RUNNING BACKS, WOLVES, AND OTHER FATALITIES: HOW MANIPULATIONS OF NARRATIVE COHERENCE IN LEGAL OPINIONS MARGINALIZE VIOLENT DEATH

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I am not a story, Mr. Foe.

Susan Barton, in
J.M. Coetzee, *Foe* [1]

PREFACE: LEGAL NARRATION AS PERFORMANCE AND COMMUNICATION

This article, through an examination of a small selection of legal cases that involve violent death and its marginalization by the courts, looks into the relations between

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[1] J.M. Coetzee, *Foe* (London : Penguin Books, 1987), p. 131.

narrative coherence, narrative absurd, and proto-mythical narrative patterns in legal opinions. Coherence, rather than a static, presupposed criterion for the attractiveness of factual reconstruction, is studied here as a highly manipulable narrative, rhetorical, and finally cognitive *performance*. The readings of the cases explore how judicial narration and factual reconstruction are framed by the *kind* of coherence that courts employ along choices of "narrative ideology," which in turn contribute to the shaping of the kind of institutional performance they render, ranging from formal approaches to institutional justice to judicial vigilantism.

That all the agents involved in the legal process tell stories has become somewhat of a truism: parties and lawyers, lay and expert witnesses, judges and juries.[2] While they tell them to others, legal agents are also their own original audiences, telling stories to themselves as they reconstruct facticity and weave it with legal conceptualism in various stages of legal interactions. This is not to say, as some do, that *all* we ever do in law is tell stories: obviously, legal practices are complex in ways that are irreducible to their narrative and linguistic constituents alone, as salient as those may prove.

Legal agents tell stories for different reasons and to different effects, and the language they launch *does* things in ways that may be indifferent to its narrators' performative intentions, just as intentional acts generally can be analyzed without being bound by

[2] In the United states, juries may even produce texts, such as when they are asked to render a Special Verdict or a General Verdict Accompanied by Answer to Interrogatories, FRCP R49(a) and R49(b), respectively. In the case of Special Verdicts juries are required to "return only a special verdict in the form of a special written finding upon each issue of fact," but "each issue" hardly means just separate findings that are not narratively linked. In the case of General Verdict Accompanied by Answer to Interrogatories the court itself submits written queries on matters of fact, and "direct[s] the jury both to make written answers and to render a general verdict."

presuppositions regarding intentionality.[3] Accordingly, the present study breaks up narrative coherence in legal opinions through a shift from the examination of *meaning* to that of *performance*.[4] Recalling that law is more than merely a machine for the

[3] Technically speaking, such are "accidents" of intentionality. Lawyers actually are quite familiar with such approaches to interpretation, e.g., in the so-called "objective theory" of contract formation, where parties are held responsible for the effective representations they make as these are interpreted by "reasonable" interlocutors, not necessarily for the representations they intended to make. *See* A E. Farnsworth, *Contracts* (Boston: Little, Brown and co.,6th ed. 2001), pp. 76-98. However, elsewhere I argue that the "objective theory," rather than a theory about language, is a method of risk allocation in the absence of a clear theory of intersubjective performative language. *See* Jonathan Yovel, "*What is Contract Law 'About'? Speech Act Theory and a Critique of 'Skeletal Promises*,'" 94 *Northwestern University Law Review* 937-962 (2000).

[4] Performativity — "doing things with language" — is a language paradigm studied especially since the publication of J.L. Austin, *How to do Things with Words* (Oxford: Clarendon Press, 1962; Cambridge, Mass.: Harvard University Press, 1962). The study of performative pragmatics and meta-pragmatics in shaping linguistic interaction — whether textual or not — has lately taken on added momentum; *see* Michael Silverstein, *"Metapragmatic Discourse and Metapragmatic Function*," in John A. Lucy, ed., *Reflexive Language: Reported Speech and Metapragmatics* (Cambridge: Cambridge University Press, 1933), p. 33. Note that while Austin assumes that speech-acts are intentional, his analysis in fact does not rest on that: once utterances satisfy a set of procedural "felicity conditions" — whether conforming to an utterer's intention or not — the performance is successful (as long as the presence of such an intention is not a felicity condition itself). For a discussion of the performative paradigm and of legal language's inherently performative functions *see* Jonathan Yovel, "*In The Beginning was the Word: Paradigms of Language and Normativity in Law, Philosophy,*

production of texts, that it is primarily a performative framework — an insight some approaches seem to overlook — I do not ask merely "What is the meaning of this text (as construed by any theory of interpretation)?" but, engaging the discursive community, I ask "What does this text *do*?" The question is contextually framed: in law, judges and other narrators occupy and perform institutional roles, facing "captive audiences" who approach judicial opinions from various practical, political, and institutional positions. I see little sense in ignoring this social context and treating judges and other legal agents as abstract narrators, speakers, or authors. Ultimately, lawyers and political subjects and agents care about legal narration and its integrity mainly because they care about justice, not merely as examples of narration in general, and this study precedes from those concerns.[5]

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and Theology," 5(1) *Mountbatten Journal of Legal Studies* 5-33 (2001) (discussing the different linguistic functions of legal language in terms of representation, rhetoric, and performativity.) *See* also Yovel, "*Rites and Rights: Initiation, Language and Performance in Law and Legal Education*," 3 *Stanford Agora* (2002), as well as Yovel, *supra* note 3, and references thereof.

[5] *See* Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: MIT Press, 1996). Different approaches to this concern for critical rationalization of the institutional structure of legal textuality inform the so-called "Dworkin-Fish debate" about legal text's — statutes, precedents etc. — ability to constrain subsequent their interpretation and application. In less than a nutshell, Dworkin's position is that future readers are institutionally-bound an authoritative text's meaning somewhat like "chain novel" authors are restrained by the portions that were written by prior contributors. Fish's point is that, as texts' meaning is not "in the text" nor "put there" by its author, but constructed by every subsequent reading of it, any such interpretative restraint is a mirage: there is no "fit" criterion to decide when one is interpreting a text and when one is inventing something new, as Dworkin's model requires (and as judges are ostensibly

Within this general framework, the analysis of manipulations of coherence in legal opinions both evokes and critiques a form of analysis known as "reception aesthetics," discussed in more detail below.[6] A relative of "reader-response" theory, it too may count as an offspring of phenomenological hermeneutics.[7] Broadly speaking, such approaches

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distinguished from legislators). Meaning, Fish claims, is by and large set by the conventional and moral reading of the relevant "interpretive community," a conception modeled on Thomas Kuhn's notion of "normal science" and its paradigms being the accepted (and transitory) notions prevalent among "scientific communities." *See* Ronald Dworkin, "*How Law is Like Literature?,*" in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), p. 146, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), Stanley Fish, *infra* note 7, *also Fish v. Fiss*, 36 *Stanford Law Review* 1325 (1984), *see also* Thomas W.J. Mitchell, ed., *The Politics of Interpretation* (Chicago: University of Chicago Press, 1983).

[6] *See* Hans Robert Jauss, *Toward an Aesthetic of Reception*, Timothy Bahti, trans. (Minneapolis: University of Minnesota Press, 1982), *also* Jauss, *Historia Calamitatum et Fortunarum Mearum, or: A Paradigm Shift in Literary Study*, in Ralph Cohen, ed., *The Future of Literary Theory* (New York: Routledge, 1983) p. 112. For some collective-action aspects of "reader-response" theory *see* Fish, *infra* note 7.

[7] *See* Hans-Georg Gadamer, *Truth and Method* (2nd ed. rev., New York: Crossroad, 1993). "Reader-response" theory has been developed and used since the sixties in such works as Stanley Fish, *Surprised by Sin: The Reader in "Paradise Lost"* (London: Macmillan, 1967), Umberto Eco, *The Role of the Reader: Explorations in the Semiotics of Texts* (Bloomington: Indiana University Press, 1979), Elizabeth Freund, *The Return of the Reader: Reader-Response Criticism* (London: Methuen, 1987). The approach has been widely applied to legal theory — mostly focusing on meaning and interpretation rather than on performance — in different ways and to support different claims. While a general survey is beyond the scope of this article, *see* some paradigmatic cases in Amsterdam & Hertz, *infra* note 32, Stanley Fish, *Is there a Text*

share the view that a text's meaning is not an objective, independent, preinterpretative piece of information to be discovered by scientific inquiry, but a matter for readers to construct as they interact with the text; a dialogue that, like any other, runs between participants of uneven power, linguistic competence, and purposes. This, however, does not mean that texts do not "codify" portions of culture that may effect their reading — indeed, in my discussion of reliance and invocation of proto-mythical narrative patterns I explore such codification and argue that texts invariably do this.[8] Where the "reception" perspective distinguishes itself is in approaching reading not as an individual's interpretative adventure but as a form of collective action, emphasizing the "horizon of expectations" that is the backdrop constituent of meaning for each "discursive community" — persons who are in a position to respond to cultural tropes coded in texts, who engage it in its extra-institutional and political forms.[9] However, while the analysis below accepts Jauss' notion of "historical reading," it does not accept it as an open invitation for reflection and recasting of the text, but instead as an opaque rhetorical

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in this Class? (Cambridge, Mass.: Harvard University Press, 1980), Fish, "*Working on the Chain Gang: Interpretation in Law and Literature*," 60 *Texas Law Review* 551 (1982), W.D. Michaels, "*Against Formalism: The Autonomous Text in Legal and Literary Interpretation*," 1 *Poetics Today* 23 (1979).

[8] Modeling communication after the metaphor of a code shared by "sender" and "receiver" — not a static code, but one that the parties shape metalinguistically through their reciprocal messages, in ways that are imbedded in regular talk — was offered by the prominent linguist and literary critique Roman Jakobson, *The Framework of Language* (Graduate School of University of Michigan, 1980). For a discussion and critique *see* Elizabeth Mertz and Jonathan Yovel, "*Metalinguistic Awareness*," in J. Verschueren, J-O Östman, J. Blommaert and C. Bulcaen, eds., *The Handbook of Pragmatics* (Amsterdam: Benjamins, 2000) pp. 1-26.

[9] The concept of "discursive community" is somewhat more complex than this initial indication. For discussion see below.

manipulation set to frame narrative by certain historical and ideological contexts. Thus when discussing coherence relations I attempt to show how judges and lawyers, not content with merely presupposed "horizon of expectations" against which their narratives may assume meaning, use sophisticated metapragmatic devices in shaping, molding, and manipulating the salient contexts for the "drive to coherence" to take effect. The relation between this drive and law's claims in terms of rationalization are discussed in the concluding remarks.

NARRATIVE COHERENCE IN LEGAL OPINIONS

Chief among the poetic characteristics that lend legal narratives plausibility and credibility is coherence. Systematized by Bernard Jackson,[10] this is hardly a novel claim: the forebear of all western treatises in literary theory — Aristotle's *Poetics*, written in the 4th century BCE — asserts the "unity of plot" as a principal poetic postulate.[11] Granted, this is a bit of an extrapolation: the *Poetics* deals almost exclusively with a single literary form — namely, tragedy — that Aristotle carefully defines as mimetic, "an imitation of action" and not a narration of it.[12] However, "unity" is what Aristotle requires

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[10] Notably in Bernard Jackson, *Law, Fact and Narrative Coherence* (Merseyside, UK: Deborah Charles Publications, 1988). *See* also Peter Brooks and Paul Gewirtz, eds., *Law's Stories: Narrative and Rhetoric in the Law* (New Haven: Yale University Press, 1996), and Richard Weisberg's pioneering work in humanasing law, *Poethics and other Strategies of Law and Literature* (New York: Columbia University Press, 1992). Coherence concerns tacitly occur also in the extremely insightful work by Anthony G. Amsterdam and Randy Hertz, "*An Analysis of Closing Arguments to a Jury*," 37 *New York Law School Law Review* 55 (1992).

[11] *See Aristotle, Poetics*, Francis Fergusson ed. and trans. (New York: Hill and Wang, 1961).

[12] *Id*., at VI, 61, 62, and *passim*.

specifically of the plot, i.e. the narrative crux around which the action builds, sometimes described as "The soul of the action,"[13] and he acknowledges that aspects of unity apply equally to the plot of narrative rather than mimetic forms.[14] While "unity" for Aristotle was a predominant regulative poetic quality, it did not amount to quite the rigid literary rule for the strict constraining of dramatic action and the framing of space, time, and plot, later assumed and applied by renaissance scholars and authors such as Milton (in *Samson Agonistes*),[15] or Racine.[16]

Nor has narrative coherence failed to impress legal theorists who explore the roles and functions of narrative in law and legal practice. A main argument made by Jackson is that persuasion — credibility and plausibility of evidence — has less to do with Bayesian probability calculi of discrete events, and more with rhetorical and poetical qualities, chiefly among them narrative coherence. Thus judges and juries use portions of stories as interpretative anchors for other portions, requiring that factual reconstruction, character reconstruction, and other objects of narration make sense in a more holistic, gestalt

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[13] And less picturesquely, the "arrangement of the incidents." *Id.,* at 62, *also* parts VII, VIII).

[14] "As in a tragedy." *Id*., at 105.

[15] Regarding Aristotle's "unity of time," In the introduction to Milton's *Samson Agonistes,* the poet assures that

> It suffices if the whole Drama be found not produc't beyond the fift Act, of the style and *uniformitie*, and that commonly call'd the Plot, whether intricate or explicit, which is nothing indeed but such economy, or disposition of the fable as may stand best with verisimilitude and decorum… the best rule to all who endeavour to write Tragedy. The circumscription of time wherein the whole Drama begins and ends, is according to antient rule, and best example, within the space of 24 hours." [*sic*.] John Milton, *Samson Agonistes* (1671).

[16] *See* J. E. Spingarn, *A History of Literary Criticism in the Renaissance* (Westport, Conn.: Greenwood, 1938).

manner than that suggested by a body of doctrine preoccupied with technical "admissibility," "relevance" and "weight" of information-bytes, which are principle concerns of the law of evidence.[17]

In an era marked by literary and narrative exploration, it is interesting to observe that law's approach to narration is marked by fairly conservative frameworks, that adhere by an institutional requirement that stories make sense. While this at first may seem obvious, it is not a trivial point. Making sense in law is not a narrative but a discursive and institutional requirement. It is predominant in law due to the categories of action that differentiate law from, e.g., drama. Trials are deliberative processes that conclude with a legal decision, not just a story or even a diversity of stories. As essential as narration is to law, it is subject to this practical structure. For one, legal narration is constructed around courts' notions of *relevance*, and the various storytellers' manipulations of it.[18] In other

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[17] *See* Jackson, *supra* note 10. Jackson likes to demonstrate the practical pervasiveness of this theoretical claim through lawyers' instructing materials, e.g. David A. Binder and Paul Bergman, *Fact Investigation: From Hypothesis to Proof* (St. Paul: West Publishing, 1984).

[18] *see* Jonathan Yovel, "*Two Conceptions of Relevance*," 34 *Cybernetics and Systems: Formal Approaches to Legal Evidence*, 283-315 (2003) for an attempt to supply an explanatory theory of the logic(s) of relevance, as well as its metapragmatic and constitutive functions, rather than merely topical and regulative ones. Relevance is by no means a clear or unified concept in either law, philosophy, or cognitive studies. Thus in jurisprudence and in the theory of other decision-making practices it is important to distinguish between "cognitive" relevance — what information may actually effect decision-makers' performance — and "normative" relevance, i.e. what should effect it (this distinction cuts across the standard distinction between "conversational" v. "practical" relevance). Lay litigation — such as in small-claims courts, where litigants are not represented by lawyers and have only their everyday linguistic apparati to rely on — typically features contention between "relational" and

words, legal narration must have a point: it is not the case that, like fiction and other literary genres blissfully may, it is allowed to merely express the human condition (invariably, it does also that.) Courts are adherents to Aristotelian poetics of "unity" of plot, action, and closure, and have little if no use in waiting for Godot.[19] When — due to certain institutional or narrative deficiency — narrative fails on this account, institutional distress over the threat of the absurd gives rise to unusual compensating performances such as invocation of proto-mythical patterns or maverick manipulation of doctrine. Two such cases are discussed below.

The literary critic Francis Fergusson expresses a well-established interpretation of Aristotle according to which "The most fundamental question one can ask about any

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"rule-oriented" relevance-claims; *see* Jonathan Yovel, "Language and Power in a Place of Contingencies: The Polyphony of Lay Argumentation in Small Claims Courts," unpublished manuscript, on file with author (an ethnographic study of lay litigation in ethnically-diverse settings); *also* John M. Conley and William M. O'Barr, *Rules versus Relationships: The Ethnography of Legal Discourse* (Chicago, University of Chicago Press, 1990). For general literature *see* Richard M. Diaz, *Topics in the Logic of Relevance* (Muenchen: Philosophia, 1981), A.. R. Anderson and Nuel D. Belnap, *Entailment: The Logic of Relevance and Necessity* (Princeton: Princeton University Press, 1975), Dan Sperber and Deirdre Wilson, *Relevance: Communication and Cognition* (Cambridge, MA: Harvard University Press, 1986), *Symposium on Decision and Inference in Litigation*, 13 *Cardozo Law Review* 253 (1991).

[19] For an elaboration of this discursive and institutional poetic requirement and its clash with more diverse, epistemologically-reflexive narration-producing discourses *see* Jonathan Yovel and Elizabeth Mertz, "*The Uses of Social Science in Legal Decisions*," Austin Sarat ed., *The Companion to Law and Society* (Oxford: Blackwell, in print).

work of art is that of its unity: how do its parts cohere?"[20] At the very least this means two things: that the internal sequential arrangement of the narrative — its *plot* — must obey "unity" in that its various parts sit with each other; and that the narrative as a whole conforms to contextual presuppositions held by the interlocutors for which it is intended. The first validates it as a portion of discourse, the second imbues it with meaning. That is the "horizon of expectations" of the relevant "discursive community," made up by those who in fact share this background and excluding those who do not. Only members of the discursive community are in a position to truly grasp the text's significance in terms of its performance, i.e. what it *does* instead of merely what it means. This also means that texts constitute their discursive communities rather than the reverse, where the possibility of text is presupposed by a community of readers (this is a meta-performance of texts). No narrative that must "make sense" may avoid either aspect of coherence. However — and this is where things get more messy — what the requirement of "coherence" really entails is less straight-forward than Fergusson implies. Causation is a case in point: narration that establishes causal links must both show that these are at least allowed by the sequential events it recounts, as well as position them in a manner acceptable by interlocutors' background assumptions about causal relations in reality in general, both social and physical.[21] But how does coherence, the unifying principle of narrative and thus a principal agent for "making sense," frame causal relations? How does it lead readers to expect some outcomes as "natural" and some actions as implying certain cognitive states such as intent? How manipulable is coherence — can legal narrators

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[20] Francis Fergusson, *Introduction* in Aristotle, Poetics, *supra* note 11, at 20. For a critical survey discussing the search for unity as a major drive in dramatists from Sophocles to Pirandello and critics from Aristotle to T.S. Eliot *see* Francis Fergusson, *The Idea of Theater: The Art of Drama in Changing Perspective* (Princeton: Princeton University Press, 1949).

[21] *See* H.L.A. Hart and Tony Honoré, *Causation in the Law* (2nd ed., Oxford: Clarendon Press, 1985).

persuasively apply different aspects of it, to diverging conclusions, on the basis of the same evidence?

The remainder of this study approaches these questions through an examination of two syntagmatic forms of coherence that govern legal narration, each requiring different performances and replying to different narrative strategies and concerns. Some labeling may be profitable at this point: below I examine conceptions of "internal" v. "external" coherence, the former dealing with the internal sequential arrangement of the narrative's elements, the latter with how the narrative fits or "sits" with background knowledge, cultural presuppositions, and expectations prevalent in its discursive community. While internal coherence works through culturally-entrenched notions of sequentiality, causation, and action, to form the story's plot, external coherence invokes connotations and associations that are suggestive in supplying it with meaning. Sophisticated legal narrators do not leave "background knowledge" to chance and attempt to manipulate it through narrative and non-narrative performances around external coherence, as the analysis of the following case shows.

TWO KINDS OF NARRATIVE COHERENCE: DEATH AND THE MAN

Bernard Jackson emphasizes the narrative indispensability of external coherence (without using that term), the very trait that makes it so manipulable:

> The Telling of those events must be accompanied by some contextual detail, which may itself be irrelevant to the basic story-line, but nevertheless *places it in a context recognizable to the audience*. (Italics added.)[22]

To refine Jackson's point, it seems that narration in adjudication and in advocacy does not merely count on "recognizable context" as a presupposed contextual background that coded messages obviously invoke. Instead, narrators may attempt to stir interlocutors to such salient contexts as serves distinct rhetorical purposes. "Recognizable context" is not

[22] Jackson, *supra* note 10, at 12.

always, or even typically, left to chance. Consider the case of *Ze'ev v. State of Israel*,[23] appealed in front of the Israeli Supreme Court in 1989, and producing on the basis of the same "evidence" (positivistically speaking) a minority and a majority opinion whose respective approaches to coherence — and ultimately their respective judgments — differ radically. The appellant, whose name — Ze'ev — literally means "wolf," ironically a shepherd by trade, was a Brooklynite Jewish settler in the Israeli-occupied "West Bank" (or "Samaria,") who in 1988 shot and killed a Palestinian shepherd and wounded another in an incident on the outskirts of the settlement of Shilo were the appellant lived. The Palestinian shepherds, as established by the trial court, were unarmed and intended no aggression, and Ze'ev was convicted of manslaughter. The main claim made in his appeal was that the homicide was involuntary and accidental, and that he was justified in fearing aggression and shooting in a prefatory manner to scare away what he reasonably regarded as a threat to his home; it was everybody's bad luck that he was a lousy shot with inadequate training. Appellant also claimed that before opening fire he shouted at the shepherds to go away, but that in response they cursed him and moved in his direction.

The majority opinion is quite straightforward in its narrative approach. Lean in its associative scope, it focuses on an internal reconstruction of the event. As it turns out on the appellant's own account, the very short time span between first contact and the shooting — less than a minute — could not have allowed for the preliminary steps he claimed to have taken, such as shouting warnings, firing in the air, etc. Relying on expert

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[23] CrA 26/89 *Ze'ev* v. *State of Israel*, Piskei-Din 43(4) 631 (1989). Israel, by and large a common-law system, allows judges the same freedom of narration and voice as other common-law systems, in contrast to the regimented and constrained narration associated with legal systems based on Roman law. The standard abbreviations used throughout this article are : CC — Criminal Case (trial level), CrA — Criminal Appeal, CiA — Civil Appeal, MM — Miscellaneous Motions (some of which are, strictly speaking, petitions). *Piskei-Din* is a law report; *see infra* note 52. The two digits after the slash stand for the year in which the case was opened or appealed, as it may be.

ballistic evidence the majority concludes that the appellant, in order to have fired the good many rounds that he in fact did, must have began shooting immediately, taking no precautionary steps. The majority opinion interprets the Aristotelian requirement of temporal unity in non-referential terms, relying only on very widely-shared assumptions about how the material worlds work.[24]

The appellant's version, however, sat well with the minority justice who proceeded to tell a story of a secluded settlement populated by infants and women and vacant of most of its men amidst a vast, menacing periphery. The minority opinion goes to great lengths to cite several security threats and official notices to that effect, although it is not actually claimed that the appellant was aware of them: they are rhetorically invoked for the benefit of interlocutors, to prepare the set for a story that will cohere externally, with the specific background setting in which the opinion places the action. To this it adds evidence regarding appellant's generally mild character (he was tending to his flock when the victims-to-be were spotted) and accepts his claim that before firing at the victims' direction he first shot in the air, and even this only after they failed to heed his verbal attempts at driving them away. Responding to such a framework eases interlocutors into sharing the appellant's presumed sense of urgency and anxiety. So

[24] This is not to say that adherence by internal coherence or any notion of coherence doesn't owe to constitutive social aspects. On the contrary, as coherence is both narrative and discursive, it *see*ms very plausible that reliance on internal coherence is a cultural construct. However, for two phenomena — external and internal coherence — to have social aspects does not mean that there are no significant differences between them, that they are not conceptualized, applied and manipulated in different manners, and especially that they are narratively manipulable to the same extent. Judges and interlocutors may disagree on psychological and political interpretations of actions more easily than on the law of contradiction. Internal coherence at least *see*ms more entrenched in linguistic ideologies and narrative patterns than external coherence. It is thus less transparent when invoked, and more conspicuous when breached.

much so that what is left out is the appellant's own claim that he was not, in fact, afraid, just wanted to end the interaction as quickly as possible. The reconstruction of events as framed by the minority opinion uses external coherence to weave a story of its own. Let us look closely into two inter-connected narrative mechanisms that generate this performance: the invocation of proto-mythical narrative patterns and the use of "pseudo-objective" voice — both which may be seen as the opinion's claim to what should count as the "normal language" of description and interpretation of the case.

THE LANGUAGE OF MYTH AND THE MANIPULATION OF CONTEXT

Through its emphasis on the menace emanating from the victims rather than from the perpetrator, the minority opinion in *Ze'ev* invokes, without explicit reference, background stories of aggressors invading secluded communities and townships, that belong to the canonical, heroic historiography of Israel's dominant culture, Zionism. The present case is thus categorized with other proto-events, portions of culture that render it a distinctive and ominous meaning. That becomes what literary theorist Mikhail Bakhtin termed the "general language" of the communication, the correct linguistic approach metapragmatically invoked by any speaker, text or narrative in any given communicative context (I prefer "normal language," a term that emphasizes ideological determinations and keeps them relative to fragmented, unspecified discursive communities).[25] Like "The Alamo," "Verdun," "Stalingrad," "Gettysburg," "Pearl-Harbor," and now "September 11" (or "9/11" or "nine-eleven") these code-names invoke commonly-shared stories of bloody events — the myths that constitute and solidify collective identity. Such myths are potent in more than one way. Even when considered factually suspicious, battered by critical or revisionist historiography, they nevertheless maintain a *moral*: in American consciousness, Pearl Harbor would function as an instant invocation of the traitorous

[25] *See* Bakhtin, *infra* note 35; compare to Eagleton's definition of ideology, *infra* note 78. *See also* Mertz & Yovel, *Metalinguistic Awareness*, *supra* note 8.

belligerence of foreigners and an imperative justification for aggression no matter its precise historiography. In a sense, the nouns "American consciousness" and thus "American" are defined and identified by such constitutive narratives. Transformed, they have transcended history and now occupy in culture and collective consciousness the niche of myth. This is not to say that the members of the discursive community accept myth as factual history. It means, rather, that for them — but only for them — mythical narrative is independent of interpretation, that it is, as Ernest Cassirer argues, expressive and self-sustaining in relation to the culture over which it applies.[26] As a speech act, myth does not call for interpretation: it is a *manifestation*, either of a factual pattern or a moral lesson, or both.[27] Mythical invocation typically renders accounts of heroism and sacrifice that transcend the mundane normativity of everyday practical calculations. These accounts instruct the culture's members about human nature, "natural" causation, ideals, and the like. In a specific, technical sense the narrative use of myth is archetypal: a well-known opening yields a well-expected conclusion. Such tacit invocation of myth underlies the minority's performance in *Ze'ev.* The story it tells fits closely with a certain widespread, constitutive mythical narrative of Zionism, namely the Tel-Hai story: a name instantly invoking a sense of urgency, heroism and sacrifice, as well as a moral: beware

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[26] Ernest Cassirer, *Essay on Man* (New Haven: Yale University Press, 1944).

[27] In his later writings about speech act theory John Searle has employed "manifestation" in the sense used here: a "performative" (strictly speaking, an illocutionary act, one that changes normative relations whether *in rem* or *in personam*) being a "manifestation" of a performative intent (Grice's influence is still very much distinct here). *See* John Searle, "*How Performatives Work?*" 12 *Linguistics and Philosophy* 535 (1989), rep. 58 *Tennesy Law Review* 371 (1991). Of the numerous grounds on which to reject the notion on the basic speech-act level (as opposed to a discursive claim) *see* some in Jürgen Habermas, "*Comments on John Searle: 'Meaning, Communication, and Representation'*," in Ernest Lepore and Robert Van Gulick, eds., *John Searle and His Critics* (Oxford: Blackwell 1991), p. 112.

the seemingly-innocuous stranger approaching a secluded dwelling, especially if the former is Arab and the latter Israeli. Consider the tangents and congruencies between the 1984 Shilo and the 1920 Tel-Hai. A secluded Galilee stronghold, Tel-Hai was attacked by a local Arab force that, initially pretending no aggression and allowed entrance, subsequently attacked and destroyed it.[28] The Tel-Hai story abounds with heroic, even sacrificial elements. Eight of the stronghold's female and male defenders were killed, including Joseph Trumpeldor, a one-armed, decorated hero of the Russian-Japanese war of 1902, and WWI commander of a Jewish auxiliary unit in the British army that fought in Gallipoli. Trumpeldor's myth rides mostly on his supposed last words after Tel-Hai: "No matter, it is good to die for our country."[29] Recent studies question the story's veracity (according to a popular cynical notion Trumpeldor in fact blurted out a Russian curse), yet the point, of course, is not one of historiographical accuracy but that of the cultural and political roles which the story took on.[30] In a familiar spin, like the case of

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[28] For a thorough interpretative study of the role of the Tel-Hai myth — as well as other myths of heroism and death — in Zionist history, culture and politics *see* Idith Zertal, Death and the Nation: History, Memory, Politics (Or-Yehuda, Israel, 2002) (in Hebrew). *See also* Eli Poda, The Portrayal of the Arab-Israeli Conflict in Israeli History and Civic Books, 1953-1995 (in Hebrew, 1997), Yael Zerubavel, Recovered Roots: Collective Memory and the Making of Israeli National Tradition (Chicago 1995); David Ohana and Robert S. Wistrich eds., Mitos ve-zikaron [Myth and Memory: Transfigurations of Israeli Consciousness, in Hebrew, 1996). For a discussion of some aspects of the creation and function of mythical semiotics in discourse and in non-discursive cultural contexts *see* Roland Barthes, *Myth Today* in Mythologies (Paris : Editions du Seuil, 1984).

[29] Several versions exist. See Zertal, supra note 28 ,at 31-2.

[30] As these words are paraphrased on a famous Latin verse by 1st century BCE poet Horace, "Dulce et decorum est pro patria mori [It is sweet and proper to die for the homeland]," there is no compelling reason to think that they did not in fact occur to

the Alamo, a military defeat and political mess took on solidifying, identity-churning mythical functions. It became an interpretative key for future experience, transcending historiography; Israeli schoolchildren are sometimes surprised to find out that the place actually exists. Cassirer's notion, that myth is not a mystery requiring psychoanalytic interpretation but an independent interpretative framework, while shaky in some of its applications, seems to work here.[31] Myths, on this account, are not empirically-informed accounts of reality: their status is almost a-priori, a condition for experience rather than its product, a blueprint for reality rather than its reflection, a guide for interpretation rather than its object.

The minority opinion *in Ze'ev* owes much of its persuasiveness to reliance on tacit invocation of Tel-Hai as a mythical parable — but that, only among the discursive community that in fact shares the myth. For the trope "Tel-Hai" is never actually mentioned. Members of the relevant discursive community are expected to perform the associative link from the narrative pattern and several "baits" or "anchors," thus realizing what the story in *Ze'ev* is really all about. It is very probable that readers external to that discursive community — such as, in this case, the victims — would be perplexed by the causation implied by the minority's story, because that relies on cultural expectations coded in mythical patterns that they do not share and that are not spelled out in the narrative itself. The minority's use of the myth in framing the narrative is tacit and proactive, as it acts not merely as a receiver or "client" of the story but further instigates and entrenches it. The myth supplies experience — the case at bar — with meaning in a manner powerful enough to preempt other factual findings, as most of the court's interlocutors — though decidedly not all — would share the common-sensical knowledge of what happens when menacing strangers emerge from those unknown stretches beyond

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Trumpeldor, a fervent patriot and graduate of Russia's military instruction system. *See* Horace, III *Odes*, 2, 13, C.E. Bennet, trans. (Cambridge, Mass.: Harvard University Press, 1914).

[31] Cassirer, *supra* note 26.

civilization towards a secluded dwelling. This is where Jauss' approach of a "shared horizon of expectation" may be both invoked and critiqued (namely contextualized and relativized).[32] Certainly, the minority opinion in *Ze'ev* is replete with historical and mythological layers. But these are not offered in dialogical mode, as an opportunity for reflection or exchange. They come from an institutional authority, imposing meaning or at least attempting to do so. The reader is counted on to form certain responses through the suggested "horizon of expectations" without letting her in on these horizons' invocation. Two rhetorical levels interplay here: on a psychological level, the myth operates as the unifying principle for supplying the protagonist — the defendant — with a probable expectation of aggression. The second is the discursive level, i.e., supplying the audiences with a unifying interpretative framework, the expectation that the story will turn foul *naturally*, obviously, not for anyone's fault. Predetermination preempts responsibility. When discussing "external" coherence I engage both levels, but certainly more so the discursive-rhetorical level than the psychological one. [33]

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[32] *Supra* note 6 and text thereof.

[33] In Zionist historiography and popular media such geographical tropes stand for bloody cases of attacks in small or secluded communities: "Maalot" for the 1975 Fatakh seizure of a high-school in that northern Israeli town, where a group of teenage students were kidnapped, of which twenty-two were eventually killed in an ensuing battle; "Nahariya" for a 1979 Fatakh landing in the sea resort town where a family was killed in its home; "Misgav-Am" a 1980 capture of two nurseries in this Kibbutz by Fatakh, during which a toddler was killed and four wounded; etc. (no doubt Palestinian historiography is building its own, possibly parallel, canon of victimization and triumph, violence and infamy.) Even though the precise details of these and like events were probably not at the fingertips of the minority justice or his interlocutors, the pattern would be familiar to those who share the country's dominant culture and historiography.

This then is a case of "external" coherence: a story that coheres not internally, but with other narrative portions of culture that it invokes.[34] To top it, the invocation of and reliance on interlocutor-oriented external coherence allowed the minority opinion to disregard the (internal) inconvenient fact that the appellant himself actually denied sensing threatened or being afraid — he just wanted, he said, to scare the shepherds away and be done with it.

As claimed above, coherence in law is not just a narrative requirement but a practical and institutional one. In the majority opinion, coherence is not referential in relation to presupposed background cultural knowledge or myth. Instead it focuses on the narrative's internal integrity. The majority refused to interpret the story solely through the importation of ideological context (and importation of context is always an ideological performance, replying to the questions "What matters in this story?" and "What elements of meaning should govern its interpretation?") To an extent, the majority employed a formalistic approach, signifying that no amount of importation of — or reliance on — external cultural input may change its positivistic approach to facticity. But it is not a non-narrative approach: it just implies that narrative should not be merely tellable as a rhetorically attractive tale, but — as long as it is constructed against a backdrop of rationalization, as legal narration must — ought to be justifiable in those terms. The majority opinion does not neglect context. In defying the minority's version it eventually places the story within a context that is not less informed by culture and in its way is not less sinister. It reestablishes the roles of perpetrator and victim. While the majority does not shy from context, it warns from its manipulability, exactly because it is such a necessary and powerful component of meaning.

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[34] Ideologically-biased legal narratives have another disturbing effect, namely that they alienate those interlocutors that, while entitled to an equal treatment by law as political subjects, do not necessarily share the mythical and other cultural layers that external coherence relies and builds on.

WHO'S SPEAKING, PLEASE? VOICE, IRONY, AND IDENTITY

An interesting and telling feature of the minority opinion in *Ze'ev* is that from very early on the justice's voice transforms into what Bakhtin called a "pseudo-objective" voice, one that in the semblance of the objective voice of an omniscient narrator who ostensibly is not a character and does not take part in the story, actually takes on one of her characters' voices, speaking through her phraseology and ideological world-view.[35] This technique is both potent and subtle in its relative nontransparency to the casual reader, as well as to narrators: some judges, perhaps unlike literary masters, seem to use pseudo-objective voice inadvertently more often than not. To exemplify a use of pseudo-objective voice, consider Bakhtin's discussion of a paragraph from Ivan Turgenev's "FATHERS AND SONS", a key novel to Russia's 19th century encounter with modernity, depicting an old-style country gentleman:

> Pavel Petrovitch sat down to the breakfast table. He wore an elegant morning suit in the English style, and a gay little fez on his head. This fez and the carelessly-tied short cravat carried a suggestion of the freedom of country life, but the stiff shirt collar — although not white but striped, as is correct in morning dress — pressed as inexorably as ever against his well-shaved chin.[36]

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[35] *See* Mikhail Bakhtin, "*Discourse in the Novel*," Caryl Emerson trans., in Michael Holquist ed., *The Dialogic Imagination: Four Essays* 258 (Austin: University of Texas Press, 1981). Analysis of voice is offered also in Mikhail Bakhtin, *Speech Genres and Other Late Essays*, Vern W. McGee, trans, Caryl Emerson and Michael Holquist, eds. (Austin: University of Texas Press, 1987); *see* also Mikhail Bakhtin and Pavel N. Medvedev, *The Formal Method in Literary Scholarship: A Critical Introduction to Sociological*, Albert Wehrle trans.(Baltimore: Johns Hopkins University Press 1985), as well as Lucy, *supra* note 4.

[36] Ivan Turgenev, *Fathers and Sons*, Constance Garnett, trans. (New York: The Modern Library, 1917 (1862)), slightly modified.

While the description begins and ends in the voice of the external, omniscient narrator going about his descriptive choices (it is Turgenev who characterizes the fez, a brimless cone-shaped flat-crowned hat, as "gay" — an adjective that may be read in a wholly different sense today), the clause "As is correct in morning dress" switches voices — it expresses not Turgenev's position on matters proprietary but how Pavel Petrovitch or a like-minded gentleman would account for his morning *toilette*. This seamless shift is an example of the pseudo-objective speech that in this paragraph provides the underlying ironic quality, the slight ridicule with which the narrator treats this protagonist. Had the clause been surrounded by quotation marks or inverted commas it would have formally declared that Turgenev's voice had been momentarily suspended, swapped for Pavel Petrovitch's. The whole point is to avoid a formal signifier, to speak in a multi-layered voice whose effect, in this case, is equivocation and irony.[37]

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[37] Multilayered speech, by which characters appear through their own idiosyncratic voices, is constitutive of the novel genre according to Bakhtin. *see* Bakhtin, *Discourse in the Novel*, *supra* note 35. Pseudo-objective voice is only one form of layered voice. Consider the following example, a paragraph from Charles Dickens, *Little Dorrit* (London: Southwark, 1857), where the narrator's voice shifts to and fro, weaving the voice of narrative description with that of the character in question, to a typically ironic effect, as Mr. Merdle is later exposed as an incompetent crook (shifts of voice are italicized):

> The conference was held at four or five o'clock in the afternoon, when all the region of Harley Street, Cavendish Square, was resonant of carriage-wheels and double-knocks. It had reached this point when Mr Merdle came home from his daily occupation of *causing the British name to be more and more respected in all parts of the civilised globe capable of the appreciation of world-wide commercial enterprise and gigantic combinations of skill and capital*…. For a gentleman who had this *splendid work cut out for him*, Mr Merdle looked a little common. [sic] (ch. 33.)

Through its framing of time, space, and action, as well as through its choices of adjectives and adverbs, the minority opinion in *Ze'ev* employs a distinctly pseudo-objective voice. It recruits the appellant's own narrative ideology and gives it the status of general language. This goes beyond semantic choices to poetic and performative ones. The narration of the "event" bears a clear escalating cadence matched by rhythmic intensity; it works from within the well-lit, detailed settlement with its kindergarten and fence towards the menacing unknown obscurity around it: an island of peacefulness and normalcy that the Palestinian shepherds "circle" around like so many sharks. For that matter, space itself is ideologically framed: the occurrence took place "On the outskirts of Shilo,"[38] not on those of the Palestinians' grazing areas. Note that none of these narrative choices is — from the point of view of positivistic evidence doctrine — inadmissible or imprecise. Technically, no description offered in the case is more or less precise than another — at least, nothing in my argument hinges on such a claim. The question is not that of factual "truth" according to any truth-by-correspondence theory but that of justice, or "narrative due process": are the narrative choices employed fair to the parties? What kind of prejudice is tacitly coded into the minority's use of pseudo-objective voice? What significance is there to the fact that the minority expresses rather than reports the anxiety and concern it ascribes to the appellant in its own voice?[39] Creative-writing instructors

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[38] *Ze'ev,* supra note 23, at 635.

[39] Consider another distinction, perhaps harder to pin-point, that legal narrators may apply: that between the voice of the author and that of the narrator, which first appeared as a distinct stylistic form in the 16th century picaresque novel in Spain. The protagonist-narrator of such works as *La vida de Lazarillo de Tormes y de sus fortunas y adversidades* [*The Life of Lazarillo of Tormes, his fortunes and misfortunes*] (1554, anonymous, sometimes attributed to Diego Hurtado de Mendoza) is a rascally but lovable *picaro* who lives by his wits and travels life's venues offhandedly expressing social nonconformism and religious irreverence. In that restrictive and pious culture authors tried to get away with nonconformist expressions by distinguishing their own

would approve: the narrative "shows," not merely "tells." This is a place to reiterate the point about narration as performance, and why it cannot be analyzed solely through any theory of meaning. For the meaning of an assertion (or of propositions in general) is the same, whether the voice is reportive or expressive. Nor can the rhetorical effect be treated through traditional distinctions between direct and indirect speech, for while the speech here is grammatically indirect, its poetical expressiveness, as a performance, and its functional identification with the protagonist are as direct as could be. Through voice rather than by overt proposition, the legal narration actually asserts, not that such-and-such was the way in which the appellant interpreted the occurrences, but that this is the *correct* way to perceive them. Voice here becomes equivalent, even preemptive in respect to factual reconstruction or judicial "factfinding." Unsurprisingly, the minority opinion accepted the appeal and downgraded the conviction from manslaughter to neglectful homicide, while the minority upheld the *mens rea* conviction.

COHERENCE AND THE ABSURD

The analysis of *Ze'ev* showed how internal and external coherence may collide, in the sense that following either will generate a distinct story, producing in the context of a single legal case diverse stories with little or no conjunction. When extreme, this tension threatens a collapse of narrative to the absurd. This is an even more fractured situation than J.B. White's notion of "hearing" as based on the availability of different stories — and of the political and ethical significance of this availability — because applying

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voice from the narrator's. For one, the picaro — whose irreverent voice was that of the poor, underprivileged, foreigner or castaway — couldn't write. The protagonist of *La Picara Justina* [*Roguish Justina*] by Francisco López de Úbeda (1605) is a *picara* who deceives her lovers just as the *picaro* does his masters and social superiors. Caution notwithstanding, *Lazarillo* was put on the forbidding *Index Purgatorius* in 1559, and until the 19th century only censored editions were published.

different kinds of coherence in narration is typically an opaque performance, a competition over epistemology and language as much as over a party's "version" of what happened in the extra-legal, extra-discursive, extra-linguistic world.[40] All the cases discussed here feature such a tension between internal and external coherence. Presenting them is an opportunity to explore how widely diverse stories may emerge from seemingly identical "facts," then compete for persuasiveness on different, incommensurable grounds, each appealing to a different kind of coherence.

In literature, the absurd is a genre and a quality: some of the 20th century's most striking literary achievements — in prose, poetry, drama and cross-generic works — present the human condition as bound by meaninglessness in an unintelligible world.[41] Legal opinions, however, conclude not — not merely — with narrative, but with a judgment: a performance that shuns the absurd. While its narration may occasionally toy with the absurd, law's discursive ideology is predominated by a drive for rationalization: law's claim to the use and mobilization of power and violence is in constant need of rational justification.[42] This may require work around narrative absurd, or "coherence

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[40] *See* James Boyd White, *Heracle's Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin Press, 1985) p. 175.

[41] Any list of authors and creators may awkwardly seem both obvious and controversial, and at any rate too long and arbitrary to supply here (a few are invoked below). For general references *see* Dick Penner, ed., *Fiction of the Absurd: Pratfalls in the Void: A Critical Anthology* (New York: New American Library; London: New English Library, 1980), Martin Esslin, *The Theatre of the Absurd* (2nd ed., Woodstock, N.Y.: Overlook, 1973), Naomi Lebowitz, *Humanism and the Absurd in the Modern Novel* (Evanston: Northwestern University Press, 1971), Richard E. Baker, *The Dynamics of the Absurd in the Existentialist Novel* (New York: Peter Lang , 1993).

[42] This is true also of positivistic jurisprudence. Consider Hart's critique of Austin's so-called "command theory of law," where legal norms are threats of sanction backed by a power and a will to execute. One of the critical points made by Hart is that

failures," through either fictions ("counternarratives") or a maverick manipulation of doctrine, as explored through the following case.

NARRATIVE ABSURD AND JUDICIAL VIGILANTISM: DEATH AND THE BOY

Legal opinions' need for narrative coherence and closure is many times apparent in their absence. These are situations of institutional narrative distress — sometimes manifested through the court's own voice — that may require non-narrative mechanisms to disguise the rough stitches created in the process of narration and reality-reconstructing. Such has occurred in the strange case that followed the sad and nearly anonymous death of Abdel Khalek bin-Selah Yassin of Qalansawa, a large Arab, predominantly Muslim village of about 15,000 residents located in central Israel.[43] The decision in the case, *The People v. Afif Zmiro and others*,[44] tells (but in what sense is the story ever "told"?) how Abdel Khalek was shot in "The late hours" of an April 1988 evening, in one of the streets of his village. "Khalek and another friend were driving in the streets of the village in an old car that they 'picked up' from one of the residents of the village."[45] The car's exhaust pipe broke off, causing the car to discharge the

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under such a theory law cannot be rationalized because law's use of force is indistinguishable from any other form of violence, which makes the theory — in his eyes — unattractive in the extreme. *See* H.L.A. Hart, *The concept of Law* (Oxford: Clarendon Press, 1962). On legal positivism's relation to political rationalization and politics in general *see* Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (Cambridge : Cambridge University Press, 1998).

[43] By 2001 the municipal status of Qalansawa (or Kalansawa) was upgraded to that of a town.

[44] SCC 417/88 (Israel 1988) (unpublished).

[45] This is how the events were described by the appellate court, CiA 657/89 Afif Zmiro and others v. The People, PD 48(4) 309 (Israel 1994) (henceforth, *Zmiro*). One

distinctive loud noise favored on such occasions. Afif Zmiro and his brother Malek, both residents of Qalansawa,

> …[W]ho were in their houses at the time, heard the car outside, picked up the firearms they legally owned (the first appellant owned a shotgun and the second a handgun), and climbed onto the roofs of their respective homes. The two started shooting without any prior coordination between them. The car was hit by a number of bullets, and stopped moving. The two boys got out of the car and started to run. While running, Abdel Khalek bin-Selah Yassin sustained a head wound from a bullet, and later died as a result of the injury.[46]

The Zmiros were arrested, charged and convicted of conduct offences — discharging firearms in a residential area, and reckless conduct.[47] Nor they nor anyone else was charged with *causing* the death of Abdel Khalek, or indeed of causing any effect at all. No ballistic evidence was produced that tied the shooting to Abdel Khalek's death and the prosecution failed to present any argument to that effect; consequently the decision is

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should take note of the use of the words "picked up" in this account (referring to the illicit taking of the car), immediately followed by another "picked up," this one referring to the appellant's lawfully owned firearms.

[46] *Zmiro*, at 310. Note the prevailing sense of the appellants being very much chez eux, as opposed to the no-man's-land where the victims roam. The same structure frames spatial organization and action in the minority opinion in Ze'ev, where space is wholly constructed around the focal point of the appellant's home (that — being an ideologically-motivated settlement — is also his ideological statement and political performance). The victims, emerging from the vast unknown, have no history, biography, or narrative of their own.

[47] Penal Law (General Part) 5637-1977 (Israel), §§340A and 338(5), respectively.

silent on that far-from-trivial question.[48] Nevertheless the fact of Abdel Khalek's death was brought up, and thus two separate stories emerged: one concerning a shooting, the other a death. In the latter a boy was shot and killed. Causal relations, as Hume argued, cannot be observed: and so they are at most deduced or claimed. To which Kant replied that Hume was looking in the wrong place: that nothing is a cause nor an effect unless perceived, unless — given a "linguistic twist" — someone says (or thinks or otherwise cogitates) that they are. In one story two people opened fire in the same place and in the same time and at the relevant direction, but any effect the shooting may have had on the second story does not make it into the official, judicial account. Causation is impossible when the normal language of the case does not allow for it. Thus when the prosecution presented the death-story to the court it was hard-pressed to justify its relevance: "The death of the deceased is not attributed to the defendants. [Nevertheless,] the prosecution claims that the fact 'wraps' a claim to the effect that the recklessness in firing was life-endangering, hence the relevance."[49] In terms of the official, judicial story, this is nonsense. Doctrinally speaking, the death-story was strictly irrelevant as it bore no relation to the indictment nor to the conviction.[50]

A shooting and a death: the official story makes no use of causation whatsoever. The precise and succinct sentence-structure employed by the court suggests a careful effort to avoid the fallacy of *post hoc ergo propter hoc*, mistaking temporal or narrative sequentiality for causation: "The two started shooting... The car was hit by a number of bullets." Even the appellants' actions — mounting on their respective roofs and firing away — is not described in terms of reacting to the nuisance created by Abdel Khalek

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[48] Note that in Israel, where there are no jury trials, all criminal cases are tried by professional, appointed, tenured judges. Consequently the trial level produces textual opinions where juries, typically, would simply render a verdict (yet *see supra* note 2).

[49] *Zmiro*, at 311.

[50] This in terms of "causal" relevance, as distinguished from "normative" relevance. See Yovel, *Two Conceptions of Relevance*, *supra* note 18.

and his brother. It is as if this kind of behavior just springs from nothing, requiring no stimulus and no resolve.[51]

Abdel-Khalek's story was told in vain. It was only mentioned because a narrative that would wholly ignore such an extreme event as a violent death would be too tough to digest. A corpse is a breach of normalcy and requires a justifying story, a causal explanation. Through mentioning yet trivializing it, its story remains in effect untold. Even the experienced editors of the annotated law report where the case was published wrote, in the editorial case summary, that "The shots killed one of the boys who were riding in the car" — exactly what the actual decision failed to establish.[52] The initiated

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[51] In contrast to the failure of introducing and dealing with material evidence relevant to the effects of the perpetrators' acts, the court had little trouble stating — as a judicial factual finding — that they fired simultaneously "without any prior coordination." Ironically, it is the addition of the intensifier "any" that actually hints at a measure of uncertainty on the judge-narrator's behalf. Semantically, "any" makes no contribution to the proposition in meaning terms (i.e., the proposition's meaning is the same, with or without "any"), but it does serve a double pragmatic and rhetoric purpose, which is to emphasize the *complete* lack of coordination, as well as to express the narrator's confidence in the accuracy of her description. Intensifiers also take on the emphasis of the phrase in which they occur, in either oral or silent narration/reading.

[52] *Zmiro*, at 309. Piskei-Din is as close as it gets to a formal annotated law report. It is published by the Israel Bar, cited by the courts, and holds all Supreme Court decisions, annotated and summarized. Here is the phrase in full:

> The appellants…shot, without any prior coordination, towards a car with no exhaust pipe that was driving around the streets of the village while emitting loud noises. The shots killed one of the boys who were riding in the car. (italics added.)

I wish to briefly elaborate on the italicized definite article "the" that attributes the killing to the very shots that were fired by the appellants. The uniqueness that "the"

editors presuppose narrative coherence, causation, and closure, and like most interlocutors are ill-equipped to deal with absurd.

Yet while untold, Abdel Khalek's death was not ignored. Reluctant to accept — let alone generate — absurd, striving to some semblance of justice, the court found a doctrinal, non-narrative way of compensating for the narrative failure. Having convicted and sentenced the appellants to relatively light sentences for the conduct offences mentioned,[53] the court employed an infrequently-used procedure whereby a convicted felon may be ordered to pay a sum "In order to compensate for the damage or suffering caused" by her offense, as part of the criminal trial.[54] This is not a fine but a

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designates forms a causal relation between action and effect — the shooting and the killing — which, of course, is precisely what was not established in the decision.

According to the Russell and Whitehead's standard analysis of logical words, the definite article "the" contains three separate semantic claims: a claim of existence, a claim of uniqueness, and a predication (or description). In this way, for instance, the sense of "the king of France" is that some person exists who is a king of France (this is a discursive claim, not an empirical assertion), and that there is only one such person. While Russell's analysis has been critiqued it seems perfectly applicable for the present case, where in the phrase "whoever shot" expressed a predication — not of a quality, but of an action — tacitly, through two other claims. *See* Bertrand Russell and Alfred North Whitehead, *Principia Mathematica* (Cambridge: Cambridge University Press,1910-13).

[53] Both men were sentenced to six months of community service work plus one and a half years of suspended imprisonment.

[54] Penal Law (General Part) 5637-1977 (Israel), §77(a) states that "having convicted a person, the court may order that person to pay compensation, for each of the offences for which he or she was convicted, to the person who suffered the damage, at a maximum rate of 61,000 NIS in order to compensate for the harm or suffering

compensation paid in redress to the victim or her survivors. In this case the judge ordered the payment of 25,000 NIS (ca. $9,300 in 1989 terms) to Abdel Khalek's parents, just over 40% of the maximum then allowed by law. The court stated that "The shots 'pursued' the deceased, and that, too, could be seen as a harm."[55] If not for the tragic context this would count as a joke. The harm done to the victim was that he was killed, not abstractly "pursued" by stray bullets. Indeed, it is a telling indication that the incident's survivor — Abdel Khalek's unnamed associate in mischief — was not awarded such or any compensation, although as much "pursued" as the deceased.

It is worth repeating that the misdemeanors the appellants were convicted of were purely conduct ones, and that a *causal* link between their conduct and the harm suffered by the victim was not established. Doctrinally, when no harm is *caused* no damages or compensation for it may be awarded. Nevertheless, with the one hand — that wrote the criminal conviction — the court avoided joining the two stories, evaded a story in a common world inhabited by both perpetrator and victim. With the other the court attempted to use doctrine in order to compensate for the narrative deficiency. In its desperate attempt to gap the breach between the stories the court deepened the absurd, generating contrasting representations of reality that do not and cannot synerge. In terms of internal coherence, the formal story told in *Zmiro* is complete. It is the external requirement to account for the annoying fact of the death of Abdel Khalek, however marginalized, that renders the formal story unacceptable. While causation was withheld from the formal story, it sneaked in through the back door of doctrine, demanding inclusion on the ground of the drive for external coherence. On such grounds the court's performance in *Zmiro* may be interpreted in a more favorable light. Although the judge's maverick manipulation of doctrine moves the performance away from institutional justice

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caused." Note the usage of "compensation" and not of "damages," which could have had non-compensatory interpretations as well.

[55] *Zmiro*, at 312.

to vigilantism, the move itself is almost heroic in its desperate wrestle with the legal outcome that the skewed narrative imposed.

In *Ze'ev*, the majority and minority opinions each furnished a comprehensive account — one emphasizing internal coherence, the other overruling it for external coherence. The narrative that carried the day won through the established procedure of a head-count of concurring justices. In *Zmiro* the very same trial court produced the non-compatible accounts and attempted, through doctrinal manipulation, to compensate for the narrative distress. For that no mitigating procedure is available. Unless law's claim to rationality collapses, one account or the other must yield.

And so the defendants appealed the compensation order to the Supreme Court, who was not amused. In a short decision, the Court reluctantly accepted the obvious argument that as no causal connection was established between the appellants' acts and the death of Abdel Khalek — as they were made parts of different stories altogether — there was, properly speaking, no victimization and the appellants could not be subjected to any sanction based on the causation of harm. This is not to say that the Supreme Court itself did not express a measure of distress when it stated, in a typically laconic mixture of succinctness and empathy, that

> The respondents' grief over the loss of their son is very great, and yet we have only what is before us, and as we explained previously, we can see no possibility of ordering the appellants to compensate the deceased's family, with a lack of any evidence to tie the shots to the death of the deceased.[56]

The Supreme Court sensed the narrative flaw yet excused itself from re-writing the case. Obviously, the out-and-out vigilantism of the trial court could not be sanctioned by law's normal legitimization structures. Doctrinal alchemy can rarely make up for narrative absurd. Nevertheless, "We have only what is before us" depends on how the court *looks*

[56] *Id.*, at 313.

and what it agrees to be *shown*.[57] Invoking sight as the leading metaphor for perception carries with it, like all metaphors, the semantic and conceptual baggage that the metaphor entails: while directed, sight is passive, dependent on the absorption of external light, and forever threatened by blameless myopia and blindness. Is it true then that the only knowledge available to courts is "What is before us," or, should sight prove slight, may their mode of perception and cognizance be conceptualized otherwise, even when molded sensorially? (Can they "look," "listen," "feel")? I call this failure of seeing "blameless": yet in his chilling and humane novel *Blindness*, in which José Saramago describes an entire society going literally blind, although losing the faculty of sight is innocent, blindness subsequently incapacitates the moral sense and moral instincts: human emotions, ethics, the ability to act morally and recognize the other are alienated once people cannot see each other.[58] To return to the literary work that opened this article, we recall Milton's lament, having fallen from political grace and by then totally blind, pleading for sight through the tormented voice of the eyeless protagonist of *Samson Agonistes*, his last and most personal work, as if supplying a voice to Abdel Khalek's muted claim for justice:

> …[W]hy was the sight
> To such a tender ball as th' eye confin'd?
> So obvious and so easie to be quench't,
> And not as feeling through all parts diffus'd,

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[57] On what judicial agents — judges and juries alike — "*see*," and what they may be blind to due to some cultural constructions either presupposed or manipulated by the trial's performances and narratives *see* Shoshana Felman, "*Forms of Judicial Blindness, or The Evidence of What Cannot Be Seen: Traumatic Narratives and Legal Repetitions in the O.J. Simpson Case and in Tolstoy's The Kreutzer Sonata*," 23(3) *Critical Inquiry* 761 (1997).

[58] *See* José Saramago, *Blindness*, Giovanni Pontiero trans.(London: The Harvill Press, 1997).

That she might look at will through every pore?[59]

* * *

"I am not a story, Mr. Foe" insists Susan Barton, the protagonist of J.M. Coetzee's novel *Foe*.[60] Indeed she is not: although she is presented as the original stranded wayfarer, inceptor of the Robinson Crusoe tale — *her* memoir, as it turns to be, which she recounts to Daniel "Foe" upon a destitute return to England with Friday in tow — her character is wholly omitted from the archetypal adventure-novel that Defoe eventually wrote.[61] Coetzee leaves the question open whether Defoe left her out of *Robinson Crusoe* for the sake of a thrilling story — cannibals, manly heroism and resourcefulness, instead

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[59] John Milton, "Samson Agonistes," lines 93-7 in *The Poetical Works of John Milton* (Oxford: Oxford University Press, 1955 (1671)). Note the optic conception — deriving from Euclid's *Optica* and not uncommon in pre-renaissance science as well as art — according to which vision is an active mode of perception, involving rays beaming out of the eye and hitting objects, in contrast to the receptive model that "seeing" has acquired since Huygens promulgated his wave theory of Light in his *Traité de Lumière* (1690). While Kester Svendsen, *Milton and Science* (Cambridge, Mass.: Harvard University Press, 1956) is a standard work, criticizing Milton for scientific "backwardness," newer studies present his work as highly informed by the new natural philosophies of the renaissance; *see* Karen Edwards, *Milton and the Natural World: Science and Poetry in Paradise Lost* (Cambridge: Cambridge University Press, 1999). *See also* Singh H. Marjara, *Contemplation of Created Things: Science in Paradise Lost* (Toronto: University of Toronto Press, 1992), exploring how Milton's philosophical and poetical arsenals weave scientific analogies of "various natural phenomena into a complex structure of metaphors" (*id*., p. 15).

[60] *See supra*, note 1.

[61] Daniel Defoe, *The Life and Strange Surprising Adventures of Robinson Crusoe* (New York : Grosset & Dunlap, 1946 (1719))

of the harsh wretchedness and passivity she has actually experienced — or whether it was Barton's own call. What exactly was left out of the book, a person or a story? A "her" or an "it"? Would Barton in fact prefer this absence, realizing how literature must treat her, that at most it would be about her story — more probably about *a* story — and never about her? Yet how may a person's experience and personality achieve textuality if not through a story? It would seem inordinate to expect institutional justice — as well as any literary performance short of genius — to present us with persons who transcend stories. At the very least justice may supply those. This requirement expresses more than just a cultural bias towards stories. The conclusions of legal opinions are judgments, "legal" rather than merely representational stories. In adjudication, narration and application are not wholly distinct. It is *through* the narrative framing and structuring of the "facts" of a case that normativity is introduced and woven with facticity, even when morphologically this appears otherwise (e.g. when judicial texts are divided into "factual" and "legal" segments.) As the priest in Kafka's *The Trial* reveals, "Das Urteil kommt nicht mit einemal, das Verfahren geht allmählich in Urteil über. [The judgment does not come all of a sudden: the trial gradually becomes the judgment.]"[62]

Each story is surrounded by silence, and everything that is told invokes all that is not. In *Zmiro*, silence dominates talk, although the case's occurrences can certainly be talked about. Coetzee comes on with as strict a charge as any:

> In every story there is a silence, some sight concealed, some word unspoken... Till we have spoken the unspoken we have not come to the heart of the story.[63]

Coetzee speaks of the "unspoken," not the "unspeakable." In view of the concluding proposition of Wittgenstein's *Tractatus Logico-Philosophicus,* "About what we cannot

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[62] Franz Kafka, *Der Proceß* (Berlin: Die Schmiede, 1925), p. 180.

[63] *Foe,* supra note 1, at 141.

speak, we must be silent,"[64] Coetzee's is a carefully optimistic approach, affirming the possibility and power of narration. It is a ground for action, not for silence. In that, storytelling is the antipode of the absurd which rests, after all around it is said, unnamable: "A stain upon the silence."[65]

EXTERNAL AND INTERNAL COHERENCE: DEATH AND THE COUPLE

For a different take on possible frictions between external and internal coherence, consider two fragments of evidence from *The People v. Simpson*, the 1994-5 criminal trial of O.J. Simpson,[66] at the time dubbed "The trial of the century" by various American media.[67] While no observer may be completely certain as to what exactly swayed the jury

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[64] "Wovon man nicht sprechen kann, darüber muß man schweigen." Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* §7*,* G.E.M. Anscombe trans. (London: Routledge and Kegan Paul, 1922). My translation differs from Anscombe's, as well as from Ogden and Ramsey's or Pears and McGuines's "What we cannot speak about we must pass over in silence." Wittgenstein talks of an intentional silence, a performance that is about what language cannot capture (but may invite other "mind performances," in this pre-linguistic turn manifesto) — a far cry from merely "passing over."

[65] Towards the end of his life Samuel Beckett, author of — inter alia — The *Unnamable* (New York: Grove, 1953), characterized writing as "a stain upon the silence" and yet the only worthwhile thing doing.

[66] Los Angeles Superior Court No. BA 097211 (1994).

[67] This designation brings to mind a passage from Doctorow's novel *Ragtime*, referring to the early 20th century murder of architect Sanford White by another millionaire, Harry K. Thaw:

> The newspapers called the shooting the Crime of the Century, [but] Goldman knew it was only 1906 and there where ninety-four years to go.

to acquit Simpson from the charge of killing his former wife and her lover, hints point at a few possible directions.[68] One was allegedly indicated when the jurors asked for a repeat presentation of the time sequence during which Simpson was supposed to have driven to the murder place, commit it, leave, drive home, and discard some garments and objects. Apparently the temporal framework presented by the prosecution was quite narrow, which led several commentators to suggest that the jurors simply thought there was not enough time for all those actions to have taken place according to the prosecution's version: mostly, a matter of internal coherence. In contrast, the defense consistently invoked racist biases and tendencies presumably prevalent in the LAPD that allegedly led to framing Simpson: an issue of external coherence, as it supplies an independent interpretative and explicative principle for the evidence beyond the story at bar. The defense did not merely refer to a "recognizable context" but constructed it as the

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E. L. Doctorow, *Ragtime*, 5-6 (New York: Random House, 1975). Examples abound: *See* Nina Bernstein, "The Simpson Verdict: The Law: Views of a Legal Ordeal," *New York Times*, February 5, 1997, at A1; Gilbert Geis, *Crimes of the Century: From Leopold and Loeb to O.J. Simpson* (Boston: Northeastern University Press, 1998); Frank Schmalleger, *Trial of the Century : People of the State of California Vs. Orenthal James Simpson* (Upper Saddle River, N.J.: Prentice Hall, 1996); *Felicia Okeke-Ibezim, O. J. Simpson: The Trial of the Century* (New York: Ekwike Books and Publishing, 1997); and even J. Neil Schulman, *The Frame of the Century?* (Tampa, Fl.: 1999). Important sources for analysis are Janice E. Schuetz, *The O. J. Simpson Trials: Rhetoric, Media, and the Law* (Carbondale, IL: Southern Illinois University Press, 1999), and Darnell M. Hunt, *O.J. Simpson Facts and Fictions: News Ritual in the Construction of Reality* (Cambridge: Cambridge University Press, 1999).

[68] *See* Los Angeles Times Staff, *In Pursuit of Justice: The People vs. Orenthal James Simpson* (Los Angeles: Los Angeles Times Syndicate, 1995); Alan M. Dershowitz, *Reasonable Doubts: The O.J. Simpson Case and the Criminal Justice System* (New York: Simon & Schuster, 1996).

most dominant factor governing the case. It transformed the governing story of the case from one about a homicide and its immediate forensic context to one about the police and a wider social context. This is not an unusual tactic for criminal defenders, as Amsterdam and Hertz show in their groundbreaking study.[69] By shifting the story's settings, its protagonists, context, social and moral framework, storytellers eventually suggest a whole different meaning to the case. Thus one lawyer on Simpson's defense team hypothesized that jurors were swayed by the argument that a racially-biased police may have framed Simpson, not necessarily in the sense of accusing an innocent party but in the sense of tampering with evidence pertaining to the person they in fact believed was the true perpetrator.[70] The problem of internal coherence alone was perhaps not big enough a dent in the prosecution's case, but external coherence — namely, racism — provided an interpretative presupposition that dominated all other narrative and factual aspects of the trial. It supplied it with a distinct meaning.

When *The People v. Simpson*, which pronounced Simpson not guilty of the charge of murder, was followed by a civil trial in which the same person Simpson was found to have killed the same persons whom he was previously exonerated of killing,[71] an unavoidably puzzled citizenry required that commentators and legal experts be rushed to

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Cambridge University Press, 1999).

[69] *Supra* note 10. The authors show how defense lawyers may arrange their stories according to various cultural and proto-mythical patterns; their most notable analysis explores how an attorney's speech projects the jurors themselves as the protagonists of an ethical quest for justice, urged to overcome the temptations of anger, righteousness and revenge. Galahad, Lancelot and Julian are easily recognizable.

[70] On file with author.

[71] Rufo et al. *v.* Simpson et al., Los Angeles Superior Court No. SC 031947, SC 036340, SC 036876. While this case has generated less commentary, online media sources for it are numerable; *see*, e.g., http://www. cnn.com/US/9609/16/simpson.case/; page verified for July 2003.

the media's helm to pacify the risk of absurdity.[72] It turned out that in a discursive sense it was *not* the same person Simpson who stood trial twice. In either trial, law applied different epistemologies through its rules of evidence and the other discursive norms that shape what it ratifies as knowledge, what may count as a story, and what that story may tell. Unsurprisingly, differing epistemologies yield different stories, perhaps even different worlds. The two processes produced two different persons Simpson, and it stood to reason that while one was a killer, the other was not. This makes perfect doctrinal sense, employing expert discourse for the purpose of rationalizing law, and thus justifying it. However, for common-sensical, external-coherence-seeking, discourse-deprived interlocutors this may come on as somewhat absurd.[73] For some, it was not good enough that law managed to make up stories if those stories imposed on them a non-coherent referential narrative. Having been told that neither common-sense nor reference were what it was all about, non-initiated persons were scolded into a position where they could explain how the dual *Simpson* outcomes came about, but I suspect that many were less at ease in accepting these stories as something that makes sense in any extra-legal context. Nor would the cultivation of ambiguity, applicable in other cases of bifurcated criminal/civil verdicts, exonerate law from an appearance of failure, whether one is convinced that Simpson is, in the simplest sense, guilty, or not, or whether one does not know but still expects courts to come up with a coherent resolution. As Aristotle, Jackson and various other commentators point out, culture's drive for meaning through narrative coherence is so overwhelming that when law steers elsewhere, though doctrinally coherent, the narrative fracture is subversive in relation to law's public claim to rationality and hence to power. Once we realize that law contrives and manipulates narrative coherence as part of its ordinary, mundane practices, Simpsonesque cases present opportunities to rethink the relations between narration and law's instrumental approach to facticity. This is just one aspect of the realization pointed out by J.B. White:

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[72] *See* Nina Bernstein, *supra* note 67.

[73] *Id.*

> Once one realizes that stories can be told in different ways, with different meanings, as the law requires us to do, one's sense of the world, and of the relation of one's speech to it, change profoundly.[74]

George Fletcher — while commenting on the bifurcated verdict in the case of Bernhard Goetz, alias New York's "subway vigilante" — seems to offer a concretization of the "profound change" White discusses. Epistemological pluralism, he seems to suggest, is not just a social phenomenon, a characterization of multicultural societies: it is a sober realization that the critical political subject works through to accept the finitude and partialness of knowledge without yielding to the absurd. While courts must render judgment, we may suspend it. Thus

> Maybe we like this messy inefficiency. It bespeaks our tolerance for there being some truth on both sides. Perhaps we are relieved that we never have to make up our mind, once and for all, about whether Bernhard Goetz did the right thing when he pulled his gun and shot four young black men on the subway.[75]

Is it by chance that the *Goetz* case, like those of *Simpson, Zmiro,* and *Ze'ev* are all heavily laden with race/ethnicity (as well as class) parameters? This is an arbitrary list assembled quite by chance, but the point lingers. And finally, to return to White's dictum quoted above: In what "different ways" does the law "require" that we perform? The answer is not derived from narrative poetics nor from rhetoric but from law's own institutional interests. As we realize the pivotal role of narrative manipulations in the adjudicative process, as we come to think of it as inseparable from the question of "application" of

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[74] *Supra* note 40, at 175.

[75] Fletcher, "Justice for All, Twice", *New York Times*, April 24, 1986, at A21, discussing People *v.* Goetz, 497 N.E.2d 41, NY Ct. App. 1986. *See also* George P. Fletcher, *A Crime of Self-defense: Bernhard Goetz and the Law on Trial* (Chicago: University of Chicago Press, 1988).

norms to facts, the more it makes sense to subject legal narration to due process requirements.[76]

CONCLUSION: COHERENCE AS LINGUISTIC IDEOLOGY

Reliance on some level of shared background assumptions is a precondition for communication. Narrative cannot exist in a communicative vacuum, and while legal decisions reinforce language, they cannot constantly reinvent it.[77] Nevertheless, this truism must not be distorted: the critique of narrative coherence offered in this article focuses on the manipulations that narrators perform when they invoke and relay on *particular* background assumptions rather than on others, not reliance on *any* communicative background. Legal decisions do not invent language and to an extent are bound by ideologies of common-sense and myth that saturate their extra-legal culture. Nevertheless, that is not so much an impediment as a challenge to what procedural justice is all about: being fair. As long as narration is constitutive of justice it, too, must be subject to the fairness criteria that characterize our predominant requirement of law. The problem that justice faces is thus not narrativity itself but its abuse, whether intentional or not. Legal opinions cannot and should not be "de-narrativized," but they should apply to

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[76] This argument, which engages a new set of derivative procedural rights (e.g. "narrative appeal") is quite beyond the scope of this study. The framework is offered in Jonathan Yovel, *"Narrative Justice"*, 18 *Mehkarei Mishpat* [Bar Ilan Legal Studies] 283-322 (2002) (in Hebrew).

[77] For different approaches to discussions of this principle, *see* Jürgen Habermas, The *Theory of Communicative Action,* Thomas McCarthy trans. (Boston: Beacon Press, 1984), Roman Jakobson, *The Framework of Language* (Ann Arbor: Graduate School of University of Michigan, 1980). A crucial perspective is presented in W.V. Quine, "*Ontological Relativity*," in *Ontological Relativity and other Essays* (Columbia University Press, 1977).

narration the same requirements of fairness that due process requires of legal rules and their "application."

Both external and internal coherence are ideological aspects of narrative, because they frame it while responding to such questions as "What counts in this story (or in stories in general)?" "What is it about this case that matters?" "What aspects of the human condition, as expressible through this case, ought to be considered the salient ones?"[78] Narrative ideologies are based upon shared presuppositions regarding what makes an acceptable or attractive factual narrative, in this case in legal context. Typically, ideological biases are nontransparent to casual readers, disguising themselves in "common-sensical" or neutral language — Bakhtin's "general language" or "normal language".[79] But why, as a question of linguistic ideology, is coherence so salient in legal narration? While this question is expansively examined in Jackson's work,[80] I wish to dwell on a matter in some dispute. For Jackson, one of the attractions of the prevalence of coherence is that it sits well with Greimasian semiotics, one of whose main features is the

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[78] The notion of "narrative ideology" draws on the more general one of "language ideology" and its functions in framing speech. *See* Michael Silverstein, "*Language Structure and Linguistic Ideology*," in Paul R. Clyne et al. eds.,*The Elements: A Parasession on Linguistic Units and Levels* (Chicago: Chicago Linguistic Society, 1979), p. 193. *See* also Bambi B. Schieffelin, Kathryn A. Woolard and Paul V. Kroskrity, eds., *Language Ideologies: Practice and Theory* (New York: Oxford University Press, 1998). Terry Eagleton talks of ideology as the totality of the beliefs, insights, and "common sense" assumptions that make up the standard approach within a certain culture to certain issues. *See* Terry Eaglton, *Ideology: An Introduction* (London: Verso, 1991). For a concise account of some ideological aspects of speech and their performative and metapragmatic aspects *see* Mertz & Yovel, *supra* note 8.

[79] *See supra*, notes 25, 35, and text thereof.

[80] *See supra* note 10.

non-referentiality of language: language games are played according to their own constituent grammars, and need not — and perhaps cannot — refer or correspond to extra-linguistic reality.[81] In determining meaning, while Peircean semiotics generally looks into referential relations between signifiers and signified, or signs and "The outside world" (this is a broad characterization that ignores nuances), the Greimasian tradition holds that meaning "Consists in relations within a particular system of signification, and does not depend upon a relation of reference to the outside world."[82] Now, while invoking internal coherence supports this approach — where a story is convincing when it is internally coherent, not when it stands for extra-narrative occurrences — it puts a spin on the notion of external coherence. According to the latter, a principal point about legal narratives is that they are not self-contained, and that different people have different ideas about *how* they are not self-contained. Granted, legal narration is formed for practical purposes (in the general Aristotelian sense) and as explored above, is instrumental in the service of justice. Because — and not in spite — of this, legal narratives must relate to occurrences and events in the world that justice is "about," or more precisely to the extra-legal ways in which events are socially perceived and reconstructed (e.g. by agents whom courts use and respond to in introducing facticity, such as witnesses). This is perhaps not quite the distinction between *sjuzet* and *fabula,*

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[81] Bernard Jackson, *Semiotics and Legal Theory* (Liverpool, UK: Deborah Charles Pub., 1985), 14-17. *See also* Jackson, *supra* note 10.

[82] Algirdas J. Greimas, The Social Sciences: A Semiotic View (Minneapolis: University of Minnesota, 1990), published also as *Narrative Semiotics and Cognitive Discourse* (London: Pinter, 1990). *See also* Jonathan Yovel, "*Analogical Reasoning as Translation: The Pragmatics of Transitivity"*, 13 *International Journal for the Semiotics of Law* 1-27 (2000) (modeling legal and other transitivity relations on Greimasian semiotics).

originally suggested by the Russian formalists, but that framework still serves.[83] It distinguishes between the occurrences as they took place in that world to which narrative relates, and the order and method according to which the descriptions of the occurrences are organized, framed and presented by the narrative, in such a way so as to provide it with direction and meaning, and to affect its audience. About the world very little will be said here, as narrative coherence is a property of *fabula*; nevertheless, there is a drive for coherence in referential narration because interlocutors and narrators alike assume that a corresponding property exists in the non-narrative, non-discursive, "external" world.[84] By way of comparison, while the so-called "rule of contradiction" (which excludes any proposition of the form "p and not-p") is frequently approached as a "rule of thought" — since its Aristotelian introduction, actually — it is also a common-sensical ontological approach to the *world*, namely, that things cannot *be* p and not-p, and that that is a good reason for thinking and talking as if they weren't.[85] The point is that referential narrative

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[83] *See* Mikhail Bakhtin and Pavel Medvedev, *The Formal Method in Literary scholarship: A Critical Introduction to Sociological Poetics,* Albert Wehrle trans. (Baltimore: Johns Hopkins University Press, 1973).

[84] By contrast, Greimas' nonreferential semiotics have had a considerable influence on Jackson and other legal scholars. According to Greimas, narrativity — that is, the organization of reports of occurrences along temporal sequences — is a universal human dimension that characterizes all cognition. Narrative is constructed at action's conclusion, as actors reflect upon their practical acts retrospectively, casting them in light of their relative success, creating stories out of the events so as to transfuse them with meaning. Narratives, according to this approach, relates to other narratives, rather than to non-narrative or non-discursive reality. *See* Algirdas Julien Griemas, *On Meaning* (Minneapolis: University of Minnesita Press,1987), *Narrative Semiotics and Cognitive Discourse* (London: Pinter, 1990); *also* Jackson, *supra* note 10.

[85] For clarification's sake, in this I do not invoke a non-idealist epistemology: the argument holds whether "the world" is constructed by the categories of perception and

must capture something intelligible about the world, whatever our understanding of the latter be. This maxim is not limited only to what Leibnitz termed "necessary truths" — those that hold in any possible world (such as the rule of contradiction) — and are contrasted with "contingent truths" that are idiosyncratic to any given world. Gravity, action, temporal sequentiality and other contingent factors belong to the world of talk about phenomena because they signify the world of phenomena. They may not hold quite the ontological status of the rule of contradiction in Leibnitz' system, but as long as we seriously think that they capture something about how the world works, that realization should find its narrative counterpart. Thus the question of legal narrative's reference (as well as their creators' intentionality) is not just a social-scientific matter but needs answer to law's exigency for rationalization. While shunning the absurd like a bat shuns the daylight, law requires that narrative make sense because it captures something about a world that, in order to be subject to any kind of normative regulation, must be representable in sensical talk.[86]

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cognition or whether some attributes can be ascribed to "the thing in itself," independently. In Kantian epistemology "the thing in itself" is what we cannot know anything about, the pre-cogitated thing that reason interacts with by way of the senses and, through experience, molds into the knowable world. Reason and perception, according to Kant, work through a-priori, ahistorical and acultural "categories" and other constitutive patterns — space, time, quantity, causation, number etc. — that are prerequisites of experience and not its product. We read them from reason into "the world," rather than the other way round. *See* Immanuel Kant, *Critique of Pure Reason*, J.M. Meiklejohn, trans. (New York: Wiley Book, 1990 (1781)).

[86] To avoid a possible misunderstanding, this is not at all a call for a positivistic approach to facticity. On the contrary, law's instrumental approach to facticity — its preference for justice over truth — renders it as nonpositivistic an environment, if not even less so, than narrative historiography.

Thus the unusual allure and power of coherence — in both its internal and external brands — is at least partly due to an ascription of a corresponding property to the world, which coherence, seen as a property of speech *about* the world, reflects. Whether rightly so or not is a different matter entirely. Nor is law's "aboutness" relation to pre-legal things simply a referential or an "application" relation (as in "Applying a rule to facts"). There is a sense in which legality always constructs that which it subsequently "applies" to. Law cannot be separated from society in such a way as to be in a referential sense "about" presupposed social reality that is formable exclusively in non-legal (or non-normative) terms.[87]

There is one further clarification I wish to make in connection with judicial manipulations of narrative coherence. Claiming that judges always, or mostly, construct their narratives tactically and rhetorically to support pre-established conclusions rings, on the whole, false. The reason is that any such agent's premier audience is herself. Narration is not merely an instrument implemented by legal narrators for rhetorical purposes: it is the cognitive structure of adjudication. Granted, there is a rhetorical aspect to narration, as the judge-narrator must convince her readers not — not only — of the validity of the legal doctrine she applies, but of the plausibility and attractiveness of the narrative she constructs in respect to their expectations and background assumptions. But that is just part of the process. Narration is pre-rhetorical because the judge or juror must tell *herself* a story. Anyone ever seriously engaged in writing has experienced its creative powers, knows that one does not — or at least not always — end up merely pronouncing in writing some prior content or language. "Narrative justice" is therefore a cognitive and not solely a rhetorical critique. No doubt, there are cases of minutely-crafted rhetorical manipulations in adjudication. But on the whole common law judges, like writers in general, are themselves seduced by narration, through whose phraseology, metaphors,

[87] *See* Yovel, *supra* note 3 (critiquing the notion of purely "skeletal" promises that legal norms are subsequently "about").

voice, perspective, ideology, and even rhythm their performances are spawned.[88] It is a power and hence a responsibility, both a snare and the bait within it. But it is also law's primary communicative link to the world.

[88] Since writing these lines I have conducted, under the auspices of the Judicial Institute for Advanced Studies in Jerusalem, several workshops discussing narrative and textual analysis with Israeli judges from different ranks and areas of expertise, geared to develop and test this claim in the broader framework of "narrative justice." To date [March 2003], some ninety judges have participated. The findings will be reported elsewhere; initial findings – and this is written with all methodological restraint – tend at least partially to corroborate the main argument stated above.