Sparking The Legal Imagination in Theory and Practice: a Humanistic Approach to Law

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> 'To think is to imagine'[1]
>
> 'It is a characteristic of sociologists that they discount the grimly insistent nature of the human imagination'[2]

1. IMAGINING THE LEGAL IMAGINATION

James Boyd White's *The Legal Imagination* has been with me since I first read it when I was working on my dissertation in the early 1990s. Perhaps this opening sentence does not augur well for an impartial reflection on the impact of *The Legal Imagination* on the study and practice of law that the editors of this special issue envisage. To justify it, I add that while I then thought that as an academic I understood the book theoretically, it wasn't until I became a judge that I understood its lessons for legal, and more specifically judicial practice. That is why, by way of introduction, I indulge in a small archeological and archival exercise, privileged as I have been to have had many conversations with the man himself when writing my dissertation. For one trained in a continental European civil law jurisdiction with an emphasis in legal education on codified law, *The Legal Imagination* seemed odd to say the least. As one Dutch reviewer remarked, "This is the most unusual book in our field that I have ever had in my hands . . . The title does not explain anything, the subtitle not much more, and the rather detailed 'Preface' and 'Introduction to the Student' do not provide a clear presentation."[3] To me, *The Legal Imagination* seemed to me a rich but

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1. PETER GOODRICH, ADVANCED INTRODUCTION TO LAW AND LITERATURE xi (2021).
2. HILARY MANTEL, MANTELPIECES 11 (2020).
3. Gerard E. Langemeijer, *Boekbespreking The Legal Imagination*, 53 NEDERLANDS JURISTENBLAD 763, 764 (1978). The book review made me chuckle, for in the accompanying letter sent to the publisher (19 October 1978, shown to the author by James Boyd White), it says, quite arrogantly, that Langemeijer is "without exageration [sic], the most famous jurist of Holland. So it is very flattering for Mr. White that his book has been reviewed by Mr. Langemeijer." I rest my case on whether the name

daunting Pandora's Box of suggestions for making a life for oneself in and with law.

Many consider this yellow brick a basic code like the Bible or the Napoleonic Code Civil, or even a constitution of *Law and Literature* itself; even the very title of the book must have been especially provoking at the start of the humanist renaissance in law, because it functions as an oxymoron that connects two phenomena that from the long prevailing view of law as a science must have seemed disparate. This is not, however, what its author had in mind. As White modestly wrote, "any claim that law and humanities began in 1973 would obviously be ludicrous, for the connections between law and the arts of language go all the way back to the beginnings of law in European history."[4] As early as 1965, White wrote that he deplored the then-prevailing lack of professional intimacy between law, history, and literature, fields once common to the legal profession, and, foreshadowing *The Legal Imagination*, he suggested that "a very valuable part of a legal writing program, for example, would be some experience in writing in other ways – as an economist or a fictionist, for example – upon the same fact situation or social program."[5] *The Legal Imagination* is therefore "not really a 'law and literature' course . . . in which one academic 'field' is seen to contribute its findings to others, but a course grounded in the specific experience of the eager and the genuine mind of a student giving himself or herself a legal education," the idea of which "is to help the students imagine their own situations in the world differently, including what is expected of one who is a lawyer."[6] This follows from White's view that the essence of a jurist's work lies in the process "of identifying and construing authoritative texts, of translating from another discourse into the law" and these are literary activities, arts, or "*technai*."[7] Here is where the imagination as the linchpin between law and literature comes in, or rather, "the translation of the imagination into reality by the power of language" in order to define oneself "as a mind" whose "act of self-expression" is the real subject of *The Legal Imagination*.[8] Legal practice, then, is characterised

Langemeijer is known better than that of James Boyd White.

4. James Boyd White, *The Cultural Background of The Legal Imagination*, *in* TEACHING LAW AND LITERATURE 29, 29 (Austin Sarat, Cathrine O. Frank & Matthew Anderson eds., 2011).

5. James Boyd White, Book Review, 78 HARV. L. REV. 1713, 1713 (1965).

6. James Boyd White, *Teaching Law and Literature*, 27 MOSAIC 1, 4, 6 (1994) *cf*. Milner Ball, *Review of The Legal Imagination*, 44 U. CHI. L. REV. 681, 683 (1977): "*The Legal Imagination* . . . is not simply a law-and-literature book, but a book about law *as* literature. There is a lot of imagination in this book, but it is not simply a book about law and the imagination; it is rather a book *of* the legal imagination" (italics in the original).

7. James Boyd White, *What Can A Lawyer Learn From Literature?* 102 HARV. L. REV 2014, 2022 (1989).

8. James Boyd White, THE LEGAL IMAGINATION, STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 758, xxi (1973). The book began as a "set of course materials entitled 'The Nature of Legal Expression' (*see* White, *supra* note 6, at 1 and/or as "Principles and Practice of Legal Expression" (*see* Richard Weisberg, *Review of The Legal Imagination*, 74 COLUM L. REV. 327, 327 (1974)). Given White's emphasis on performance, it is easy to see why ontological terms as "nature"

by a constant need to come to terms with the combined representations of events in narrative form and the systematic exposition of law as a language of concepts, while acknowledging the need to recognise a diversity of rationalities when it comes to the exposition and valuation of the facts and the ability to present one's story and case persuasively.

As I imagined the meaning of *The Legal Imagination*, I felt relieved of the disappointment that the staple diet of rule-oriented law courses in the civil law tradition had brought me (needless to say that to teach a course with *The Legal Imagination* would raise eyebrows in this tradition). When I began to serve as a judge, the importance of developing one's legal imagination in its various guises for success in *doing* law was made clear to me the hard way.[9] It was indeed the case that I found it difficult to transform materials presented to me, let alone creatively, and I experienced "the collapse of language under strain . . . the perpetual breaking down of language" and "the stresses of our demands for truth and order and justice" that are indeed "the conditions of our existence."[10] If "imagination is the root of justice," how, then, can we imagine the relevance of the legal imagination for law and spark it in legal practice?[11] The translation of the imagination in legal practice can best take place if legal professionals are aware of the pitfalls of their linguistic usages, confront their conscious and unconscious biases (both private and professional), and ponder the impact of their arguments and decisions in people's lives. These challenges, ethical to the core, can best be met by turning to the insights that philosophical hermeneutics and legal narratology can provide. These include practical wisdom, mimetic and narrative re-presentation, all necessary to gain *iuris prudentia*, insightful knowledge of law.

2. THE CONDITIONS OF OUR LEGAL EXISTENCE: PRACTICAL KNOWLEDGE, METAPHORICAL INSIGHT AND DIALECTIC APPLICATION

The Legal Imagination urges legal professionals to develop command of the language of law in a triple sense. The first is an understanding of and the ability to handle the institutional possibilities and impossibilities of the culture that is law. These include knowledge of substantive and procedural law as much as understanding that the language of law includes non-verbal

and "principles" were discarded.

9. For a comprehensive overview of the aims of *The Legal Imagination* see James Boyd White, *Establishing Relations Between Law and Other Forms of Thought and Language*, 1 ERASMUS L. REV. 1 (www.erasmuslawreview.nl). In fact, all of White's later works not only originate from *The Legal Imagination*, they all focus, though differently, on judicial decision-making. *Justice as Translation* focuses on the translation of competing claims for meaning into a new judgment and on judicial criticism, *Acts of Hope* shows that judicial authority is not a given but, time and again, something to be reconstituted in later decisions, while resisting 'the empire of force' of imperialistic language that is the topic of *Living Speech*.

10. WHITE, *supra* note 8, at 760.

11. JAMES BOYD WHITE, LIVING SPEECH, RESISTING THE EMPIRE OF FORCE 90 (2006).

expression and customs specific of the profession or what White calls the "invisible discourse" of law, or law's "cultural syntax," which implies that "behind the words . . . 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."[12]

While natural and necessary, acculturation also runs the risk of professional bias of the this-is-how-we-do-things kind that may, in turn, lead to the psychological errors of confirmation bias and belief perseverance in evidentiary environments. The confirmation bias is a form of selection bias that often takes the form of an active search by a decision maker for evidence that confirms her initial hypothesis. Subsequently, more weight is assigned to it. At the same time, evidence disconfirming the hypothesis is ignored. As a result, potentially confirmatory evidence is taken at face value, while disconfirming evidence is scrutinized extremely critically, so that one sticks to one's initial belief.[13] That is also why an awareness of the impact that a jurist's choices have is required, because the language of law is normative in that it is a proposal to get a grip on both language and the world it decides on.

Finally, jurists should find a way of thinking *about* the law as a practice of the individual mind and its effects on the lives of those who *do* law. Taken together, these three characteristics form the literary aspect of law, or its constitutive rhetoric, in Whitean terms, "The law can best be understood and practiced when one comes to see that its language is not conceptual or theoretical . . . but what I call literary or poetic, by which I mean . . . that it is complex, many-voiced, associative, and deeply metaphorical in nature."[14] Here is the heart of the literary approach that emphasizes the particularity of human experience rather than an abstraction formulated on the basis of presuppositions that are hard to test. As Martha Nussbaum puts it, what matters is the capacity "to imagine the concrete ways in which people different from oneself grapple with disadvantage," "the ability to see one thing as another, to see one thing in another," or "metaphorical imagination."[15] It requires from us "the power of imagining vividly what it is like to be each of the persons whose situations he imagines."[16] Both in White and Nussbaum, vivid imagination as a rhetorical skill is squarely set in a long tradition beginning with Erasmus, who divided the *circumstantiae* of a case into circumstances of the fact and of the person

12. *Cf.* WHITE, *The Lawyer as Writer*, *in* THE LEGAL IMAGINATION *supra* note 8 and JAMES BOYD WHITE, HERACLES' BOW, ESSAYS ON THE RHETORIC AND POETICS OF LAW 63 (1985).

13. *Cf.* Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 129 (D. Kahneman et al. eds., 1982).

14. WHITE, HERACLES' BOW, *supra* note 12, at xi-xii.

15. MARTHA C. NUSSBAUM, POETIC JUSTICE, THE LITERARY IMAGINATION IN PUBLIC LIFE xvi, 36 (1995).

16. *Id.* at 73.

that both contributed to "*enargeia/evidentia* or vivid imagining," i.e., "the vivid bringing of a whole scene before the mind's eye."[17] In current philosophical hermeneutics, Paul Ricoeur denoted metaphor as "the rhetorical process by which discourse unleashes the power that certain fictions have to redescribe reality."[18] And law is replete with fictions, from legal concepts to hypothetical arguments and arguments in narrative form that are always conceived *ex post facto*, in retrospect. The latter connects metaphor to narrative, discussed in section 3, because, despite what many people think, metaphor is not "a vehicle of distortion" but rather a form of cognition.[19]

From the point of view of jurisprudence, constitutive rhetoric implies a move away from a positivist theory of legal knowledge solely focused on empirical proof and rational argument and a return to a contextualization of knowledge with a focus on the practical ratio.[20] With the latter comes the requirement "for seeing what is new in a situation in the first place."[21] Neatly tucked away in an article entitled "Doctrine in a Vacuum" rests the other term for the legal imagination: *ingenium*, or "the power to make something new."[22] Historically, *ingenium* can be traced back to Italian humanist thought, though it was seemingly forgotten when the schools of thought of rationalism and empiricism took over. One last stand was Giambattista Vico (1668-1744), a professor of rhetoric and law in Naples, who called for a return to an all-round education, comparable to the *enkuklios paideia* of ancient Greece and the *artes liberales* developed since the eleventh century at European universities, which focused on the reflective qualities of students.[23] Vico's term for the (legal) imagination is *fantasia*. Highly critical of the Cartesian analytical methodology and its focus on the natural sciences while disregarding ethics,[24] Vico advocated a

17. Lorna Hutson, *"Lively Evidence": Legal Inquiry and the Evidentia of Shakespeare Drama*, in SHAKESPEARE AND THE LAW. A CONVERSATION AMONG DISCIPLINES AND PROFESSIONS, 72, 88-90 (Bradin Cormack et al. eds., 2013).

18. PAUL RICOEUR, THE RULE OF METAPHOR, MULTI-DISCIPLINARY STUDIES IN THE CREATION OF MEANING IN LANGUAGE 7 (Robert Czerny, Kathleen Mclaughlin & John Costello eds., 1986) (1975).

19. Greta Olson, *On Narrating and Troping the Law:The Conjoined Use of Narrative and Metaphor in Legal Discourse, in* NARRATIVE AND METAPHOR IN THE LAW 19, 19 (Michael Hanne and Robert Weisberg eds., 2018).

20. For the history of ideas of the return to rhetoric, *see* STEPHEN TOULMIN, COSMOPOLIS, THE HIDDEN AGENDA OF MODERNITY (1990).

21. White, *supra* note 9, at sec. 4.2.

22. James Boyd White, *Doctrine in a Vacuum: Reflections On What A Law School Ought (And Ought Not) To Be*, 36 J. LEGAL EDUC. 155, 163 (1986).

23. The *artes liberales* formed the basis for secular studies as distinguished from theology: the *trivium* (grammar, rhetoric and dialectic) and the *quadrivium* (arithmetic, geometry, astronomy and musicology).

24. *Cf.* GIAMBATTISTO VICO, ON THE STUDY METHODS OF OUR TIME, DE NOSTRI TEMPORIS STUDIORUM RATIONE (Ernesto Gianturco trans., 1990). Vico's piece is an inaugural oration delivered at the start of the academic year in Naples in 1708. As a Professor of Latin Eloquence, Vico's duty was to help students achieve the necessary qualifications for the practice of law. Owen Barfield, referring to

contextualized approach to law and legal education focused on *inventio* and *ingenium*, literally 'in-sight'.[25] *Ingenium* is thus a combination of wit and acute awareness of the situation. The jurist personifies the Vichean man because, ideally, she combines knowledge of the legal rules with ingenuity to see what matters in the case before her.

Thus, *ingenium* resembles what Aristotle called *phronèsis* , or practical knowledge, aimed at knowing *how* one should proceed (in contradistinction to *épistèmè*, or theoretical knowledge, aimed at knowing *that* X is the case). *Phronèsis* requires the ability to enter imaginatively into any given situation; it is the disposition of *prudentia* which takes its deliberations from the circumstances of things.[26] Knowledge in practical matters such as law is never general, but is always context-dependent and provisional. *Phronèsis* can therefore not be taught in the traditional sense. Practitioners can only acquire it through experience, by gaining insight into the ways in which fields of law develop, and by augmenting their ability to apply such insight to new situations. Furthermore, *phronèsis* is not simply a matter of combining knowledge with technique − it is also specifically a matter of character and morality, a combination of epistemology and ethics. This speaks for a continued bond with the humanities. Its methodology is not deductive and its main characteristic is deliberation (*bouleusis*), with oneself and with others in legal surroundings.[27] Therefore, *phronèsis* does not aim at arriving at universal truths, but rather thrives on dialectical reasoning, advancing arguments for and against a specific premise, and weighing or balancing them.

Back to wit, then, but differently. In Chapter 6 of *The Legal Imagination*, "The Imagination of the Lawyer," White raises the question whether the judge can really be a poet, citing Sir Philip Sidney's claim in *The Defense of Poetrie* (1595) that the poet couples the general notion with the particular example.[28] The metaphor of the judge as poet has been controversial from the start. It brings us to the heart of the debate on the nature of legal and/or judicial interpretation and application, and, with it, to (presumed)

Vico, lamented that the study of jurisprudence in the humanistic sense used to be "an essential element in a liberal education" that "has long since been abandoned." Owen Barfield, *Poetic Diction and Legal Fiction*, *in* THE REDISCOVERY OF MEANING AND OTHER ESSAYS 44, 63 (1977).

25. THE NEW SCIENCE OF GIAMBATTISTA VICO (Thomas Goddard Bergin and Max H. Fisch, trans. and eds.,1986).

26. This is the *προσ τον καίρον* ("pros ton kairon" or, in English, "according to the circumstances"); *see* ARISTOTLE, THE NICOMACHEAN ETHICS 76 (H. Rackman trans., J. Henderson ed., 2003). For an extensive treatment of *phronèsis*, see JEANNE GAAKEER, JUDGING FROM EXPERIENCE. LAW, PRAXIS, HUMANITIES (2019).

27. Aristotle also connects *phronèsis* as Prudence in the general sense to "prudence as regards the state" and Prudence as specifically important for the faculty of judging equitably. *See* ARISTOTLE, *supra* note 26, at 347.

28. WHITE, *supra* note 8, at 761-762; James Boyd White, *Justice in Tension: An Expression of Law and the Legal Mind*, 9 NO FOUNDATIONS 1, 13 (2012) (https://www.nofoundations.com/NoFo9WHITE.html).

differences between common law and civil law reasoning. Richard Weisberg has taken White to task for his connected claim that "the facts determine what law is relevant; the law, what facts are relevant: the life of legal thought is a motion back and forth between them, a constant translation of one sort of proposition into another."[29] In contrast, Weisberg asks whether the role of the judge "under this peculiar logic" is indeed one of "Great Wit."[30] To Weisberg, "Wit . . . has absolutely no place in this phenomenon of judgment unless there simply are no absolute standards on which to judge" because "ideally the judge's function is to apply impartially the 'general notion' that *precedes* any particular case, and is called 'justice,' to every 'particular example' that comes before him, regardless of the esthetic result of the decision."[31] However, it is not the aesthetic result that White emphasizes, but the process. The idea of a *iudex deductor* who applies the rule to the case 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 legal norms to easily stated facts. This idea is incorrect. The hermeneutic movement is always dialectic, a going hither and thither of fact and norm by the mind's eye, so to speak, as coined by the German jurist Karl Engisch in the phrase the *Hin-und Herwandern des Blickes*.[32]

Thus, the concomitant conception about civil law legal reasoning – which holds that it is supposedly a mere syllogistic, deductive rule application, moving from abstract, codified legal norms to the decision in a specific case, all in contradistinction to common law reasoning – is also incorrect. The expectation raised by such a conception of rule application seems to be that of an unproblematic existence and use of abstract norms. That notion is oversimplified, to say the least. Furthermore, it creates a false opposition between common law and civil law thought on the act of judging – adjudication being the most prominent feature of the intertwinement of theory and practice. Namely, it proclaims for civil law jurisdictions a formalist hermeneutics. that is to say, one of "outside-in" legal reasoning – as Ronald Dworkin called it – from the abstract to the concrete, rather than "inside-out" reasoning, with a focus on the judicial effort of connecting the facts of the case to the legal norms.[33] However, in no jurisdiction are the rules self-explanatory and/or self-applying. The practicing jurist's methodology is the combined effort of the perception and assessment of the facts against the background of what legal norm means. This includes the awareness that the whole process is governed by the dynamics of the

29. WHITE, *supra* note 8, at 820.
30. Weisberg, *supra* note 8, at 329, 334.
31. *Id.* at 334-335.
32. KARL ENGISCH, LOGISCHE STUDIEN ZUR GESETZANWENDUNG 15 (1943).
33. RONALD DWORKIN, JUSTICE IN ROBES 54 (2006).

interpretive frame that is itself subject to constant developments and challenges. Therefore, jurists should also bear in mind the influence of their own interpretive frameworks on both fact and norm, because as humans we cannot escape our hermeneutic situation of being culturally determined, professionally as well as personally. If anything, *The Legal Imagination* asks us to consider how this affects us and our decisions.

The deliberative aspect of *phronèsis* ties in neatly with the legal methodology of connecting the facts and the relevant norm, to this hermeneutic movement of the "back-and-forth." In *Oneself as Another*, Paul Ricoeur points this out when he discusses the ideas that we have about, for example, the good life or justice, in connection to the decision to be made in a concrete case.[34] Ricoeur's view on rule application in the situation of a criminal trial is consonant with it; he says, "the 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."[35] In his view, *phronèsis* as the creative process of the imagination is perceived as an essential component of actual judging, that is, when "the man of wise judgement determines at the same time the rule and the case, by grasping the situation in its singularity."[36] The good judge is a *phronimos* who combines attention to the circumstances and insight into the demands of a specific case with the theoretical knowledge that law suggests she should apply. She orients her deliberation at choosing the best of the available legal means in order to translate these into the appropriate action. She possesses "the aptitude for discerning the right rule, the *orthos logos*, in difficult situations requiring action."[37] What matters for the judge, therefore, is "to create a living whole."[38]

3. LAW AND NARRATIVE: ESTABLISHING THE FACTS OF THE CRIMINAL CASE

As Ricoeur suggests, the task of connecting the facts and the rule depends on the (judicial) capacity to gauge the narratives of the (presumed) events as presented to her by others, all in the competition of the narratives in the trial. In *The Legal Imagination*, to reiterate, this process is called "the central act of the legal mind," or the "conversion of the raw material of life . . . into a story that will claim to tell the truth in legal terms."[39] And, as

34. PAUL RICOEUR, ONESELF AS ANOTHER 179 (David Pellauer trans., 1992).

35. PAUL RICOEUR, REFLECTIONS ON THE JUST 55-56 (David Pellauer trans., 2007).

36. RICOEUR, *supra* note 34, at 175.

37. RICOEUR, *supra* note 35, at 54.

38. White, *supra* note 28, at 15: "Think of the way a poem is built: it is a structure of meaning in which many dimensions, each one built on tensions of its own – image, story, meter, rhyme, sentence shape, and so on – interact to create a living whole. Legal work is like that."

39. WHITE, *supra* note 8, at 859. *Cf.* WHITE, HERACLES' BOW, *supra* note 12, at 169: "One fundamental characteristic of human life is that we all tell stories, . . . The need to tell one's story so that

Peter Brooks claims, "if we are to believe the story we are hearing, we need to be convinced of the good faith and reliability of the narrator."[40] This pertains to all narratives in the criminal trial, from the police record to the appellate brief. Application of the rule is therefore always intertwined with mimesis as re-presentation of human actions, of events and happenings deemed legally relevant. The question, then, is whether what is re-presented to the judge is "real" in the sense of probable against the background of the evidence presented. Probability, not absolute truth, is the threshold test. I abstract from the distinction between the adversarial and inquisitorial trial (as I see it, the adversarial system is less symmetrical than the term suggests; the current inquisitorial trial offers more equality of arms than before), and between the jury trial and trial by a panel of three judges here, although most depends on whether or not one is given access to the whole file. Furthermore, I am aware of procedural differences between jurisdictions, such as whether or not the appellate court is a second trier of fact. What matters to me in any system, is that "once a narrative reaches the court room, considerable narrativization has already happened" and, equally important, that legal arguments are being made through narratives and that includes assessments of evidence. [41] That is why jurists, and judges more specifically, need insight into narration as the very act of relating what happened – how it is done and under what circumstances – and understanding of the difference between story in a legal setting as the facts and/or the sequence of events, and discourse as the form of the telling.[42] This is not a trivial matter, for, as the great sleuth Sherlock Holmes cautioned us, "there is nothing more deceptive than an obvious fact."[43]

Narrativization already starts in the police record. The form of a suspect's first interrogations therefore matters a great deal. Is it a question-and-answer or free indirect speech? Was there pressure or trickery on the part of the interrogators? Once there is a written criminal charge, it guides further

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it will make sense to oneself and to 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."

40. PETER BROOKS, SEDUCED BY STORY. THE USE AND ABUSE OF NARRATIVE 27 (2022).

41. Ralph Grunewald, *Forces Beyond Linear Reasoning: The Evidentiary Power of Narrative in Wrongful Conviction Cases*, *in* NARRATIVES IN THE CRIMINAL PROCESS 189, 200 (Frode H. Pedersen et al. eds., 2021); Greta Olson, *Futures of Law and Literature: A Preliminary Overview from a Culturalist Perspective*, *in* RECHT UND LITERATUR IN ZWISCHENRAUM/LAW AND LITERATURE IN-BETWEEN 37, 44 (Christian Hiebaum et al. eds., 2015): narrativization is how "a text is processed in someone's mind in response to its narrativity, or story-like qualities."

42. Olson, *supra* note 41, at 44. "Discourse, or the form of the telling, is typically used in contradistinction to 'story' (what happened)." Cf., Frode H. Pedersen, *THE RHETORICAL USE OF PLOT-CONSTRUCTION IN JUDGMENTS*, *IN ERZÄHLEN UND RECHT/NARRATIVE AND LAW* 151, 152 (Monika Fludernik and Frank L. Schäfer eds., 2022): "Story . . . the chronologically ordered sequence of events, which is, in factual stories, selected from the raw material of experience. . . . Discourse is used to refer to the verbal presentation of the story, in which events may be referred to independently from their chronological order."

43. Arthur Conan Doyle, *The Boscombe Valley Mystery*, PAGE BY PAGE BOOKS (https://www.pagebypagebooks.com/Arthur_Conan_Doyle/The_Adventures_of_Sherlock_Holmes/ADVENTURE_IV_THE_BOSCOMBE_VALLEY_MYSTERY_p3.html).

interrogations, and the police may then lend the defendant his words to make his narrative in conformity with the charge. Details of great importance to the defendant may be deemed irrelevant to the police. Elsewhere I have called this process a narratological bow tie: the criminal charge is its first knot, bringing unity to the diversity of the narratives in the preliminary stage. During the trial stage, a new diversity takes place in the competition of the narratives of the defense and the prosecutor. The judicial decision is the second knot where these are evaluated. The whole process is replicated in the appellate stage, depending on jurisdiction.[44]

During the trial, facts are being narrated to form a convincing story. Narratives may persuade even if the evidence points into a different direction. Therefore, the difference between form and content, between the "how" and the "what," matters. What is more, narratives in courts of law are always co-governed by legal procedure – who gets to say what and when?[45] That is also why another lesson of *The Legal Imagination* is that we need to be aware of the fundamental difference between the narrative and the analytical forces in law, between "the mind that tells a story" and "the mind that gives reason," for "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."[46] One day in a court of law will show you that these are always in tension, until the very moment when the judge (and that includes panels of judges) in chambers decides about the outcome of the trial and writes the verdict. Like the omniscient narrator in a novel, in the split-second of deciding the case, the judge is both an external focalizer who "knows" the represented realities apparent in the narrative of others, and, from the institutional perspective, an internal focalizer who is part of the process and who cannot "know" everything about them precisely because of the filtering that takes place from the moment a suspect is arrested. To use a metaphor, the judge is like the outside doll in a stack of nested dolls: she suppresses the others who have become part of her narrative and replaces them with her own narrative, the verdict. Therefore, as Paul Ricoeur urges us keep before our mind's eye, to tell a story is already to interpret and explain.[47]

This is also to say that the way in which the judge narrates the facts is indicative of the outcome. In other words, to narrate is both to choose and

44. *Cf.* Jeanne Gaakeer, *The Criminal Charge: A Narratological Bow Tie?*, *in* ERZÄHLEN UND RECHT/NARRATIVE AND LAW, *supra* note 42, at 129.

45. Peter Brooks, *The Law as Narrative and Rhetoric*, *in* LAW'S STORIES. NARRATIVE AND RHETORIC IN THE LAW 14, 19 (Peter Brooks and Paul Gewirtz eds., 1996): "Against what may often appear as the fragmented, contradictious, murky unfolding of narrative in the trial courtroom stand formulas by which the law attempts to impose form and rule on stories. The judge must know and enforce these rules."

46. WHITE, *supra* note 8, at 859 (my italics).

47. 1 PAUL RICOEUR, TIME AND NARRATIVE 178 (Kathleen Blamey and David Pellauer trans., 1984).

to decide. Sequences of events are therefore created by the narrative rather than found.[48] Judges construct meaning in law by reconstructing what happened and giving it a place in the plot of their own narratives as they read for the plots in the narratives of others; therefore, the meaning of "facts" co-depends on "their being placed in the general framework of the entire sequence, the plot."[49] Here, too, the psychological errors of confirmation bias and belief perseverance may negatively affect the judicial narrative, especially when the case seems open-and-shut or when it is so very old that everybody wants it to be settled quickly. Scripts and schemas may unconsciously influence decision makers, as may stock stories we all have in our minds about how things usually happen, such as how a robbery usually takes place. Legal concepts, too, are miniature stock stories. And parties may deliberately try to work on judicial sweet spots. Taken together, this is to alert us to the fact that our choices may be unconsidered. When all of this happens "the empire of force" is at work to the extent that we trivialize the experience of others by our "habits of the mind and imagination."[50]

4. AFTERWORD

While the discipline of narratology is often said to have started in 1966 with Roland Barthes's "Introduction to the Structural Analysis of Narratives"[51] and/or in 1969 when Tzvetan Todorov coined the term *narratologie* (of which narratology is the English translation),[52] it took a while and a lot of terminological confusion and ideological debate before narratology gained traction in law,[53] not least because of the indiscriminate use of story and narrative by legal scholars and because the lack of theorizing in the initial phase.[54] And while Peter Brooks had already asked whether law needs a narratology, he recently reiterated concern, warning "I don't think that many judges or other legal actors recognize that their choice

48. *Cf.* Anthony G. Amsterdam & Jerome S. Bruner, MINDING THE LAW 124-7 (2000).

49. *Cf.* PETER BROOKS, READING FOR THE PLOT (1984); FLORA DI DONATO, THE ANALYSIS OF LEGAL CASES, A NARRATIVE APPROACH 26 (2020).

50. WHITE, *supra* note 11, at 5; Jeanne Gaakeer, *Interview with James Boyd White*, 105 MICH. L. REV. 1403, 1405 (2007).

51. Roland Barthes, *Introduction to the Structural Analysis of Narratives, in* A BARTHES READER, (Susan Sontag ed., Richard Howard trans., 1982).

52. TZVETAN TODOROV, GRAMMAIRE DU DECAMERON (1969).

53. *Cf.* Patrick Colm Hogan, *Fictive Tales, Real Lives: Problems with Reading Law as Literature, in* UN-DISCIPLINING LITERATURE. LITERATURE, LAW & CULTURE 271, 277-8 (Kostas Myrsiades and Linda Myrsiades eds., 1999): "One of the most common themes in law and literature is the putative 'narrative construction' of legal meaning. But theorists who put forth this claim rarely define the term 'narrative' in such a way as to prevent the claim from being vacuous."

54. *Cf.* Martin Kreiswirth, *The Narrative Turn in the Humanities, in* ROUTLEDGE ENCYCLOPEDIA OF NARRATIVE THEORY, 377 (David Herman et al. eds., 2008). For an overview of the terminological debate between narratologists, see Jeanne Gaakeer, *Futures of Law and Literature: a Jurist's Perspective* in RECHT UND LITERATUR, *supra* note 41, at 71.

of narrative may shape their selection and alignment of the facts on the ground."[55] That is also my experience and it is corroborated by others. In Germany, for example, "the comparative reticence of German legal studies towards narratology" combined with the fact that legal professionals in Germany do not have a basic training in the workings of narrative, makes them susceptible to narrative naivety.[56] In many civil law countries it is the case that prospective judges without other practical training (for example, as an advocate) see their first file only when training and taking the exam to enter the judiciary. Furthermore, formalist hermeneutics are still with us. The U.S. American Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization* comes to mind as an example of a disregard of the insights contemporary legal hermeneutics provides, such that the text as written in the past no longer exists but has become part of a legal tradition that connects it to the present.[57] When a text is written down, it therefore removes itself from the original situation of its genesis; in other words, "distanciation" takes place and strict originalism becomes obsolete.[58] In all, the lessons of *The Legal Imagination* to respond to any text with intellectual generosity by engaging in creative dialogue with oneself and others are as valid and valuable today as they were in 1973.

55. Peter Brooks, *Narrative Transactions-Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1 (2006); BROOKS, *supra* note 40, at 127-128.

56. Ruth Blufarb, *Law as Narrative und das deutsche Recht – Chancen und Grenzen, in* ERZÄHLEN UND RECHT/NARRATIVE AND LAW, *supra* note 41, at 36.

57. Dobbs v. Jackson Women's Health, 597 U.S. 215 (2022).

58. *Cf.* PAUL RICOEUR, HERMENEUTICS AND THE HUMAN SCIENCES, 131-44 (John B. Thomson ed., 1981).