The Criminal Charge: A Narratological Bow Tie?

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> No practice of law takes place in the absence of stories.
> (Elkins 2019, 5)

1. Telling a Better Story

The rise of narrative jurisprudence and, before it, the "turn to interpretation" in law have traditionally been contrasted with the idea of objectivity in law cherished in legal positivism (Elkins 1985,134–135). In the second half of the twentieth century, legal and literary scholarship refuted the kindred notion that language is a neutral vehicle and argued that the articulation of reality by linguistic means presupposes a process of contextual, selective interpretation. This contextual approach to interpretation is not without its pitfalls. From an epistemological point of view, there are some narratological issues to consider.

Firstly, the judge in her function as a reader-narrator describes not only the world as she finds it, in the file and the narratives of those involved, and/but this is also the world on which she will pronounce judgment. Secondly, law, and especially criminal law, constitutes its own referential world in that the criminal charge offers a legal translation of a pre-legal reality of events and actions. Interdisciplinary, narratological research is thus faced with the question whether or not these issues imply a return to the long obsolete descriptive approach to language. This pivotal problem was pointed out already in the 1980s by the criminal law professor 't Hart (1983).

The first issue highlights why law and legal studies belong to the humanities. The second issue urges us to consider the problem of referentiality from the perspective of legal narratology, and to do so more carefully than has been done to date. It is along these lines that I develop my argument in what follows – to offer yet another interdisciplinary intersection between law and the humanities and not to provide an avenue of escape from legal theory and doctrine.

The written criminal charge provides guidelines for the various narratives that make up a criminal case. The defendant's story as well as the narratives produced by the legal professionals involved are thus framed: "trials always function through a framework of storytelling" (Ferguson 1996, 84–85). The metaphor in the title of this article, the 'narratological bow tie', suggests that procedures of the law are subject to a process of knotting and tying in a to-and-fro movement. Firstly, legal storytelling is a progress from diversity to

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unity. The stories in the pre-trial stage, namely those by the defendant, the victim, the witness, and the police on 'what happened', come to form a unity on account of the criminal charge with its normative, textual specification of what constitutes a criminal offence. There is therefore a movement from the left side of the bow tie to the 'knot' in the middle. Then, secondly, at the trial stage, there is a reverse shift from the unity of the 'knot' (which corresponds to the charge) to diversity. Based on the criminal charge, a multiplicity of narratives and arguments is brought forward in court, and these constitute the right side of the (first) bow tie. Finally, in the judicial decision, there is once again a return to unity, if only for the moment, figured in the 'knot' of yet another, the second, bow tie. This process, although not an infinite regress (the proceedings must come to an end in the foreseeable future: *lites finiri oportet* 'legal disputes must come to an end') is repeated in appeal and cassation and, in some cases, before a supranational court. Because the plot thickens in the hierarchy of courts, legal narratology matters (Chestek 2008).

Depending on the legal system and the jurisdiction, the wording of the criminal charge may or may not undergo changes during the pre-trial and the trial stages, in the lower court as much as in the appeal. In the Netherlands, for example, the public prosecutor is *dominus litis*, i.e. the 'master of the dispute' who decides to bring a charge and who decides on the text of the charge and on any amendment deemed necessary during the trial stage. If such an amendment is brought forward, the first question that the judge asks herself is: does this affect the scope and content of 'the fact' as delineated in the original charge? If a charge of murder is amended with the subsidiary charge of manslaughter, this is certainly not the case because manslaughter is the lesser charge. Yet if a charge of 'fencing,' i.e. of intentionally handling illegally obtained goods, is amended to a theft, the judge might very well answer in the affirmative. Why? Because the human act behind the two charges is different, and so are the actual punitive consequences. Even if the statutory norm provides a comparable punishment, the protected societal interests encapsulated in the statutory norm differ. As a result, the punishment meted out for theft will usually be higher, at least in the Netherlands. Such an amendment will of course meet with resistance from the defense. Contrariwise, if there is something wrong with the final wording of the charge (e.g. when the name of the city in which the crime presumedly took place is incorrect) nothing can be done by the judge if the prosecutor fails to amend the charge during trial, and she must acquit. The same applies when the public prosecutor makes a mistake as far as the choice of the offence or the form of participation are concerned (e.g. introducing the role of joint author where there is evidence only for the role of accomplice).

In other European countries, the judge is allowed more freedom. Evidently, if more changes can be made to the text of the charge during the proceedings, then this poses more problems for the defense. If the defendant has told her

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story to the police in her own words, truthfully from her perspective, then this poses the question whether or not it fulfills its function, i.e. does it work to her advantage when viewed against the charge? Can she still change her story when faced with a more differentiated charge? The situations of storytelling differ at various stages of the proceedings as does perhaps the way in which the chronology of events is given its narrative form. At the end of the day, the judge must distinguish between events and human acts that can and such that cannot be regarded as legally relevant facts. For narratologists, these choices present a great challenge due to the concept of *mens rea*, the mental element of the defendant's intention to commit a crime, which is theorized differently in common law and civil law jurisdictions. The judge must also differentiate between narratives that are plausible in a legal context and those that are not, and between narratives to which a legal value may or may not be attributed.

Thus, the story of the judge as reader-narrator relies on her interpretation and evaluation of what others have told her. Certainly, her decisions in this respect have penal consequences. Success in this evaluative and interpretive process depends on *phronèsis*, judicial practical wisdom (Gaakeer 2019). Such wisdom includes a certain narrative knowledge or narrative sensitivity that enables the judge to conduct an assessment of competing narrative truths (which may also be historical truths), the result of which is conviction in both senses of the word.

In what follows, I address issues concerning narrative and norm in the pretrial stage (section two). In section three, I take into consideration that the criminal charge is structured differently in various European legal systems. I do so in order to ask what consequences these differences may have for the plethora of narratives in the discursive practice of the criminal case. Ultimately, the aim of this essay is to acknowledge these narratives' relevance for legal narratology.[1] I am not trying to out-argue the expert narratologists in the field, but I will at least try, from the perspective of legal practice, to out-narrate them to some extent (Caputo 2018, 177).

[1] Two caveats are in order here. I am aware of the differences between common law and civil law jurisdictions. The groundwork that I aim to offer here is also important for criminal law systems in which, for example, plea bargaining is an option; any narrative mistake in the defendant's initial story can have grave negative consequences later on. Secondly, I am also aware of the (ideological distinctions with respect to the) terminological differences in the field of narratology and its main concepts, such as narrativity, story and plot. Compare Gaakeer (2015).

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2. Beginning

2.1. 'Know your Bloody Facts First'

How can anyone "know their bloody facts first" (Heilbron 2019, 2)? Allow me to start with an example. § 261[2] of the Dutch *Code of Criminal Procedure* refers to the concept of 'fact' as the statement of the underlying substantive offense contained in the accusation, i.e. the charge. The charge should also contain the circumstances, i.e. the secondary facts by means of which the offense may be inferred, such as time, place and manner of execution (*modus operandi*). Together they serve to delineate what the defense needs to prepare against. In court, facts are only *assumed* to have happened, at least for the moment, due to the requirement of judicial impartiality and suspension of judgment. Paraphrasing Aristotle, we could say that the charge is the mimesis of the action, the (referential) construction of events and the reenactment of 'what happened.' But Aristotle (1999 [335 BC], 8, 1451a 16–18 (57)) also offers an important warning, namely: "Any entity has innumerable features, not all of which cohere into a unity; likewise, an individual performs many actions which yield no unitary action."

What, then, are actual facts when viewed against the abstract legal norm? How does the profile of a crime, i.e. the legislator's criminalization of specific human behavior and the legislator's' underlying reasons for doing so, impact on the distinction of what is and what is not a fact? This issue is especially acute given the risk of over-criminalization as a result of contemporary technological developments in artificial intelligence. Furthermore, what are actual facts when viewed from the perspective of the prosecutor's understanding of substantive criminal law and her reasons for charging a citizen with a specific, alleged act or activity? It is one thing to criminalize specific human behavior, but quite another to claim that criminal responsibility should be attributed to this specific individual. Any statement of facts is always already guided by the normative background of existing legal rules concepts and by case law. Both have a formative influence on the narratives of all parties involved in legal cases. There is no unmediated application of objective legal norms to the facts. It is the case itself that matters. As Esser (1964) put it, "Erst die Kasuistik teilt uns mit, was Rechtens ist" (288), i.e. it is the facts of the case that tell us what is legally the case. The movement between fact and norm is always dialectic. Speaking with Engisch (1963, 15), it is like the gaze which wanders to and fro ("Hin- und Herwandern des Blickes"). The written rule may well be the starting point for a debate or the basis for further argument and reasoning, but it is not the sole determinant of the outcome. As von Arnauld (2017, 320) points out, the

[2] In Dutch, these sections are called "articles."

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justification of "the reconstruction of the process of norm application through narratological means" is found in the case. However, jurists should bear in mind the influence of their own interpretive frameworks on both fact and norm. Both professionally and personally, we cannot escape our hermeneutic situation of being culturally and situationally determined.

Jurists are in need of guidance as far as the production and the reception of narratives is concerned. Firstly, they have to be made aware of the distinction between narrative in the sense of a story told (what narratologists call the *histoire*) and narrative as the manner in which a story is being transmitted so as to have a specific impact on its audience (*narration* and *discours*). In legal practice, this distinction is crucial. To employ Cardozo's image, legal professionals have to develop a linguistic antenna sensitive to peculiarities beyond the level of the signifier, because the form and content, the 'how' and the 'what' of a text, are interconnected (Cardozo 1925). In other words, and from a narratological perspective, jurists will benefit from learning to differentiate – consciously and conscientiously – between *story* or *what* is told, and *discourse* or *how* the story is told.

Secondly, legal professionals need to realize that 'story' comprises *both* events (either actions or happenings) *and* characters that themselves initiate actions or get involved in happenings, all in specific temporal and spatial settings. These distinctions are crucial in criminal law. For example, as noted above, for the presumption of innocence and that of *mens rea* one needs to ask: is an act committed in the knowledge that a specific result will or is almost certain to occur, i.e. is the actor aware of the foreseeable consequences of particular actions or circumstances? Or is the act the result of negligence, namely when someone knows about its possible consequences but does not sufficiently take account of them; or else is the action an act of deliberate recklessness? For the sake of illustration, let us examine a case of alleged reckless driving in Dutch law. The case concerned a collision between a Porsche and another car, resulting in the death of its five passengers. The conductor of the Porsche had been driving at double the maximum speed. The Dutch Supreme Court judged the behavior of the Porsche driver to be 'extremely negligent' in accordance with Dutch law but not 'intentional,' i.e. consciously; it was argued that he had not consciously accepted the possible consequence of being killed himself.[3] The concept of recklessness is the subject of ongoing debate, not least because societal views on this issue strongly differ from judicial decisions. When is an occurrence an act (i.e. a deliberate action) and when is it merely an event? The answers co-depend on the valuation of the facts, the circumstances and our

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[3] Dutch Supreme Court 15 October 1996, ECLI:NL:HR:1996: ZD0139. For European decisions that have a European Case Law Identifier (ECLI), see the European e-justice portal <e-justice.europa.eu>. For a German example, see the Bundesgerichtshof, 18 June 2020, BGH-4StR 482/19.

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professional perceptions which are influenced by our judicial training, culture, and background.

Thirdly, jurists should be aware of the manifold ways in which narratives are transmitted and pay careful attention to chronology, narrative voice, narratorial presence as well as point of view. The 'how' matters also in the sense that it can render a narrative credible. Especially in jury trials, where the persuasiveness of the story is often prioritized to the detriment of an empirical verification of evidence, poetic effect may win the case. The role of a defense lawyer in common law is to refute the prosecution's claims to narrativity, or rather to puncture their narrative:

> [...] a jury will only convict if the prosecution case exhibits some Aristotelian coherence and, rather than offer a counternarrative, the defense lawyer must convince the jury that the crime may be the result of random or inexplicable action or circumstance – that the true facts are either confusing or aesthetically disappointing. (Weisberg 1996, 69)

Again, narrative matters.

2.2. Voice and Text: Determining or Being Determined by the Narrative?

When it comes to ascertaining the facts, the pre-trial stage needs to be differentiated from the trial stage of the proceedings. In the pre-trial stage of police interrogations, narratological research could focus on the defendant's narrative voice, on the way in which the narrative construction or constitution of the facts takes place, temporally and spatially, and on the narrative coherence of the world thus constructed, all viewed in the light of the (preliminary) charge. A word of caution is here in order. Perceptions of the facts may deceive. If a suspect is caught red-handed, what we think we perceive may not be what actually happened. Well-known scenarios and scripts regarding suspicious demeanor may lead to errors in interpreting the suspect's initial story, and subsequently to a specific charge that may be unwarranted. When that happens, how can the suspect now turned defendant be successful when offering a different but equally plausible explanation of events later in the proceedings? Our natural tendency to structure reality by means of narratives may prove to be a trap, since we tend to apply set stories as set rules.

Furthermore, initial perceptions can guide the rest of the investigation, e.g. the interrogation of witnesses and forensic investigations at the crime scene. When, on the other hand, information about the suspect is the result of prolonged investigation (e.g. in drug-trafficking cases), it is tempting to confront the defendant with only those facts and/or allegations that confirm the prosecutor's reason to start investigating the case in the first place. Because of the bond between facticity and normativity, this issue is of crucial importance.

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The following example will help to clarify these points. Recent research on false allegations of rape suggests that the prototypical story of women filing a false complaint does not include elements such as kissing – kissing being an aspect connected to consensual sex – nor does it mention that the (fabricated) rapist apologized or was friendly afterwards. By contrast, in presumably true stories of rape victims, kissing often occurs and the rapist does indeed often apologize and is frequently friendly after the act. Yet juries tend to believe that an allegation of rape is false when the alleged rape was preceded by a kiss (Zutter et al. 2017, 3–4, 7). This example goes to show that we need to become aware of our prejudices concerning typical behavior that co-occurs with a specific crime and must avoid them. A crime may imply a narrative that is totally different from what we typically expect. In other words, our "poetic needs" may deceive us, as may our "cognitive baggage" and the coded cultural meanings aligned with it (Berns 2018, 201).

As Alber points out, "[w]hen recipients narrativize texts (including performances), they deal with the question of 'who did what to and with whom, when, where, why, and in what fashion' in the represented world" (2017, 363). This question, which originates with Quintilian, is pivotal also in the field of legal narratology (Quintilian 2001, L, V, 10, § 20). Many interrogations do not follow the format of these rather open questions but instead ask the defendant to confirm the events that the investigation process has produced as the most likely story. Even more frequently, the records do not provide the exact questions asked by the police. If the record is presented as a continuous first-person narrative, or if it consists only of selected legally relevant passages, although the narrative is presented as a unified whole, then the judge-qua-reader cannot recognize any irregularities. For instance, she will not be able to determine whether the story suggests a chronology or linearity of events where in fact there was none, or whether parts of the defendant's account were accidentally or deliberately left out and, if so, for what reasons. If there is no audio(-visual) recording, the judge cannot ascertain these omissions.

Human narratives often deviate from a chronological ordering of events, in legal surroundings as much as anywhere else. Moreover, narratorial presence is an issue to consider. There can be (unmarked) shifts in narratorial voice, the narrator's presence as an actor in the story may be more or less recognizable, and extradiegetic narrators may suddenly take over. This is the case, for example, when a narrative closely associates hearsay evidence with the narrator's own knowledge. Jurists should therefore pay careful attention to two aspects that narratologists call narrative level and narrative person. On the one hand, they should consider the level at which the narrating occurs, i.e. whether the narrator is situated outside or inside the story world (extradiegetic vs. intradiegetic narration). On the other hand, the relationship between the narrator and the story must be taken into account, i.e. whether the narrator is also a character in

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the story or not. Narratologically, this corresponds to the distinction between homodiegetic narration (the 'I' or narrating self relates his/her own story) and heterodiegetic narration (the narrator relates what others have said and done) (Kearns 1999, 101).

I suggest that, in criminal law, the (extradiegetic-heterodiegetic) omniscient third-person narrator of a criminal record is especially problematic when it comes to fact-finding: how are we to verify the sources of information presented in the narrative? What action or intention is attributed to whom? What role did the narrated person have – accomplice? witness-bystander? victim? expert witness? Equally problematic is the situation in which the suspect is the homodiegetic narrator and the reader cannot scrutinize the question-and-answer structure behind the interrogation, a structure that is decided by the interrogating police officer who, given her training and experience, may act under the influence of a similarity between the suspect's story and the prototypical story that is the codified legal norm.

The seminal work of Komter (2019) on Dutch criminal law suggests that the long-dominant method of interrogation which produced a linear narrative in the style of a monologue is now more and more being replaced by a more balanced criminal record in a question-and-answer style or in the form of a "recontextualised monologue," in which the interrogating police officer's statements concerning her knowledge of the case are recorded alongside the suspect's comments (Komter 2019). However, this does not mean that the criminal record is an actual transcript of what has been said during the interrogation. Indeed, there may be huge discrepancies between story time and discourse time. Komter points out several examples in which utterances recorded in the transcript are much more formal or complex than could be expected from the suspect in question (and which do not agree with what the suspect actually said, as the audio-recording proves). Furthermore, there are also examples of narratives in which details are related in such a manner that they indicate a problem of referentiality, i.e. when they move into the direction of the constitutive elements of the criminal charge. Komter's work has been corroborated by further research which shows that only 19 to 21 percent of what the suspect says during an interrogation is recorded in the form of a transcription. This includes the suspect's answers to questions as well as the narrative that results from "investigative interviewing," a form of interrogation that allows her to tell her story in her own words (Malsch et al. 2015, 11).

Judges need to assess to what extent the written reports adequately 're'-present the characters' alleged actions and the events as they actually occurred. To do so, the quality of the police work is important because it influences how we read for the plot in the written files. Judges also need to realize that it is a fiction to think that one can visually perceive whether the suspect/defendant is lying. Prudence is required when interpreting body language and/or perceived

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unease and nervousness. Such non-verbal behavior is not necessarily a sign of lying. The only objective indications of lying are evasive answers to direct questions (Malsch et al. 2018). In other words, what I want to point out is that the requirements of the statutory rule prove problematic. The more specific the statutory norm is, i.e. when it requires qualificative elements such as "constitutive events" that "are necessary for the story to be the story it is" (Abbott 2021, 22), the greater the risk of referentiality.

Another complication that narratological research on suspects' or defendants' statements has not yet taken into consideration is the following: in the Netherlands more than 250.000 people have an IQ lower than 70 and 2.5 million people have an IQ between 70 and 85. These people are cognitively impaired to the extent that their linguistic ability as well as their understanding of space and time are often severely reduced. It seems reasonable to assume that the numbers are comparable in other countries. Since it is precisely this group of people that is proportionally overrepresented among suspects/defendants, this factor likewise impacts the narratives produced in interrogation. Moreover, we have not even taken into consideration the effect of false sympathy, trickery, or pressure, either real or perceived, during interrogation. Every police interrogation is a stressful situation and not every suspect is a repeat player (Malsch & de Boer 2019). Finally, the use of visual material such as photos taken of the victim or camera footage of the crime scene may also affect the narrative (Verhoeven et al. 2020).

3. *Middle: The Knotty Relationship between Norms and Narratives*

3.1. Seeing the One as the Other

The preliminary stage with its narratological diversity comes to an end when the writ of summons is issued against the defendant. It contains the charge that guides the genesis of narratives and decisions in the trial stage. Its defining unity, the first 'knot' of the (first) bow tie, brings the alleged crime into focus. At the preliminary stage, the prosecutor could still opt for dismissal of the case. Once the trial is under way, this is no longer possible; should the prosecutor have second thoughts about the evidence, she can only ask for acquittal. Thus, the prosecutor carries a double burden. As far as the wording of the definitive charge is concerned, she must make the correct legal choice. At the same time, prosecution is an ethical decision because the presumption of innocence requires that no citizen be dragged into criminal proceedings without good reason.

During the trial stage, the pivotal question is the following: what does the allegation (considered as a text) mean when viewed from the perspective of

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criminal law? This leads to several follow-up questions. Thus: does this perspective increase the risk of a semantic collapse between accusation and guilt, as is the case in Kafka's "In the Penal Colony," where facts and norms literally fuse on the convict's back? In other words, is there the risk that the German concept of "Sachverhalte," i.e. the facts and circumstances, will all too easily be qualified as "Fälle von Tatbeständen," i.e. elements of the (codified) offence (Hassemer 1968, 11–12)? The trained practitioner is faced with two tasks. Firstly, she must recognize what is literally the case from a legal point of view and, secondly, when she then uncovers the decisive element(s) of the case, she must continue to be attentive to her potential professional bias. As Aristotle pointed out, when people contemplate resemblance, "they understand and infer what each element means, for instance 'this person is so and so'" (Aristotle 1999 [335 BC], 4, 1448b5 (39)). Put differently, when making sense of facts and circumstances, we are all influenced by organizing frameworks such as schemas and scripts (Sherwin 1994, 50). Thus, we should consider our frameworks carefully and acknowledge that they influence our notions of credibility and persuasiveness in actual legal decision-making. Another way of characterizing this conundrum is to point out that our bias which depends on schemas and scripts is somewhat similar to syllogistic reasoning. A script can prompt us to rearrange the facts in such a way as to make them fit into its framework; similarly, syllogistic reasoning may bend the truth by bringing the facts into conformity with the major premise. One might think of the Procrustean bed as an analogue. In short, this corresponds to the fallacy of referentiality at its worst.

Furthermore, there is the risk that stock story, deep frame and script on the one hand, and confirmation bias or belief perseverance, on the other, are mutually getting reinforced. After all, negative information is "weighted more heavily than positive information in forming impressions of others" (Chestek 2015, 50). Theoretically, the reciprocal relation of facts and norms is not deductive and syllogistic, but that does not mean, that in our practical legal lives, the tensions between fact and norm are easily resolved, textually or 'factually.' What is more, most of our European criminal codes were drawn up in the nineteenth century, yet we attribute meaning to their norms in the twenty-first century. That the interpretation of the laws and norms can only be performed contextually can be seen as both the beauty and the burden of legal decision-making, and this applies especially when the norm of criminal law contains terms that are not geared towards facticity.

Allow me to illuminate this problem by means of an example. § 310 of the Dutch *Criminal Code* runs as follows: "A person who removes any property belonging in whole or in part to another, with the object of unlawfully appropriating it, is guilty of theft and liable to a term of imprisonment of not more

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than four years or a fine of the fourth category."[4] The word "property" in the statutory norm needs factual specification in the criminal charge because the defendant needs to be informed what exactly it is that the prosecutor claims she has stolen; otherwise, she cannot defend herself. Did she break into a house and steal one plastic watch or five gold watches and three silver bracelets? The Dutch Supreme Court decided that the term "property" was factual enough if the written charge was unambiguous as to the nature of the stolen property. However, the term "an image of a sexual act" in § 240b of the Dutch *Criminal Code* on child pornography was not considered to be unambigious.[5] In analogy with societal views on the concepts of recklessness and negligence, other norms may likewise suffer from what Schroth (1971, 109) calls stereotypical terminology. An example of this is the obsolescent German term *Unzucht* for illicit sexual acts; this lexeme does not only have a negative connotation, but for many people commonly evokes a strong evaluative affect of censure and repugnance that may influence the decision-making process.

From a narratological perspective, it should be noted that in Germany, other than in the Netherlands, the writ of summons consists of the "abstrakte Anklage," the criminal offence in terms of the codified norm, and the "konkrete Anklagesatz," the narrative description of 'what happened' [6] When it comes to the qualification of the committed offence, the German judge is thus less constrained by the codified norm than her Dutch colleague. If the discussion in court of 'what happened' permits it, she can requalify behavior that is termed theft in the charge differently, for example as "handling illegally obtained goods." However, if such new qualification were to entail the inclusion of aggravating circumstances and hence an increase in the penalty should the defendant be found guilty, then the judge must give the defense the opportunity to respond (Stevens et al. 2017, 104–105). This can lead to a deferment of the trial. In Belgium, too, the judge can modify the constitutive elements of the crime with which a defendant has been charged. When this is done, the same complex of facts and circumstances will lead to the application of a different paragraph in the *Criminal Code*. The Belgian criminal charge is called *saisine*; it refers to the scope of the case before the court as delineated by the prosecutor. This means that *autosaisine*, the extension of the charge by the judge, is prohibited. However, so long as the complex of facts remains the same, the Belgian

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[4] I quote from the English translation of the Dutch *Criminal Code* by Rayar (1997), and the European Judicial Training Network's (unofficial) translation available at http://www.ejtn.eu/PageFiles/6533/2014/20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf. Where modification was required due to recent changes to specific paragraphs, the translation is mine.

[5] Dutch Supreme Court 20 March 2018, ECLI:NL:HR2018:394; Dutch Supreme Court 24 June 2014, ECLI:NL:HR:2014:1497.

[6] For the comparative legal aspect, as far as the criminal charge is concerned, I draw on Stevens et al. (2017).

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judge can re-qualify the facts and convict the defendant following another paragraph of the *Criminal Code*. What is more, when this 'rabbit' emerges from the narratological 'top hat,' the judge can convict "sous sa plus haute expression pénale," i.e. impose the highest possible penalty (Stevens et al. 2017, 55–56).

Allow me to elaborate on this point by means of a comparison between the Dutch and German codified norms applied to aggravated forms of theft and their translations into the criminal charge. This comparison is worthwhile for a number of reasons. First, the juxtaposition of legal systems requires us to be specific in our narrative analyses of legal cases. Note that the European Court of Human Rights accepts a variety of legal systems in Europe without regarding it as their duty to harmonize these systems. Secondly, and even more importantly, a comparative perspective is necessary if legal narratology is to have any impact on legal practice.

§ 312 of the Dutch *Criminal Code* on aggravated theft could be translated into a concrete charge that may run like this:

> The above-mentioned person summoned to appear in court is charged with the crime that on or about 12 June 2019, in Rotterdam, he has taken away, with a view to misappropriation, a smartphone, in any case a good, belonging, wholly or partly, to X, in any case to another person or other persons, which act was preceded, accompanied or followed by an act of violence against X, consisting of multiple kicks to the body and head of said X, in order to procure said smartphone.

Compare how the §§ 242 and 252 of the German *Criminal Code* translate into the following concrete charge:

> 'X und Y werden angeklagt, in Hamburg am 31.10.2006 gemeinschaftlich handelnd bei einem Diebstahl auf frischer Tat betroffen, gegen eine Person Gewalt verübt zu haben, um sich im Besitz des gestohlenen Gutes zu erhalten, indem sie:
> gegen 05:50 Uhr in der Gaststätte A in der a-Straße 2 in [Postleitzahl] Hamburg im bewusst und gewollten Zusammenwirken arbeitsteilig handelnd unter erheblichen Alkoholeinfluss stehend (der Beschuldigte X ein Atemalkoholgehalt von 1,55 ‰ und der Beschuldigte Y von 1,56 ‰) der Beschuldigte X eine Flasche Whisky "Jim Beam" vom Tresen entnahm und in seinen Hosenbund verstaute, sodann beide Beschuldigte zum Ausgang der Gaststätte gingen, dabei von der Zeugin A aufgehalten wurden, der Beschuldigte Y daraufhin die Zeugin zurückzog, schüttelte, schubste und daran hinderte, den Beschuldigten X am Verlassen und damit an der Mitnahme der Flasche Whisky zu hindern, um zumindest auch den gemeinsamen Besitz der zuvor entwendeten Flasche "Jim Beam" zu erhalten. Verbrechen, strafbar nach §§ 242 Abs. 1, 252, 25 Abs. 2 StGB.' (Stevens et al. 2017, 183)[7]

> X and Y are being charged that, having been caught in the act of theft perpetrated on 31 October 2006 in Hamburg, to have committed violence against a person in order to retain the stolen good in the following manner: that at around 05.50 hrs in restaurant A [name] in the a-Street [name of Street] in [postal code] Hamburg, X and Y while they were under the influence of a considerable amount of alcohol [X a breath alcohol

[7] For the German *Criminal Code* (*Strafgesetzbuch*), see https://dejure.org/gesetze/StGB/ and https://germanlawarchive.iuscomp.org/.

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> level of 1,5% and Y a breath alcohol level of 1,56%] knowingly and intentionally as joint authors, X took a bottle of Whiskey Jim Beam from the shelf and put it in his waistband, after which act both accused went to the door of the restaurant, where they were being prevented from leaving by witness A, [and that] defendant Y then pulled her back, shook her up and punched her in order to keep her from obstructing their exit and preventing their taking away the bottle of whiskey, in order to retain the joint possession of said bottle of Jim Beam. Offence punishable according to §§ 242(1), 252, 25(2) of the German *Criminal Code*. (Stevens et al. 2017, 183; translation Monika Fludernik)

The German concrete charge provides a much more detailed narrative than the Dutch one. Thus, German defendants who, together with the charge, receive documents containing the evidence that the prosecutor bases her case on, can try to get their story right and avert the looming danger that their behavior will be identified as belonging to the category of the abstract norm. A complication in the German format of the criminal charge, at least in comparison with other jurisdictions, is its complexity. The individual defendant's concrete charge frequently contains (the acts of) all participants or accomplices to the crime that she is being charged with, including information as to whether juvenile court jurisdiction applies. This renders entangling the charge (what she herself is charged with) and, subsequently, finding the most effective story more difficult.

Put differently, if the defendant manages to clearly differentiate *her* story from the story encapsulated in the charge, she may be acquitted. The judicial qualification of the offense is based on the specific act which alone establishes the offense or fails to do so. For all participants, it is a matter of offering the most convincing of the (available) "perspectival narratives" (Brooks 2006, 10). Especially in legal systems in which court proceedings are based on the principle of orality, one needs to pay attention to the fact whether from a narrative perspective everything relevant is brought to the fore. This is crucial, for instance, in France, where a trial before the *Court d'Assises* with a jury has an oral character. In Germany, too, the so-called "Mündlichkeitsprinzip" requires that any written document contained in the case file is read aloud in court. Likewise, in Norway, the "bevisumiddelbarhetsprinsipet"[8] requires that all the evidence is orally presented in court. As an example, let us take the case of a French judge who instructs the jury incorrectly about the charge of murder because she fails to mention that, if premeditation cannot be proved, a conviction for manslaughter will be possible; an acquittal will be the likely outcome due to procedural error. Neither the prosecutor nor the surviving relatives of the murder victim will be happy with this conclusion of the proceedings, to say the least. Appeal will undoubtedly be the result. The stories told in the court of appeal will once more diverge, though probably in different ways than

[8] Thanks is due to Frode Helmich Pedersen (Bergen University) for providing me with this Norwegian term.

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during the trial of the first instance. And with these stories, the narratological conundrums typical of trials re-emerge with a vengeance.

The impact of narrative also affects the victim impact statement. What is their narrative scope and relevance in jury trials and elsewhere? Is a victim impact statement literally just that, a narrative about the impact of the crime on a victim's life, or is the victim allowed to discuss the evidence and ask for a conviction? If the victim details her suffering and trauma, how is one to deal with emotions running high? If the victim is a party to the legal process, how will the victim's permission to address the evidence and sentencing influence the judge's decision? The victim's story may be in conflict with the presumption of innocence of the defendant.

The criminal trial relies on the narrative competence of all parties involved. However, the defendant has the right to remain silent and sometimes her defense lawyer will advise her to follow this strategy. Should the defendant try to tell her story in her own words, i.e. without attention to the legal terminology applicable in her case, this may have negative consequences. At the trial stage, the specific truth conditions and procedural constraints of criminal law, including the rules of evidence, influence the stories that are being told. The defendant needs a lawyer to translate her view of the facts into legal terms. Her story must stay clear of the charge yet cohere with the charge's semantic framework, especially with the legal qualification of her act. In summary, the more extensive the description of the human actions under consideration in the criminal charge, the greater is the risk that a referential view on language will prevail. That is to say, the greater the detail in the charge as far as the description of the human activity that is deemed criminal it contains, the greater the risk that in the fact-finding process the prosecutor and the judge may seek for evidence to cover all the details, taking everything literally. Thus, narrative strategies employed by the defense lawyer may backfire.

3.2. Resisting (Pre-)Figuration

The hermeneutic circularity of the relation between facts and norms is further complicated by aspects of temporality.[9] This trajectory is inescapably a vicious circle. If any human act is regarded as "*an activity and a desire in search of a narrative*," then every human experience is always "already mediated by all kinds of stories we have heard," as Ricoeur (1986, 129; original emphasis) noted. For Ricoeur, the temporality of the world of action – what jurists or lawyers call 'the brute facts' – is always already influenced by our pre-understanding. For example, we have a certain preunderstanding in criminal law about how a robbery is usually planned and how it takes place. Speaking with Ricoeur (1984,

[9] I have discussed this in greater detail elsewhere, see Gaaker (2019, 145–152).

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55), "[e]very narrative presupposes a familiarity with terms such as agent, goal, means, circumstance, help, hostility, cooperation, conflict, success, failure, etc., on the part of its narrator and any listener". This knowledge influences the way in which the brute facts translate into legal facts in legal contexts. Therefore, we should not unconditionally accept our pre-understandings, at least at this early stage of narrative prefiguration. The circularity between facts and norms or scripts involved here should alert us to the necessity of acknowledging our faulty tendency to hold on to a type of story we have identified in relation to the case at hand irrespective of contrary information. Ricoeur correctly points out that "to understand a story is to understand both the language of 'doing something' and the cultural tradition from which proceeds the typology of plots" (57). Any profession has specific plots on which it relies. This means that

> […] an event must be more than just a singular occurrence. It gets its definition from its contribution to the development of a plot. A story, too, must be more than just an enumeration of events in a serial order; it must organize them into an intelligible whole, of a sort that we can always ask what is the 'thought' of this story. In short, emplotment is the operation that draws a configuration out of a simple succession. (65)

This is what Ricoeur called the stage of *mimēsis*$_2$. Such a translation of 'what happened' into a manageable form to be used in the trial stage includes propositions that adumbrate the realm of metaphor. The 'as-if' (Vaihinger 1924 [1911], 92), the seeing of the one thing in the other, entails the suggestion of a 'what if.' At the same time, it must steer clear of the risk that the 'if plot' of statutory rules (Sternberg 2008) becomes an 'as-if plot' in the negative sense. This is the case if one adds facts and circumstances to the charge that a defendant is charged with and that are suggestive of the criminal act as charged. This may fuel bias and lead to a conviction for which there is no sufficient evidence. Hence, plot analysis is clearly crucial.

All participants in the criminal trial offer their suggestions for what they claim is the most plausible emplotment. They either try to connect the case to the legal norm or disconnect the case from it. With storytelling comes the need to woo the audience, to seduce, making legal storytelling "duplicitous" (Douzinas et al. 1991, 110). For judges, rule application in criminal trials "consists both in adapting the rule to the case by way of qualifying the act as a crime, and in connecting the case to the rule, through a narrative description taken to be truthful" (Ricoeur 2007, 55–56). This narrative description, then, is also guided by one's theory of the case, i.e. the combination of facts and legal theories supporting one's case. And the theory of the case, in its turn builds on a narrative theory: one must be prepared to offer another story should the opponent's narrative so require. For example, when the prosecutor in her argument focuses on the proof of the primary charge, the defense may need to offer a story on the basis of the subsidiary charge in order to effect damage control in cases where the evidence is so overwhelming that no judge will

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acquit. These processes are even more pronounced in common law settings with adversarial proceedings, where the control that parties have is greater than in inquisitorial settings. The sum-total, then, of the centripetal and centrifugal forces of stories and counter stories, in the movement from diversity to unity at the trial stage, what I have called the knot of the bow tie, depends both on substantive and procedural law.

4. *Conclusion: Tying the Bow, Connecting Facts and Norms*

4.1. Conclusion I: The Decision

Since narratives in court are always in competition with one another, a decision is called for. The judge's decision is based on the material facts (*facta probanda* – 'facts here to be proved') expressed in the charge and the weighing of the evidence, both in the written file and as presented in the participants' narratives. The judge as narratee must appropriate the various texts into her own judicial world and emplot them to arrive at her decision. This is the stage of refiguration or, in Ricoeur's terms, *mimēsis*$_3$, in which the judge explains her view of the 'new world' that is the result of the interaction of *mimēsis*$_1$ and *mimēsis*$_2$. *Mimēsis*$_3$ is the stage of application: our pre-understanding is informed and transformed by *our* act of configuration, when figuration executes its power of redescription and so becomes effective. When *mimēsis*$_1$ and *mimēsis*$_2$ interact, our earlier pre-understandings also become subject to change. Narration is a form of explanation. In bringing together heterogeneous facts and circumstances woven into competing narratives of opposing parties, the judge draws on the written and unwritten sources of law that are themselves part of the stage of *mimēsis*$_1$ as much as they are the result of an earlier application: namely, an earlier *mimēsis*$_3$, when one considers the dynamic process of law's development of precedents and refined interpretations of existing norms as a story. The judge must decide because her decision helps to create law.

Any such emplotment and application requires insight into narratology. Narratology is necessary because the decision-making process is guided by one's interpretive framework. Secondly, both narrative and legal interpretation involve a judgment about probability, verisimilitude and truth, based on the whole of one's knowledge of the world. As Floris Bex notes, "one of the main dangers of stories is that a coherent story is judged as more believable than an incoherent story, regardless of the actual truth of the story" (2011, 79). Furthermore, from a judicial practical perspective, the lower courts' narratives are always composed in such a way as to withstand scrutiny by a higher court in appeal, and the same is true for the higher courts with a view towards scrutiny by courts of cassation. Put differently, these narratives are composed with an eye on the

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legal and factual feasibility of the evidence that has been chosen to legitimize the decision. The politics of judging matters. For example, the Dutch Supreme Court in the cassation procedure can deliver a 'factual' judgment on the Court of Appeal's decision, a juridical judgment, or a mixed, i.e. a factual and juridical judgment. While the 'factual' judgment is a marginal test that only considers whether the Court of Appeal's view on the facts is 'not incomprehensible,' the juridical judgment considers whether the Court's decision does or does not contain an incorrect view of the (application of the) law, and so does the mixed judgment. Thus, judges may in practice follow Aristotle's advice to leave out anything unnecessary, that is, anything that distracts from the main storyline of the (juridical) judgment, because in the legal context, such unnecessary detail could give any higher court a reason to reverse or quash the judgement. Obviously, such brevity may compromise the judicial narrative, especially when 'events' in the file become 'legal facts' and are translated into a causal chain of events that produces legal consequences, or when condensation prevails where detail was required. This is yet another reason why the form and content of judicial narratives, the 'how' and the 'what,' are of huge significance.

4.2. Conclusion II: Reality and Fiction

In the end, literally and figuratively, the judge-narrator who determines the outcome of the trial cannot escape what White (1984) wrote about narratorial character:

> […] a writer always gives himself a character in what he writes; it shows in the tone of voice he adopts, in the signals he gives the reader as to how to take that tone of voice, in the attitude he invites his reader to have toward the world or toward people or ideas within it, in the straightforwardness or trickiness with which he addresses his reader – his honesty or falseness – and in the way he treats the materials of his language and culture. (15)

If the judge as a narrative addressee is misled by narratives, either by deliberate policy or on account of her own prejudices, her own narrative voice and text may end up misjudging both as far as its form and content are concerned. The judge's narrative can be a response to all kinds of triggers that evoke subconscious or unconscious reactions. Both the constitution of the facts and the interpretation of the statutory norms depend on judicial habitus (Bourdieu 1991, 12) as well as professional and private background. For instance, the judge may ask biased questions such as "Surely you could have run away when you saw him grab that knife?" or "Surely you could have dressed differently when you went out late at night?". Thus, a training in philosophical-legal hermeneutics and narratology is important, precisely because of the dangers of referentiality or factuality as (a) legal fiction. To return to the problem of referentiality once more, it is important that judges

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> […] should never forget that language, by virtue of the infinitive generative but also *originative* capacity – in the Kantian sense – which derives from its power to produce existence by producing the collectively recognized, and thus realized, representation of existence, is no doubt the principal support of the dream of absolute power. (159; original emphasis)

Equally important is the judicial reflection on the violence of law's outcomes (Cover 1986). Ultimately, the judge must learn to resist hasty closure. Legal-narratological research should therefore strive for two things: a multilateral re-contextualization of topics, both theoretical and practical, and the recognition of the experiences of the main actors in the criminal trial and procedure.

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