only actors in the dramaturgical model of classical adversary trial but also directors in a battle of narratives, in which the defense fights the prosecution with weapons of equal strength.

Let us turn to a practical application. In all systems of criminal law, a legal sense-construction in a trial occurs as a result of interaction between different semiotic groups with different internalized discourses. Three forms of forensic communication have been distinguished: lawyers with lawyers (counsel addressing judge, judge ruling on objections), laypersons with laypersons in the jury room, and lawyers with laypersons (examination of witnesses, etc.) (Jack-

son 1995, 394). Each trial starts with the indictment (which is a plausible narrative that the defendant is guilty). Hence, narrative analysis reveals a difficult dilemma in the justification of judgments: at times, there is a choice between narratives or other discursive forms that will be effective in a courtroom, on the one hand, and narratives that are true to clients' experiences, on the other hand. One may seek to justify the choice of means with reasons, but the means are not themselves considered rational. The rational system is one that uses reason, so far as feasible, in the determination of disputed questions of fact and law, since it is the law of evidence that provides a structure that findings of facts may be made by either a judge or a jury.

Finally, the fourth section is the negotiation of the outcome of the act of enunciation between the parties concerned, if the case does reach formal litigation, because the Anglo-Saxon civil justice system encourages negotiated settlement and provides incentives for this to occur (especially in personal injury litigation). The outcome of the negotiation is usually perceived as a model of how the shared professional ideologies of judges affect the differential framings of legal validity in parties' claims. Suffice it to say that, in terms of Greimassian semiotics, one could easily think of the legal validity as the manifestation of a modal "value": that is, the communication of messages that certain claims are being made between communicators. Legal semiotics easily accepts such a communicative model without endorsing in any way the truth or justifiability of truth-claims. Legal validity is a part of the ideological message conveyed within legal discourse, while "truth" depends only on the plausibility of the law's narrative structures (truth is a part of the narrative syntagm) and on the coherence of semantic structures (Jackson 1991). Different stories (narratives) have different political impacts; once jurors/judges begin evaluating how narratives influence the perception of events, these impacts become more visible. For instance, some potentially valid legal claims may be dismissed and silenced if they are expressed by less socially powerful litigants who have unequal power in mustering approved linguistic forms in legal reality construction, whether in informal courts or in court-ordered mediation settings (Fineman 1991).

Legal narratology might be especially interested in questions of narrative transmission and transaction, that is, in stories in the situation of their telling and listening, asking not only how these stories are constructed and told, but also how they are listened to, received, reacted to, how they ask to be acted upon, and how they in fact become operative. The analytical task of the semiotician would then be to excavate the narrative structures deployed in legal

practice, since narrative structure informs not only the content but also the manner in which stories are told. A narrative is understood here more broadly as a story, that is, a sequence of events invented, selected, emphasized, or arranged in such a way as to explain, inform, or edify.

Some may argue that, in legal practice, this particular narrative sequence implies the existence of two distinct situations, each of which can be described with the help of propositions, in such manner as two narrative propositions are combined in a single predicate, called "narrative function" (Todorov 1977). To illustrate this concept, let us employ an easy example of an informant's statement: "Someone is planning to commit murder." In this example are two separate narrative propositions (the planning of murder and the committing of crime) that are brought together into a relation of transformation of intention. Having an identical predicate on both sides, both propositions are transformed into one narrative element/function. The transformation of intention in this particular context indicates the intention of the subject of the proposition to perform an action, and not the action itself. That is, the transformation of intention underpins the criminal law's bias toward intentionalist stories, being reflected in legal notion of intention (one of the types of *mens rea*), which is generally defined in terms of foresight of particular consequences and *a desire to act so that those consequences occur*. Since criminal law constructs the legal subject as a rational being with cognitive capacity, *mens rea* is determined by purely cognitive tests of durativity/intensity, knowledge/foresight, and foresight of general risks and particular consequences ("manslaughter by gross negligence") and is thus conceived as the nondurative mental state of the defendant, which corresponds to the momentary *actus rea* (the nonmental components of offense) and described by a rather restricted vocabulary of responsibility (intention, recklessness, negligence). At the same time, we should recall that the *actus rea* that every description of crime involves generally its tacit social evaluation in the form of the thematic stereotypes (narrative typifications) are used in order to attribute specific meaning to the acts, circumstances, and consequences.

Returning back to the theoretical discussion, we should mention that this simple type of transformation itself is a component unit of narrative organization. The organization of narrative is constructed as a sequential string of significant narrative elements (story), in which some narrative elements correspond with the time of narration and others range from this base time of the narration. The narrative structure is an inherent part of the persuasiveness of any given narrative, and the way in which a story is told will have considerable

bearing on its perceived credibility, regardless of the actual truth of the story (Bennett and Feldman 1981).

The importance of narrative structure in making sense of legal facts in the courtroom is illustrated by Pennington and Hastie's (1990) study of how mock jurors processed trial information by imposing the summary structure of story on the processed evidence and by seeking the best fit between the verdict and their "story." What matters most in the law is how the listeners (jurors or judges) hear and construct the story of case: in most legal cases, the outcome of trial is dominated by narratives to the extent that a good story is better than half-proof. When making a decision, jurors construct and compare stories that explain most of the evidence and then choose the most coherent and plausible story that explains the most evidence. Since in all systems of criminal law a trial begins with the story told in the indictment, it is important that the story told by the prosecution meets the requirements of a good story, in which all elements are persuasively linked to a readily identifiable central action with clearly defined goals of the participants. And, of course, the story told in indictment must contain the requisite elements of the offense (identity, *actus rea*, and *mens rea*), which are provable by means of the evidence and advanced in support of the story.

However, even those narratives with persuasively presented sequences of narrated events are not always sufficient in the courtroom. No matter how logically perfect and plausible the prosecution's account (of what has happened) is, the finder of fact should also consider whether the account presented by the prosecution or the defense could be tied to reality by means of evidence. Moreover, the juridical narration itself (in the form of a speech act) is accorded to the performance of a particular goal, producing the belief in the adequacy of convictions based on narrative coherence and commonsense stereotypes, which potentially may lead to unsafe convictions. Wagenaar and his colleagues have elaborated on this problem and proposed the series of "universal rules" for evaluating the quality of narratives, rules that are used in the construction of facts in the courtroom. According to Wagenaar (1993, 10), narratives could be safely accepted for fact finding only if they could pass the test of narrative "goodness" (narrative coherence) and then could be "anchored by the way of evidence to common-sense beliefs."

In the Anglo-American legal system, the conduct of cases is adversarial and is conventionally depicted as a contest to determine which of the two sides can produce the more convincing version of the relevant events. The testing of the evidence provided by both parties occurs both explicitly and implicitly: ex-

plicitly by the challenging of the versions produced by the parties' witnesses on cross-examination and implicitly through the jury's opportunity to compare those competing versions. The central role of testing one side's story against the other's underlies the requirement that admissible evidence be generally limited to that which can be attested orally in court (as testimony of a fact at issue given on oath or affirmation or after an admonition to tell the truth), as contrasted to (a generally inadmissible) hearsay, which is a reported account of what someone said (Drew 1992, 472). A notable exemption from the aforementioned rule is a relatively elaborate and complex set of rules for fact finding in the European Court of Human Rights; these rules vested a chamber with broad authority to permit the parties to produce various forms of evidence from a wide assortment of sources. Still, as a general rule, direct evidence is to be preferred to indirect evidence, when the latter is to be considered as a chain, where each piece of evidence is a link in the chain.

The linguistic reconstruction of the event suspected to be criminal also has a crucial importance for the legal process: the application of the written abstract legal norm to nonlinguistic concrete events. The importance of the linguistic reconstruction of the event turns the formulation describing it into the principal factor uniting the legal text on a syntagmatic level, on a syntactic-discursive level, and on the level of the lexical structure. It is this description that forms the thematic focus of the legal case, which has its own structure that excludes certain forms of evidence whose reliability cannot be tested and lays down general criteria as to the weight of legal arguments ("burden of proof"). However, the modern criminal process accepts, along with traditional evidence of fact, inferred evidence, which has to be inferred from facts (Twinning 2006) using different combinations of probability theories and common sense. This type of circumstantial evidence may be defined as any fact relevant to the issue (*factum probans*) from the existence of which the adjudicator may infer a fact in issue (*factum probandum*); they are "evidential" facts that are not themselves facts in issue, but from which inferences bearing on facts can be drawn. This category includes also so-called procedural facts, like the warning given before the medical examination of a person charged with driving under the influence of alcohol, the ownership of stolen goods, and so forth (Wilkinson 1986, 8–9).

Since judgments of jurors are based in part on the plausibility and coherence of the rival stories told by the witnesses, the importance of narrative in sense-construction is also accepted by legal scholars. Decision making by jurors is based predominantly on accommodated holistic ideas of narrative coherence. Legal arguments and judgments ostensibly rely for their credibility and

persuasiveness on the presentation of factual claims and the determination of facts through due process. The persuasiveness (and thus the legitimacy) of judgments within this model rests upon their claims to represent "what actually happened." If this is so, it should follow that judgments based on proceedings that are partisan, that is, adversarial, and that lack due process would lack facticity and as such their credibility and persuasiveness would be undermined. In practice, however, this is not always the case, and it is possible to tell a persuasive narrative in the absence of fact: proof of the *factum probandum* (ultimate fact, or the fact sought to be established) depends upon different (culturally, politically, or socially contingent) conventions of inference. The range of contents and meanings embodied in the texts of both the prosecution and the defense is determined by means of a set of semantic-pragmatic choices. A reconstruction of an occurrence by means of language is achieved by presenting a chain of descriptions of "relevant" events; obviously, the relevance of a certain event to a given occurrence is frequently a matter of interpretation.

The semiotic characteristics of judicial reasoning and a jury's findings of fact (or a juror's deciding on guilt) deserve special attention. In order to pursue semiotic properties of the adjudication of fact and law in court and to understand their relevance to the process of reasoning, one needs to have recourse to the logic of a trial. Although jurors in triable cases are not compelled by logic alone to reach one conclusion rather than another, judges (in their instructions to the jury at the end of trial) sometimes encourage the jury to base their findings of facts on commonsense argumentation. A trial judge's decision on law follows another scheme: "The judge must first arrive at it intuitively and, then only, work backward to a major 'rule' premise and a minor 'fact' premise to see whether or not that decision is logically defective" (Frank 1973, 184). However, it seems clear that, at the trial level, there is much room for loose legal reasoning to enter into the judgment. Thus, the construction of "facts" is not different from the judgment as to the credibility of fictitious events in novels, except in one respect: traditional jurisprudence holds the juridical "facts" to be true, while events in novels do not need to be true.

The difference between legal facts and fictional events does not, however, presuppose any alternation in the underlying structure of signification, for in Greimas's semiotics the truth-claim is merely the syntagmatic part of the message that a particular discourse seeks to convey (Jackson 1997, 157). According to Jackson, a fact is a claim constructed within language that a certain state of affairs in the real world is true; a law is a claim constructed within language about the normative significance of a particular behavior, linked to a claim that

such a rule is "valid." Both truth and validity (like the normative significance of the behavior) are "modalities," which correspond to semantic categories of the highest generality ("linguistic universals"). These modalities are manifested through the possibilities inherent in the "semiotic square,"[10] which produces a complex array of "deontic modal structures," according to which behavior may be permitted, required, or prohibited. For reasons we shall not detail here, we believe that one clearly perceives an articulated similarity between the patterns of legal behavior considered as manifestations of deontic modal structures, on the one hand, and Hohfeld's (1913) scheme of legal relationships, on the other.

Rhetoric of Crime

Laws are written or communicated in language. Legal analysis is concerned with discerning the meaning of statutes and cases, the authoritative materials and practices of the law, in light of their purposes and the goals of a legal system as a whole. Literature is also an interpretive and creative activity in which we are concerned to understand the meaning of communication in language, that is, to share meanings by means of words. For example, Dworkin supports his argument against the positivist doctrine of "no right answer" by adducing literary criticism either as an analogue to legal interpretation or even as a model for the central method of legal analysis. Dworkin (1985, 158–59) often compares legal theory to literary criticism: both legal and literary interpretations are interpretative enterprises, in which rational arguments may be constructed about matters neither stated in the text nor necessarily to be inferred from it. Therefore, they are judged according to "aesthetic principle." In other words, an interpretation of a piece of literature attempts to show which way of reading (or speaking or directing or acting) the text reveals it as the best work of art (Dworkin 1985, 149). It is the role of adjudicators (judges), like the role of literary critics, to decide what texts mean. Therefore, Dworkin advocated the thesis that stands in stark contrast to the basic principles of positivism. Recognizing the defects of classical legal positivism, he shifts the emphasis of legal philosophy of positivism by holding the view that the development of the law is somewhat analogous to the activity of literary critics, or even to the activity of authors, who write in the artificial genre of literature that Dworkin calls the "chain novel" or "*novel seriatim*." Each novelist in the chain interprets the chapters he or she has been

10. Courtés (1991, 152) defines it as the visual representation of the logical structure of an opposition. The semiotic square is a means of refining oppositional analyses by increasing the number of analytical classes stemming from a given opposition from two to four or even to eight or ten.

given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Despite this striking analogy, some legal writers (most notably, Andrei Marmor [1996, 44]), while conceding with Dworkin that jurisprudence might be construed as analogous to literary criticism, find that Dworkin's analogy is too weak to hold the comparisons between legal theory and practice. Nevertheless, we could reexamine the weak and strong thresholds of Dworkin's argument by analyzing the rhetorical form of the text rather than how it is written or read.

Whereas legal scholars seek to view law as a narrative or a universal level of discourse, it is possible to define any particular legal case in terms of story, regarded as a sequence of events that makes up a story. What readers have to derive from a text is the order of narrated events that could be presented in a specific way (Aristotelian *mythos* or plot), while this own specific mode of organization is usually defined by specific *heuresis* (which means here the choice of appropriate paradigms, structure, and concepts in formulating arguments toward the perlocuted objective of persuasion). Thus, legal stories can be envisioned as organizational devices for presenting plausible sequences of events (episodes), which coalesce into a final sequence of events with specific objectives. For example, a lawyer constructs the story line based on a chronological time line. In this ironic construction, a lawyer entertains at least two perspectives at once: at least one normative order that contains the possibility of law, and narratives that construct law for particular community.

Under certain circumstances, however, the events can be, for certain strategic reasons, brought into a sequence different from that in which they are claimed to have occurred. The concept of mythos appears to explain why the story must have a beginning, a middle, and an end, and be so constructed that the audience takes in the mutual relation of beginning, middle, and end. The audience will also see how factual narrative of trial merges with the trajectory of events as entailed by a chronological process. Thus, it would be rather unfair to criticize legal stories of ignoring the elements of "structuration," because narrative (*mythos*) represents a principle of organization that transforms loosely detached juridical facts into a coherent discourse by "sequencing" speech into valid narratives regardless of rhetorical figures, themes, and tropes contained therein.

This issue addresses the broader perspective from which the questions of fact may determine the audience and sequences. The concept of *mythos* has been further extended by Robin West (1983), who has drawn parallels between Northrop Frye's *Anatomy of Criticism* and classic legal theories seen as aes-

thetic objects. Distinguishing four "organizations" of archetypal symbolism in literature, Frye sees works of literature as lying somewhere on a continuum between being plot driven, as in most fiction, and idea driven, as in essays and lyrical poetry. In brief, Frye (1957, 139) begins exploring organizations of archetypal symbols (subdivided into tragic and comic poles) in each mode and ends with a similar discussion of thematic literature. Myth is the first of three organizations of archetypal symbols (theory of myths, or archetypal criticism); it lies at the pole of total metaphorical identification, and it assumes the form either of a desirable apocalyptic world or of an undesirable demonic one. Myth is a process through which individuals relate to others. This perspective is often accompanied by a sense of threat posed by the inimicality of myth to individuality and democracy. The second two organizations are related to analogical imageries, in which the myths are represented in the actual human world. Frye claims that apocalyptic imagery is appropriate to the mythical mode, and the demonic imagery to the ironic mode in the late phase in which it returns to myth. It is obvious that the term *myth* was explicitly chosen by Frye in an effort to overcome the distinction between "story" and "history." The idea is exemplified with an example from jurisprudence in which Frye has argued that the rhetoric of comedy shares certain affinities with the rhetoric of jurisprudence, since both imply confidence in human power of reasons. The comedy also tends to duplicate the structure of legal conflicts. Since "tragedy seems to lead up to an epiphany of law, of that which is and must be," Frye (1957, 208) sees the essence of a vision of law in tragedy that seems to be a synthesis of heroic *auto* and *irony*; on the level of law, tragedy operates as a revenge. The nearer the tragedy is to *auto*,[11] the more closely associated the hero is with divinity; the nearer to irony, the more human the hero is.

In reaching its decision in Kaplinski's case, the Tartu County Court generalized from Kaplinski's narrative inter alia the concept of literary self-expression, the meaning of particular expressions in Kaplinski's text and the public response to Kaplinski's text. In Northrop Frye's terms, Kaplinski's text could be perceived as a demonic parody of the constitutional freedom of expression, and his literary activity as manifesting a typification of social criticism. The legal response of the Tartu County Court to Kaplinski's behavior is almost identical to Kaplinski's own explanation, where the defendant's narrative is

11. In its most restricted sense, *auto* means "a form of drama in which the main subject is sacred or sacrosanct legend, such as miracle plays, solemn and processional in form but not strictly tragic" (Frye 1957, 365).

apparently framed by the test of criminal intent and causality (the Tartu County Court did not find an element of causation between Kaplinski's activity and public injury).

One instance of mythos occurs in a criminal trial's summing-up as the story in the trial, in which all contested narratives (those of defendant, prosecutor, and counsel) are summed up with reference to the contested events (Robertshaw 1998,7). In this case, we can analyze different narratives in the trial as layers relating to the perspectives of engaged actors. Despite this summing-up of narratives, stories of actual experiences of defendants, lawyers, as well as textualized perspectives on the contested events are usually analyzed separately for remaining intact multiple point of view on law. The Aristotelian term *endoxa* denotes propositions that are normally accepted in the social context in which the dialogue is embedded. What unifies these propositions used in often incommensurable contexts is that there is a group of self-evident principles. Indeed, *endoxa* may be viewed as defeasible presumptions, to be accepted until refuted. Actually, we can argue that nothing hinders legal scholars from using more complex rhetorical formulas that go beyond the *endoxa*. Many practicing lawyers have felt at one time or another a certain preference for rhetorical places (topoi) over *endoxa*. We have also reason to believe that topoi originated from the collection of *endoxa*. As Aristotelian rhetoric demonstrates in abundance, *doxa* and *endoxa* serve here to furnish the topoi as principles of argument. Before deploying *endoxa* in an argument, the rhetorician must reconstitute propositions in terms of commonplaces or topoi. Thus, in its first connotation (by virtue of its connection to the question of ideological stereotype-norm), the concept of *doxa* plays a crucial role in the process of reading, because *doxa* (and topoi) function as rhetorical devices in meaning construction and its evaluation—if not as the very conditions of literal reading in "legal doctrine."

Another connotation of the notion *doxa* is perhaps best illustrated by exploring examples provided from particular legal practices, for example, from the summing-up of facts in a criminal trial. Paul Robertshaw (1998, 8–10) can rightfully claim the discovery of extending the Aristotelian category of *doxa* into additional categories of structural analysis in the multitude of legal discourses: *nomo-dogma* (i.e., the judge's instructions in legal questions on how law should be applied), *nomo-doxa* (the judge's advice to the jury), *krito-doxa* (expressions of juridical opinions on matters other than questions of law and questions of facts), and *mytho-doxa* (a judicial comment on a narrative). Another type of mythos could be found in the literature: trial-mythos, which

covers all references to events leading to or in the course of trial itself (Jackson 1996).

Different narrative methods (esp. Genette 1972) relate the motifs of discourse with story themes by describing the process of interaction between story and text by means of rhetorical figures, tropes that appeal to emotions of the audience and topoi (which invoke consensual ideas, like "the natural order," "common sense," archetypes, stereotypes, and foundational myths). The focus of attention in rhetorical argument is upon starting points (premises), from which rhetorical reasoning begins: the "places" that are often taken for granted as presumptions in human arguments and, by virtue of that fact, carry a certain force of conviction. Rhetorical figures act in the process of interaction as signs. Textual coherence is achieved and maintained, according to Genette's view, by relationships derived from presupposed, rhetorical conventions of communicative interaction. Not that "story" or "narrative" is always synonymous with "fiction." The story need not be true, because the internal world created by the story (the world that the characters themselves experience and encounter) constitutes its own *diegesis* (i.e., the fictional time, place, characters, and events that constitute the universe of the narrative). While fiction is always a narrative, narrative is not always fictional.

Generally speaking, we always expect a "narrative" account of events (Binder and Weisberg 2000). Still, there are some conditions of coherence and intelligibility that must be satisfied in order to arrive at a meaningful story. A story can be true or false, while a fiction, even if not entirely made up (ordinarily the setting, at least, is a definite place at a definite time) must contain false particulars, although often with a heavy admixture of literal truths. The same principle would also apply to judicial construction of fact. To repeat a seemingly obvious point, the judicial construction of fact is, rather, a way of distancing oneself from presuming that the fiction is often intermingled with facts. The construction of fact in law is in principle no different from the judgment as to factual credibility of a novel versus the fictional events and situations narrated in a novel—except in one respect: legally constructed facts do claim to be true, while events in *diegesis* do not.

References

Alchourrón, Carlos E., and Eugenio Bulygin. 1971. *Normative Systems*. Vienna: Springer.

Bakircioglu, Onder. 2007. "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases." *German Law Journal* 8:711–34.

Belausau, Uladzislau. 2010. "Judicial Epistemology of Free Speech through Ancient Lenses." *International Journal for the Semiotics of Law* 23 (2): 165–83.

Bennett, W. L., and M. S. Feldman. 1981. *Reconstructing Reality in the Courtroom: Justice and Judgement in American Culture*. New Brunswick, NJ: Rutgers University Press.

Binder, Gyora, and Robert Weisberg. 2000. *Literary Criticisms of the Law*. Princeton, NJ: Princeton University Press.

Combacau, Jean, and Serge Sur. 2004. *Droit international public*. Paris: Montchrestien.

Corcoran, Tom. 2005. "Legislative Practice as Discursive Action: A Performance in Three Parts." *International Journal for the Semiotics of Law* 18 (3–4): 263–83.

Courtés, Joseph. 1991. *Analyse sémiotique du discours: De l'énoncé à l'énonciation*. Paris: Hachette.

Cunningham, Clark D. 1992. "The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse." *Cornell Law Review* 77:1298–1387.

Drew, Paul. 1992. "Contested Evidence in Courtroom Cross Examination: The Case of a Trial for Rape." In *Talk at Work: Interaction in Institutional Settings*, ed. Paul Drew and John Heritage, 470–520. Cambridge: Cambridge University Press.

Dworkin, Ronald. 1985. *A Matter of Principle*. Cambridge, MA: Harvard University Press.

Fineman, Martha A. 1991. *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*. Chicago: University of Chicago Press.

Frank, Jerome. 1973. *Courts on Trial: Myth and Reality in American Justice*. Princeton, NJ: Princeton University Press.

Frye, Herman Northrop. 1957. *Anatomy of Criticism*. Princeton, NJ: Princeton University Press.

Genette, Gérard. 1972. *Figures III*. Paris: Éditions du Seuil.

Gies, Lieve. 2003. "Up, Close and Personal: The Discursive Transformation of Judicial Politics in Post-Dutroux Belgium." *International Journal for the Semiotics of Law* 16 (3): 49–74.

Greimas, Algirdas. 1971. *Strukturale Semantik: Methodologische Untersuchungen*. Braunschweig: Vieweg.

Greimas, Algirdas, and Eric Landowski. 1976. "Analyse sémiotique d'un discours juridique." In *Sémiotique et Sciences Sociales*, ed. A. J. Greimas, 79–128. Paris: Seuil.

Hirsh, Susan F. 1998. *Pronouncing and Preserving: Gender and the Discourses of Disputing in an African Islamic Court*. Chicago: University of Chicago Press.

Hohfeld, Wesley N. 1913. "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning." *Yale Law Journal* 23 (16): 28–59.

Jackson, Bernard S. 1979. "Legalism." *Journal of Jewish Studies* 30 (1): 1–22.

———. 1988a. "Can One Speak of the 'Deep Structure of Law'?" In *Theory and Systems of Legal Philosophy*, ed. S. Panou et al., 250–61. Stuttgart: Steiner.

———. 1988b. "Narrative Models in Legal Proof." *International Journal for the Semiotics of Law/Revue Internationale de Sémiotique Juridique* 1 (3): 225–46.

———. 1991. "Analogy in Legal Science: Some Comparative Observations." In *Legal Knowledge and Analogy*, ed. P. Nerhot, 145–67. Law and Philosophy Library, vol. 12. Dordrecht: Kluwer.

———. 1994. "Towards an Interdisciplinary Model of Legal Communication." In *Legal Semiotics and the Sociology of Law*, ed. Bernard S. Jackson, 97–110. Oñati: International Institute for the Sociology of Law.

———. 1995. *Making Sense in Law: Linguistic, Psychological and Semiotic Perspectives*. Liverpool: Charles.

———. 1997. *Law, Fact and Narrative Coherence*. Merseyside: Charles.

———. 1998. "Truth or Proof: The Criminal Verdict." *International Journal for the Semiotics of Law/Revue Internationale de Sémiotique Juridique* 11 (33): 227–73.

———. 2000. "Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence." *International Journal for the Semiotics of Law/Revue Internationale de Sémiotique Juridique* 13 (4): 433–57.

———. 2010. "Legal Semiotics and Semiotic Aspects of Jurisprudence." In *Prospects of Legal Semiotics*, ed. A. Wagner and J. M. Broekman, 3–36. Dordrecht: Springer.

Kristeva, Julia. 1969. "L'engendrement de la formule." In *Semeiotike: Recherches pour une sémanalyse*, 216–310. Paris: Seuil.

Leone, Massimo. 2001. "Divine Dictation: Voice and Writing in the Giving of the Law." *International Journal for the Semiotics of Law/Revue Internationale de Sémiotique Juridique* 14 (2):161–77.

Lynch, Michael, and David Bogen. 1996. *The Spectacle of History: Speech, Text, and Memory at the Iran-Contra Hearings*. Durham, NC: Duke University Press

MacCormick, Donald Neil. 1980. "The Coherence of a Case and the Reasonableness of Doubt." *Liverpool Law Review* 2:45–55.

Marmor, Andrei. 1996. "On Convention." *Synthese* 107 (3): 349–71.

Milovanovic, Dragan. 1992. *Postmodern Law and Disorder: Psychoanalytic Jurisprudence, Chaos and Juridic Exegeses*. Liverpool: Charles.

Mootz, Francis J. 2011. "'Die Sache': The Foundationless Ground of Legal Meaning." In *The Semiotics of Law in Legal Education*, ed. J. M. Broekman and Francis J. Mootz, 5–20. Berlin: Springer.

Peirce, Charles Sanders. 1998. *The Essential Peirce: Selected Philosophical Writings*, vol. 2, (*1893–1913*), ed. Peirce Edition Project. Bloomington: Indiana University Press.

Pennington, Nancy, and Reidi Hastie. 1990. "Practical Implications of Psychological Research on Juror and Jury Decision Making." *Personality and Social Psychology Bulletin* 16:90–105.

Philips, Susan. 1998. *Ideology in the Language of Judges: How Judges Practice Law, Politics and Courtroom Control*. New York: Oxford University Press.

Propp, Vladimir. (1927) 1968. *Morphology of the Folktale*. Trans. Laurence Scott. Austin: University of Texas Press.

Robertshaw, Paul. 1998. *Summary Justice: Judges Address Juries*. London: Cassell.

Todorov, Tzvetan. 1977. *The Poetics of Prose*. Ithaca, NY: Cornell University Press.

Twinning, William L. 2006. *Rethinking Evidence: Exploratory Essays*. Cambridge: Cambridge University Press.

Van Roermund, Bert C. 1997. *Law, Narrative and Reality: An Essay in Intercepting Politics*. The Hague: Kluwer.

Wagenaar, Willem A., Peter J. van Koppen, and Hans F. M. Crombag. 1993. *Anchored Narratives: The Psychology of Criminal Evidence*. New York: St. Martin's; Hertfordshire: Harvester Wheatsheaf.

West, Robin. 1983. "Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory." *New York University Law Review* 60:145–211.

Wilkinson, Alexander B. 1986. *The Scottish Law of Evidence*. London: Butterworths; Edinburgh: Law Society of Scotland.