A Narratology of the Law? Narratives in Legal Discourse

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Abstract

Part II of this paper summarizes narratological approaches to the narrativity of the law. Two proposals are given extensive attention: Peter Brooks’s proposals regarding the important influence of narrative on legal decision-making, and Meir Sternberg’s analyses of the law code as narrative text. Part III, in contrast with part II, analyzes more recent examples of the genre of the law code as well as a judgment. In this section the argument consists in countering exaggerated claims for the narrativity of the law by demonstrating how narrative substrates are carefully elided in the prose of legal discourse.

I. Introduction

This paper comes from the pen of a literary critic and narratologist. I want to return to the question of narrative in the law, looking at two types of texts, the law code (e.g., the New York Penal Law) or statute (in British law) and a judgment (by the Hon. Mr. Justice Males: R. (on the application of Serrano) v. Secretary of State for Justice).¹ I will start with an extensive consideration of two narratological contributions to the question of the relationship between narrative and the law and then move on to a linguistic analysis of the selected legal texts and a reconsideration of these law texts’ narrativity. My focus will be to throw some doubt on the thesis that law code language is inherently narrative, and to scrutinize the connotative impact of legal code language in its references to offenders. This argument is not meant to deny the important impact of narrative in the law, or in Supreme Court opinions as, for instance, so magisterially discussed in Jerome Bruner’s and Anthony G. Amsterdam’s Minding the Law.²

II. Law as Narrative from the Narratologist’s Perspective

A. Narratives of the Courtroom and in Supreme Court Rulings

In his seminal paper “Narrative in and of the Law,”³ Peter Brooks concisely summarizes the central position of narratives both in the courtroom⁴ and in judgments.

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¹ [2012] EWHC 3216 (Admin) [hereinafter Serrano].


He points out that not only in the competing narratives of prosecution and defense but also in the appeal courts’ weighing of evidence, the presence of narratives, though often only implicit, is pervasive. Different versions and different interpretations of the facts arise because “the narrative ‘glue,’” as he calls it, “is different: the way incidents and events are made to combine in a meaningful story, one that can be called ‘consensual sex’ on the one hand or ‘rape’ on the other.”

As Brooks outlines, the reasoning behind the opposing versions of events is clearly culturally based and ideologically biased to the extent of implicating views about proper behavior, reasonable choices of action, and preconceptions about what is or is not acceptable in the view of the involved parties, including the jury. As Brooks demonstrates, “Narratives [in law] do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results.”

This may not be so obvious in the case of alleged rape, but when Brooks turns to the opinion of Benjamin Cardozo in the torts case of Palsgraf v. Long Island Railroad Company, he is able to show how hypothetical reasoning designed to define what is or is not a direct consequence of the explosion rests on virtual narratives. These narratives allow us to weigh the comparative status of possible financial claims on the causer of the disaster. One of the key features of such narratives is not (only) cultural preconceptions about ranges of causality, but the various narrators’ deliberate (or perhaps sometimes unintentional) selection of circumstances, that is to say, their neglect or repression of other important evidence. Thus, in Palsgraf, the most likely scenario seems to be one in which the injury by the collapsing scales was unconnected with the explosion, since it was brought about by the stampede of patrons on the platform; yet this scenario receives no attention in a legal framework focusing on how causal effect is determined by spatial distance.

Brooks goes on to argue that legal acknowledgment of the power of narrative occurs ex negativo: legal texts employ strategies of defense against the suspicion that narratives may warp jurors’ weighing of the evidence; implicitly this tells us how important narrative is. His example is Old Chief v. United States. He cites Justice David Souter’s comments on the “persuasive power of the concrete and particular” which tends to affect jurors; thus, the knowledge of a previous conviction for the same crime

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4 See also Janet Cotterill, Language and Power in Court: A Linguistic Analysis of the O.J. Simpson Trial (2003).
6 Brooks, supra note 3, at 417.
7 Id.
8 Id. at 419.
9 Id. at 419-21 (citing Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928)).
10 Id. at 422-24 (citing Old Chief v. United States, 519 U.S. 172 (1997)).
11 Id. at 423.
might make it impossible for a jury to focus on the facts of the current case. Brooks ends with a plea for a narratology of the law, which
might be especially interested in questions of narrative transmission and transaction: that is, stories in the situation of their telling and listening, asking not only how these stories are constructed and told, but also how they are listened to, received, reacted to, how they ask to be acted upon and how they in fact become operative.12

In Brooks’s and Gewirtz’s volume Law’s Stories, both Brooks’s and Martha Minow’s contributions emphasize the humanizing powers of narrative: “[S]torytelling serves to convey meanings excluded or marginalized by mainstream legal thinking and rhetoric”; “[s]torytelling can disrupt the illusion that social sciences create in the service of rational administration, the illusion that the world is a smoothly managed household.”13 Yet Brooks also cannily questions the potential of narratives in law as dangerous to our conceptualizing of events and actions. Following Alan Dershowitz’s essay “Life is Not a Dramatic Narrative,”14 Brooks highlights the problems with narrative reasoning. Narratives presume a logic of events that may not exist in real life. By forcing what happened into a Procrustean bed of narrative shape, by imposing the well-formedness of narratives on life, we falsify the real and may base our judgments on fictions that have no purchase on what really was the case.

In “The Future of Confession,”15 which deals with the Miranda warnings and their recent emasculation in Supreme Court rulings, Brooks extends his analysis of narrative in law by pointing to the narrative substrate which is not taken into account by the Supreme Court rulings and to the fictive narratives that sustain the interpretations he discusses. In this sophisticated analysis of recent Supreme Court findings, Brooks notes that the narrative of voluntary confession is a myth that is often inappropriate to describe the situation of interrogation. As he points out, in order to satisfy the requirements of a voluntary confession, suspects would have to have a lawyer present on arrest and while they are being read their Miranda warnings, and all interrogations would have to be videotaped, as they already are in Minnesota and Alaska. Moreover, suspects do not accurately estimate their chances of fair treatment in interrogation: “[S]ome 80% of suspects, convinced of their essential innocence or of their ability to talk their way out of their bind, do waive their rights.”16 Yet, when they start to tell stories, the interrogatees quickly end up providing material for the prosecution: “As police interrogators well understand, once you get confessional speech go-

12 Id. at 424.
13 Peter Brooks, The Law as Narrative and Rhetoric, in Law’s Stories 14, 16 (Peter Brooks & Paul Gewirtz eds., 1996) [hereinafter Law’s Stories]; Martha Minow, Stories in Law, in Law’s Stories, supra, at 24, 33.
14 Alan Dershowitz, Life Is Not a Dramatic Narrative, in Law’s Stories, supra note 13, at 99.
16 Id. at 68.
ing—once you make a first breach in the wall of silence—you will generally hear something incriminating. Though not necessarily something factually true.”

The worrisome side of eliciting confessions, which are of course narratives, lies in their problematic truth status. As Brooks shows very convincingly, the situation of interrogation does not leave the suspect emotionally free to make a rational decision about whether or not to talk. If the police have elicited a confession before reading the suspect his or her Miranda rights, the incentive to repeat what has already been conceded is great, as is the interrogators’ ability to refer back to what they have already heard, though they know they cannot use it in court. Brooks presents an ingenious comment on the metaphors employed by the rulings (“fruit of the poisonous tree” for the taintedness of illegally seized evidence, “letting the cat out of the bag” for confessions before the reading of the Miranda rights—a cat which then cannot be stuffed back into the bag). These metaphors, it must be noted, are part of a narrative framework, as are many proverbs and commonplaces.

Brooks’s discussion of Missouri v. Seibert is particularly interesting in its moral ambivalence and its dependence on narrative. Patrice Seibert had a twelve-year-old handicapped son suffering from cerebral palsy who died of natural causes. Afraid that she would be charged for neglect of her son, the family decided to set their mobile home on fire in order to eliminate the evidence of little Jonathan’s bedsores. In the fire one of her sons sustained burn injuries, and Donald Rector, who was living with the family of Patrice and her five sons, ended up dying in the fire. As Brooks tells the story, Patrice was questioned by police at 3 a.m. after being awoken in a hospital bed next to her injured son Darian, who together with a friend (Derrick Roper) had set the fire. Police got Seibert to agree to their proposition that she willingly acceded to the possibility of Donald’s death, a confession she repeated after being read her Miranda rights and was again being badgered into agreeing with the prosecution’s story:

When Officer Richard Hanrahan began his questioning of her in the early morning hours—deliberately withholding Miranda warnings—he squeezed her arm and repeatedly said: “Donald was also to die in his sleep.” Patrice finally said “yes.” At this point, Hanrahan allowed her a twenty-minute break for coffee and a cigarette. Then, he proceeded to give Patrice the Miranda warnings, and turned on his tape-recorder.

After denying that “Donald was supposed to die in the fire,” the officer referred back to her earlier “confession” to make it stick: “‘Trice, didn’t you tell me that he was to die in his sleep?’ Her protest was soon superseded by another ‘yes,’ confirming his version of events.

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17 Id. at 74.
18 Id. at 57-65.
19 Id. at 57-59.
20 Id. at 61 (quoting Missouri v. Seibert, 93 S.W.3d 700, 702 (Mo. 2002)).
21 Id. at 62.
On the basis of this confession, she was found guilty of second-degree murder and sentenced to life in prison.” (Brooks does not say what happened to her son Darian.)

It is obvious from this summary—also a narrative—that for Brooks, Patrice was possibly quite innocent of both intention and negligence with regard to Donald’s death. Like many suspects, he argues, Patrice Seibert finds herself in a situation of distraction and post-traumatic stress. She obviously feels guilty about the deaths and injuries she has, perhaps unwittingly, caused, and she worries about her injured son and is overwhelmed by remorse for her treatment of the handicapped Jonathan. Confession, as Brooks argues, “can be a strange performance of shame, guilt, self-exposure, self-punishment whose reference to fact may be troubled, even delusional.” Blaming herself for what happened, Seibert accuses herself, saying “yes” to all the leading questions posed by Officer Hanrahan; she feels guilty and knows she deserves punishment, and so she eventually admits to an intention that was perhaps not really present during the events. The number of false confessions uncovered by the Innocence Project, which works to exonerate wrongfully convicted individuals through DNA testing, is startling.

What is fascinating about this particular case where—in the interpretation that Brooks gives the case—Seibert seems to have made a factually wrong confession and thereby received a much harsher sentence than she might have for child neglect, is that the narratives engendered by the police and by Brooks in his discussion of the case are not really based on the events themselves but on the frame of mind of the suspect. Since intentions cannot be proved in court (except by witness accounts of the accused having said or written something indicating their intentions), a confession is required to clinch the case for the prosecution. The narrative of Officer Hanrahan therefore relies on an explanatory interpretation of the facts with Seibert as a would-be murderess, whereas Brooks’s analysis combines two narratives, both of them also centrally concerned with the mental and emotional state of the accused. Brooks provides a narrative of the hospital scene where Seibert is confronted at 3 a.m., recuperating from shock at the events and no doubt still not quite able to think straight. With her son lying in a hospital bed next to her, she is clearly in emotional turmoil and no doubt blames herself severely. This reconstruction is very convincing, though Brooks’s account still fails to note some important facts.

22 Id.
23 Id. at 69.
24 Id.
25 For instance: Was Seibert asleep when the police entered at 3 a.m.? If she had not had a wink after the disaster, she was in no situation to make any statements both before and after the cup of coffee and the Miranda rights. (However, Weiss clarifies that the arrest occurred five days after the events. See Stewart J. Weiss, Missouri v. Seibert: Two-Stepping Towards the Apocalypse, 95 J. Crim. L. & Criminology 945, 958 (2005).) Secondly, how exactly did the disaster happen? If the fire was laid with Seibert’s connivance or at her instigation, did anything go wrong? She must have planned for everybody to remain uninjured. She herself and her two younger children left the caravan, id.; she gave Darian money to buy the gasoline and packed a bag for herself. Why did Donald not make it out of the caravan? Brooks neglects to inform us that Derrick Roper hit Donald on the head, 93 S.W.3d at 701, thus causing him to die in the flames.
Brooks’s first narrative lays out the story of the interrogation scenario as one involving unfair pressure and a forced confession, and from this deduces a second, not fully narrated, story of Seibert’s basic culpability but possible innocence as far as the victimization of Donald goes. (Again, one would like to hear what Darian’s friend, who laid the fire with him, or other neighbors had to say about Donald and the relation of the family to him—was there a murder motive or not?) The first story explains the presumably false confession and this then allows for a fictive rewriting of the prosecution’s story.

Brooks’s major contribution to the law and narrative debate is, then, the exposure of a story that is frequently elided, namely that of how the police get their evidence; here, the confession. As Brooks had previously noted, evidence is always gathered on the basis of ulterior assumptions—one would not know where to look for evidence unless one already had possible storylines in mind. Sherlock Holmes assumes that the missing horse in “The Silver Blaze” must have gone to a different stable and, on this assumption, finds the tracks that prove his case. Likewise, the police assume the guilt of a suspect and then pursue this “storyline,” trying to find proof of their hypothesis without looking for contradictory evidence. This is how misjudgments occur, not only in real life but also in Sherlock Holmes mysteries, where the police are frequently shown to have a specific theory that does not work. There are, therefore, many types of virtual narratives to be associated with the law, with the mass of evidence on the crime scene evoking one series of possible storylines of how the crime may have occurred, then the discovery of clues to confirm particular narratives, and ideally the catching of the perpetrators thanks to those clues, with evidence supporting the storyline and perhaps a confession to clinch the case. And then there are the real stories (not always provable) of what actually happened, the narratives of arrest and interrogation and finally the virtual stories told by prosecution and defense in the court proceedings. Ultimately, the jury’s verdict decides which of these stories is to be given the stamp of truth.

Brooks’s narratives of the law are all related to the deliberation of guilt. Let us now turn to a second important narratological inquiry into the law, which focuses on the syntax of the law code, or rather on the narrative premises for apportioning culpability. Meir Sternberg’s analysis detects narrativity in the law’s definitions of crime, which are interbraided with the punishments it prescribes to compensate for the perpetrated harm by harming the perpetrator.

B. The Law Code as Virtual Narrative

Meir Sternberg’s analysis of narrative in law focuses on the law code. He therefore opts for a much more difficult area of the law, where narrativity has traditionally been regarded as non-existent. Sternberg starts his essay by contrasting the categories of the


“timeless” or “atemporal” (‘being beyond time’) with the “omnitemporal” nature of the law.\textsuperscript{28} The law posits a paradigmatic model of circumstances, which will become relevant whenever this particular constellation recurs in the future. The function of the law, one could say, is therefore not only oriented towards the virtual in the future, it is iterative; its if \ldots next structure (which Sternberg outlines at length) is equivalent to a whenever \ldots then logic.

Sternberg’s analysis proceeds to demonstrate that the law code’s underlying structure consists in an if \ldots then logic which shares with ordinary narratives the three features of suspense, curiosity and recognition.\textsuperscript{29} Suspense, he argues, develops between the crime and the punishment; curiosity arises in connection with the elucidation of past events (as at the trial); and recognition emerges when legal precedents are brought to light.\textsuperscript{30} It needs to be noted that these three constitutive elements of narrative, for legal texts, are located at different levels of manifestation. The if \ldots then bracket is partly explicit but more often implicit in the language of the legal code. I will return to this fact in the next paragraph. The curiosity about what happened, however, is a feature of trials and, to some extent, judgments, through retellings of the crime by those trying to bring about a conviction or establish innocence, or to determine the facts so as to be able to judge the responsibility of the defendant. Recognition occurs in case law as the precedent that structures the case at hand, but perhaps also as simply the match between the virtual if \ldots then structure of the code and the scenario of the current trial.

As an aside, this emphasis on the law code’s if \ldots then syntax is particularly instructive in comparison with Yon Maley’s discussion of the linguistics of the legislation. Unlike Sternberg, whose pattern sentence is based on a temporal sequence and therefore on the narrative configurations that he proceeds to outline at length, Maley concentrates on the two patterns: “whosoever [does] \ldots shall be liable \ldots” and “[a] person guilty of an offense under this Act shall be liable, on conviction on indictment, to imprisonment for life.”\textsuperscript{31} Although a temporal sequence is of course implied in these example sentences, their linguistic surface structure is much more static and definitional. In both cases the syntax classifies those who are liable for a particular retributive treatment, and the reference to that class of offenders envisions not individuals but a class of possible miscreants (“whosoever”) or one element in that class (“a person”). As I will argue in section II below, despite the apparently only superficial similarity of these sentence patterns, they do in fact hide an important notional and ideological difference.

After delineating the law code’s underlying structure, Sternberg turns to actual statutes and law codes and distinguishes between three types, (1) the apodictic; (2) the

\textsuperscript{28} Id. at 42. See also Yon Maley’s characterization of “legislation” as “a set of perpetual rules of action: the generality of the legal rule.” Yon Maley, The Language of Legislation, 16 Language in Society 25, 30 (1987).

\textsuperscript{29} Meir Sternberg, Expositional Modes and Temporal Ordering in Fiction (1978).

\textsuperscript{30} Sternberg, supra note 27, at 51.

\textsuperscript{31} Maley, supra note 28, at 33.
casuistic; and (3) the syntactic condensation of the casuistic. In the apodictic category, rules are enunciated (Do’s and Don’ts), whereas the casuistic category more openly engages with the if … then pattern: “If a man has newly taken a wife, he shall not go out with the army.”

As Sternberg correctly notes, sentences like “He who kills a beast shall pay for it, a life for a life” merely invert the logical protasis–apodosis structure of the if … then syntax into a relative clause–main clause sequence which disguises the underlying pattern. The same is also true, according to Sternberg, of the first category, that of apodictic sentences: “[T]he bare apodictic directive then jumps in medias res, it implies you must do X; if you do not, you will be punished.” The result of Sternberg’s argument in the third section of his article is therefore the equivalent of all three sentence patterns: they all ultimately belong to a deep-structural if … then syntax. I will return to these sentence patterns again below.

In section four of his paper Sternberg concentrates on trials and how the prosecution, defense, and jury (and eventually the judge) try to identify the case put for the protasis as being identifiable with the case on hand; the prosecutor working for an identification, the defense for a “misidentification” or a mismatch between virtual model and actual events. Sternberg, punning on the words generating and narrative, calls this analogizing of code and life “generative, or genarrative, power.”

In the sixth section of his article Sternberg turns to the issue of modality and to questions of variables, contents and effects. In the area of modality, the law, as a variant of a command (in its apodictic form), belongs to the category of deontic modality. Yet in the retellings of what happened, the process of law enforcement resorts to retrospective and epistemically modalized narration, since the experience told contains hopes and fears, wishes and other epistemic modals relating to narrative suspense. Interestingly, the alethic modality seems to play no role in Sternberg’s account.

Eliding Sternberg’s discussion of various conditions for the application of the if … then argument, let me move on to his conclusions in section seven. (I will immediately return to his speech act analysis in section six.) Sternberg’s magisterial analysis results in the insight that “the enunciated if-plot [of the law code] coextends with the enunciatory

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32 Sternberg, supra note 27, at 52.
33 Id. (citing Leviticus 24:18).
34 Id. at 64.
35 Id. at 53-59.
36 Id. at 56.
37 Cf. id. at 59.
38 Id. at 66.
39 Id. at 67.
40 Id. at 73.
41 Id. at 75.
plot that constitutes it.” 42 While the if … then pattern engages in suppositional reality, “the act of law-plotting has no Suppose’s about it”; in the wake of the enactment of the code, the “world [is] already remade by fiat into the appropriate penal ontology.” 43 Sternberg concludes by drawing a parallel between literary history and legal history: due to the Anglophone tradition of precedent, each new statute revises the current system of law, thus mirroring the situation obtaining for literary history.

Returning to Sternberg’s apodictic and casuistic pattern sentences, I would like to concentrate on their surface structure rather than on their if … then deep structure. If analyzed from that perspective, they also fall into three groups, though into different ones. There are (a) those sentences that use an imperative (e.g., “Remember the day of the Sabbath, to keep it holy”); 44 (b) those displaying a clear if … then conditional; and (c) sentences operating with a proleptic shall (e.g., “In future no official shall place a man on trial,” or “He who kills a beast shall pay for it”). 45 In the following section of this article I will elaborate on additional phrase types of the law code. Sternberg’s focus on the Bible and early modern texts to some extent evades the contemporary register of statutes.

The point I wish to make connects with speech act theory, Sternberg’s focus in section six of his paper. Type (a) is a clear case of a command, with God or the Biblical narrator ordering believers or the people to obey His behests. As does Sternberg, I also see (b) and (c) as ultimately equivalent: If so-and-so is done, then—by legal fiat—thus-and-thus shall be done, where (c) merely highlights the instruction of what is to be the consequence, moving the modificatory circumstances into a relative clause. One can observe in this shall an echo of divine fiat. The law-maker arrogates to himself the creative power of God (Let there be light). He cannot any longer order people about (Do not kill; Obey the Law), but he articulates his power of what he will make happen in the world within the given framework of consequences: allowing men not to go to war after their wedding ceremony; punishing offenders; forcing those who have behaved in a particular way to acknowledge the harmfulness of their actions by paying reparation for the damage caused.

In the first apodictic case, though God has the power to punish, the law does not mention it: the deontic rules are set down as quasi-universal rules of behavior. In the second (and third) category, however, it is the consequences of the perpetrator’s actions which are highlighted clearly in reference to the lawgiver’s power to enforce them, while the code of conduct which has been transgressed remains unexpressed. Thus, Thou shalt not steal (note the shall of direct command) in “Whoever takes money from his master shall be whipped and stand in the pillory for three consecutive days” takes the actions of illegality for granted as a virtual premise and then stages the lawgiver’s ability to perform by ordering the magistrates/police to enforce the law.

42 Id. at 102.
43 Id.
44 Exodus 20:8.
45 Magna Carta c. 38 (1215); Leviticus 24:18.
The direct speech act of command is therefore independent of its being obeyed—we all know that non-compliance will occur. When the human legislator sets to work, by contrast, he means to enforce compliance and hence creates the law as a set of rules whose major tenets are negative, consisting in ordering people not to do particular things or to suffer punishment for doing them. Even when the law goes out of its way to prescribe behavior positively (e.g., by stipulation of payment such as customs duties), these rules of behavior can only be put into effect by law enforcement (i.e., punishment). The law thus engages in a rhetoric of persuasion by force, deterring virtual addressees from specified types of actions or compelling them to conform to particular types of behavior on pain of suffering retributive measures in case of non-compliance. The use of shall is therefore both hortatory and directive; it addresses the virtual agent and twice-virtual patient of penal action; but it also orders the law enforcement apparatus of lawyers, judges and eventually police officers and prison guards to enact the law, to make the language of the text into a reality.

The slip between the transgression and its punishment lies in the sublunary and therefore imperfect performance of the law enforcement agencies that are incapable of solving all crimes, successfully prosecuting them and then making each transgressor pay according to the book. The law code therefore shares with God’s ethical command(ment)s the same utopian belief in the power of words, though in the case of the secular law-maker it is not the words that fail to persuade but—since the penal code consists mostly of punishments—the implementation of the law within the legal and penal institutions of the state.

In the second case, the law code performs an illocutionary act, a performative speech act that makes something happen, given the right circumstances. By means of the law code, the legislator produces a reality that will be successfully implemented, given the proper legal and police powers. Among these, the judge’s sentencing is a particularly performative instance.

In section six of his paper, Sternberg demonstrates that speech act theory in its classic Austinian version cannot adequately deal with the legal code. I skip Sternberg’s notes on the perlocutionary act since it has long been acknowledged that the third category in Austin’s triad of locutionary v. illocutionary v. perlocutionary acts is problematic. Briefly, to remind non-linguists of what these three types of acts are: the locutionary act consists in the utterance itself; the illocutionary act in the speech act, for instance a constitutive or performative speech act; and the perlocutionary act in the effect intended by means of the speech act. Thus, uttering “Tell me who ordered you to kill Squire Parsons” (the locutionary act) is the first step towards performing the illocutionary act of ordering the

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addressee to reveal the name, while the perlocutionary effect might be a threat (“Or else I
will tell the police”).

Austin’s major contribution was to propose that besides reportative and descriptive
sentences (both Austin and Searle are still based in the philosophical tradition of
focusing on propositions, textually: on sentences) there are utterances which are not
merely constative but “performative.” Examples of performatives are “I hereby pro-
nounce you man and wife”; “I herewith name you Jonathan / this ship The
Dreadnought”; “I herewith sentence you to ten years in prison.” (Austin’s unfortunate
category of the perlocutionary has meanwhile been partly absorbed by the so-called indirect
speech act and the concept of implicature. “It is cold in here” may serve as the indirect speech
act of a request; the implicature is “Please turn up the heating.”) Austin outlines a series of
conditions for performative (i.e., illocutionary) speech acts, among them the status of the
speaker, who must have the institutional authority to marry couples, name ships, pro-
nounce sentence, and so on.

Let us now turn to the law code as a speech act. The law code clearly is “uttered”
by the legislative branch of the government. It effects a change in the world by creating
legal and penal consequences for those charged on its basis. As Sternberg notes, Austin’s
definition even of the performative speech act is unfortunate since, in his attempt to dis-
tinguish illocution from perlocution, he downplays the consequences or effects of the
performative. Obviously, the ship that has been thus named will carry that name in the
future, will be referred to by that name; the couple will be bound in the state of matrimo-
ny with all its responsibilities, duties and privileges; and the prisoner at the bar will end up
in prison. Sternberg’s point that Austin’s paradigmatic example (“I name this ship”) is
metalinguistic is well taken, as is his observation that language use itself may become the
object of legal encodings in the case of “breach of promise, threat, libel, offensive speech,
name-calling”47 (as well as language-related offenses such as blackmail, hate crimes, or
stalking).

The link between speech act theory and the law code is foregrounded in Ster-
berg’s assertion that “[t]he law … constitutes, in the enactment, the world that it
represents in action within the limits imposed.”48 By conceptualizing specified types of
behavior as transgressions, the legal code criminalizes certain actions and—given suffi-
cient powers of execution—enacts this world which it has created. It does so by
classifying the behavior as fitting its categories and then catching the agents and applying
the prescribed treatment to them. Sternberg also points out that the world-making of the
law goes hand in hand with the citizens’ “internalizing” of the “command of the law.”49
Put differently, the law code not only unfolds a virtual story which becomes reality when
applied to specific cases, but it moreover inscribes this story into reality in the sense that it

47 Sternberg, supra note 27, at 90.
48 Id. at 91.
49 Id. at 94.
renames behavioral practices and thus—at least to some extent—effects changes in people’s behavior: avoidance of certain actions or the disguise and obfuscation of outlawed actions.

Sternberg goes on to show how the law focuses on action since it cannot look into the minds of those giving evidence:

[If a testimony counts in law as perjury, it is only after the witnessing event and from the outside even so: the act hinges not on what the convicted perjurer knew or believed to be true, but on what the jury/judge declares him to have known in the light of the evidence, itself always possibly false or misunderstood. So the declared perjurer might in fact have told the truth, after all, to the letter or to the best of his knowledge, just as the credible, altogether unsuspected witness might have lied in his teeth: too bad, if nevertheless decided otherwise within the rules of the game.50]

Sternberg here comes to a conclusion that marks the other side of Brooks’s medal. The law code, even if it tries to impose sincerity conditions on the lines of speech act theorists,51 can only rely on external evidence; the true beliefs of the witness may not be disclosed, credited or sufficiently clarified. To this extent, Brooks would agree. As we have seen in the case of Patrice Seibert, her so-called “confession” was treated as such on the basis of what she literally said, namely “yes,” without due concern by the court for the context of the utterance or the psychology of the defendant. However, Brooks’s argument about narratives, virtual and perhaps real, foregrounds the importance of the “narrative glue” in the arguments for and against culpability, and this narrative glue is signally based on the psychology of intentions, beliefs and emotional conditions. Most importantly, it is this conceptualization of agency which helps to persuade the jury one way or the other.

While the law, through its legal code, can pronounce only on the basis of actions and must take an external, quasi-omniscient perspective on witnesses, these failings of empathy are partially corrected through recourse to psychology-based narrative, and these stories, if told not by the accused herself but by her lawyer or the prosecutor, are not merely fictive but fictional in the full sense of “natural” narratology.52 So long as the legal code cannot grasp interiority (or, if it tries to, ends up in murky reasoning), it is the stories that law tells which appear to provide us with access to the real, to the experientiality of the events. Yet, as Brooks shows, this access is likewise fraught with traps since these stories only pretend to deliver the “truth,” which in fact can never be known.

### III. Legal Rulings and the Legal Code Today

Since Sternberg’s examples are mostly from the Bible and early legal texts, I would like to approach the question of the law’s narrativity from a more contemporary angle.

50 Id. at 96.

51 Sternberg quotes Lyons: “If X makes a statement which he knows or believes to be untrue, he thereby perpetrates the abuse that we refer to as lying or prevarication; and, if he does so on oath in a court of law, he commits perjury.” Id. at 95 (quoting John Lyons, Semantics 734 (1977)).

52 See Monika Fludernik, Towards a “Natural” Narratology (1996).
Sternberg’s analysis posits an explicit (apodictic) and often implicit \( \text{if} \ldots \text{then} \) structure for the legal code, thus demonstrating a narrative “story” substrate for the law. As a consequence, suspense, curiosity, and recognition or surprise are argued to play a crucial role in legal texts even outside the courtroom. It has to be emphasized that Sternberg’s thesis of an underlying narrative does not at all extend the meaning of \textit{story} and \textit{narrative} in the manner of Baron and Epstein; they first define \textit{story} as “an account of an event or set of events that unfolds over time and whose beginning, middle, and end are intended to resolve … the problem set in motion at the start”\(^{53}\) and then contrast it with \textit{narrative}, which to them “signif[ies] a broader enterprise that encompasses the recounting (production) and receiving (reception) of stories” and “functions to organize certain kinds of problems into a form that renders culturally meaningful both the problems and their possible resolutions.”\(^{54}\) In effect, Baron and Epstein in the illustrative section of their paper end up conflating \textit{story} and \textit{narrative} again. More seriously, any argument if it refers to or is made on the basis of a story ends up being a narrative for them. (They thus fail to distinguish between the argumentative text and the level of facts that the argument is about. Those facts may well be part of a narrative.) Sternberg’s deep-structural explanation of the law code as an emplotted structure is much more specific than Baron and Epstein’s extensions of the label.

Much closer to Sternberg is the definition of a statute by Maher et al., in which the legislature “proposes to control action, usually only in the future, by the words contained in the legislation,” as cited by Maley.\(^{55}\) Maley, following Searle, goes on to distinguish between declaratory and directive speech acts, but refines this dyad by proposing that there are three speech acts in the law code: declarative speech acts which are not equivalent to statements but rather to acts of defining; illocutionary acts of repealing; and thirdly “the creation by means of correctly enacted speech acts, of rights and duties.” This third category of speech acts is directive or permissive: “They command or empower” and express a “deontic modality.”\(^{56}\)

Another way of defining the narrativity of the legal template, which is based on transgression, is to see law grappling with Bremondian binaries: the subject has to take decisions, either to obey the law or to transgress it; to work in order to acquire his object of desire (money or a car, a house, etc.) or to steal, commit larceny, etc. Once the latter choice has been made, we move on to whether or not he will be successful; whether or not he will be caught by the police; whether or not the police will be able to prove his guilt; whether or not the court will pronounce him guilty; and, lastly, whether or not he will be sent to prison (or, in early modern Europe, be executed) for theft. On this level of

\(^{53}\) Baron & Epstein, supra note 5, at 147.

\(^{54}\) Id.

\(^{55}\) Maley, supra note 28, at 27 (citing F.K.H. Maher \textit{et al.}, Cases and Materials on the Legal Process 238 (1971)).

\(^{56}\) Id. at 29-30.
story progression, suspense dominates, and it is related to choice as far as the crime is concerned, but the choices after the crime has been committed diverge when observed from the perspectives of the criminal or law enforcement protagonists. For the criminal, the aim is to escape, but a failure to achieve this is not brought about by choice but by external events (like the perceptiveness or courage of a policeman, say). After arrest, the transgressor will attempt to baffle the interrogating officer, and here again the choice is made on his side; he has to decide whether to confess or to go on arguing for his supposed innocence; whether to plead guilty or not guilty. The elements of suspense are fairly well-spread between criminal and police, but the elements of curiosity and recognition emerge more clearly on the side of the prosecution, and all the elements are fully combined in the stories told in court.

A particularly interesting case is that of tragedy, where the protagonist in the classic format chooses to transgress one law in order to be able to obey another (Antigone flouting Creon’s order in order to obey “natural law”). This case is not addressed in the law code, though a situation of this nature may come out in court as part of the mitigating circumstances.

Let us now turn to a first example, the recent decision by Justice Males in R. (on the application of Serrano) v. Secretary of State for Justice. The case is that of a Spanish national, Antonio Serrano, who was sentenced to two years in prison for selling drugs. He was blocked from receiving home detention curfew (HDC) because he was liable to deportation, but that decision had not yet come through. Serrano’s claim was that he was affected by “unlawful discrimination on the grounds of nationality” (§ 1) because British prisoners were allowed furlough.

The judgment concluded that there was no discrimination issue since the decision to refuse furlough to Serrano had been based on his liability to deportation, a factor not relevant to British nationals (§ 67); moreover, early release is argued to be a discretionary measure and “not a matter of right” (§ 71); hence the issue of discrimination on account of nationality does not arise. However, in the judgment, Serrano is encouraged to appeal the deportation order, which had meanwhile been released.

The judgment refers to several narratives in the sense of “event series”: Serrano’s conviction, prison term, date for early release, refusal of home detention curfew, and his legal proceeding against it. Overlapping with this course of events is the decision of the UK Border Agency (UKBA) in February 2012 to take “a serious view of his offense” (§ 6) and to notify him that it was “considering his liability to deportation” (§ 6). The decision on deportation was not made until 1 November 2012. The issue of awarding the prisoner home detention curfew was therefore raised during the long interval of UKBA’s silence on the deportation question.

The legal question on whether or not the prisoner had a possibility of furlough is emphatically treated as a valid concern by the judge. By the time of the hearing on 9 No-

57 Serrano, supra note 1.
In November 2012 the deportation decision had been made, but the claim is not regarded as “academic” by the judge (§ 16), and he notes that “the prisoner is not precluded from consideration for release on HDC” (§ 22). So there is indeed a valid legal point to be settled as to whether refusal was due to nationality or not.

Males also resorts to another case, that of R. (on the application of Francis) v. Secretary of State for Justice, which concerned a Jamaican. She had, however, already established that she could not be deported to Jamaica before the curfew decision became due. This precedent proves that early curfew release is possible for foreign nationals (not merely EU nationals), but in Francis, the prisoner had already been exempted from deportation at the time of the HDC decision.

These three plot lines, if I may call them that, are therefore crucially implicated in the judge’s final decision since it is the temporal relationship between liability to deportation and the curfew decision that is made the defining criterion of the judgment. Although the text of Males’s judgment retells these three stories, it is not itself a narrative text and, unlike Brooks’s examples, the states of mind of the protagonists are not in play. One could argue, at most, that the lack of knowledge about the Border Agency’s eventual decision is relevant, but this refers to the absence of knowledge and does not lead to speculation on a person’s “intentions” (the UKBA has no “mind” except metaphorically or metonymically).

This very typical judgment is therefore one which I would regard as non-narrative, though its key issue relates to how various sequences of events overlap to yield a free space within which the prison administration might have allowed furlough; except that, as the judgment goes on to argue, the mere expectation of possible deportation made it unlikely that curfew would be granted since curfew was typically seen as a measure helping to reintegrate prisoners into society.

Let us now turn to the example of a legal code, for which we return to the US. I have chosen the New York Penal Law. To anticipate results: although there remains a virtual if … then structure to the conception of the penal code, the textual manifestation tends to sever the if … then connection since the bulk of the code is discourse-specific and concentrates on defining offenses and listing possible punishments, but without any link, grammatical or textual, between these sections. The code also has an interesting opening section on the “General purposes” of the penal law:

§ 1.05 General purposes.

The general purposes of the provisions of this chapter are:

1. To proscribe conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests;

2. To give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction;

3. To define the act or omission and the accompanying mental state which constitute each offense;

4. To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor;

5. To provide for an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, including the victim's family, and the community; and

6. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection.59

What is interesting here is the sequence. First comes the law-making function in point one (“proscribe’’); then the law text is regarded as information on what one is not allowed to do and what one risks on transgression, thus serving as a deterrent; the third point sets out the definition of offenses and—most interestingly—the “mental states” assumed for the violation (how is one to get access to that?); point five is concerned with the retributive function of the law, euphemistically referred to as “appropriate public response,” which may, however, also include non-carceral sentencing; and the sixth point combines deterrence with rehabilitation and incapacitation.

In section 10 the code defines offenses, violations, felonies, and crimes.60 A crime is either a felony (imprisonment for a year or over) or a misdemeanor (an offense punished by imprisonment for more than fifteen days but less than one year), and a violation is an offense punished by imprisonment up to fifteen days. Note that the definition of the transgression is related not to a particular act but to the punishment imposed. Types of offenses are solely based on length of imprisonment (or seriousness of crime). Most striking of all, however, is the definition of offense:

1. “Offense” means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same.61

The definition of any type of transgression is that for which a punishment can be imposed. In other words, transgression of the law is not defined as an issue of morality but as an issue of bureaucracy and of the imposition of rules that need to be obeyed. It is also odd that options other than that of the fine as “appropriate public response” (restitution, community work, etc.) do not figure here at all.

The text then continues to define defendants’ actions in the light of the mental states of knowledge and intentionality (§ 15.00). Conduct “means an act or omission and

59 N.Y. Penal Law § 1.05 (McKinney 2009).
60 Id. § 10.00.
61 Id. § 10.00(1).
its accompanying mental state”\(^62\) and a “voluntary act” is defined as “a bodily movement performed consciously as a result of effort or determination, and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.”\(^63\) There is also a “culpable mental state” which consists in doing something “intentionally’ or ‘knowingly’ or ‘recklessly’ or with ‘criminal negligence.’’ \(^64\) These distinctions lead to a differentiation between offenses of “strict liability” and those of “mental liability” (the acts are only culpable in the latter case if accompanied by “culpable mentality”).\(^65\)

I will now jump ahead and consider section 65.10 (“Conditions of probation and of conditional discharge”) and choose one sentence pattern, exemplified by subsection 4(b):

(b) When imposing a sentence of probation or conditional discharge upon a person convicted of an offense for which registration as a sex offender is required … , the court shall require, as mandatory conditions of such sentence, that such sentenced offender be prohibited from using the internet to access pornographic material, access a commercial social networking website, communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, and communicate with a person under the age of eighteen when such offender is over the age of eighteen, provided that the court may permit an offender to use the internet to communicate with a person under the age of eighteen when such offender is the parent of a minor child and is not otherwise prohibited from communicating with such child. Nothing in this subdivision shall be construed as restricting any other lawful condition of supervision that may be imposed on such sentenced offender.\(^66\)

In this example it is noteworthy that rather than treating the offense as a story, the discourse of the code assumes prior conviction and stipulates what shall happen to the transgressor. In fact, in this particular case, the fiat of the law consists in creating new rules which the offender is not allowed to break. Here we find a good example of Sternberg’s \(\textit{if … then}\) pattern.

Let us now move on to section 70.04, titled “Sentence of imprisonment for second violent felony offender.” The section starts with a definition:

(a) A second violent felony offender is a person who stands convicted of a violent felony offense as defined in subdivision one of section 70.02 after having previously been subjected to a predicate violent felony conviction as defined in paragraph (b) of this subdivision.\(^67\)

\(^{62}\) Id. § 15.00(4).
\(^{63}\) Id. § 15.00(2).
\(^{64}\) Id. § 15.00(6).
\(^{65}\) Id. § 15.10.
\(^{66}\) Id. § 65.10(4)(b).
\(^{67}\) Id. § 70.04(1)(a).
In subsection (2), the authorized sentence is then given as follows:

When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a second violent felony offender, the court must impose an indeterminate sentence of imprisonment. Except where sentence is imposed in accordance with the provisions of section 70.10, the maximum term of such sentence must be in accordance with the provisions of subdivision three of this section and the minimum period of imprisonment under such sentence must be in accordance with subdivision four of this section.\(^68\)

From one perspective, this passage entails a story in the deep structure: “If the court has passed a judgment of ‘guilty’ on a person who has already been convicted once for the same offense, \(\textit{then}\) the judge has to impose the following sentence.” On the surface structure of the text, however, the sentence is detailed in a logical rather than narrative form: “If conditions X and Y have been met, then this sentence must be imposed.” As with the Biblical examples of Sternberg, one can narrativize this locution to impose causality: the defendant is convicted and then the court sentences him. In this reading, the commission of the felony is set aside as a presupposition. On the deep-structural level of the \(\textit{histoire}\) we have the defendant, say, engaged in a shoot-out, then see him getting arrested and tried, and eventually find him convicted and sentenced; by contrast, on the discourse level the criminal deed is presupposed, and the trial and conviction are stated as a reaction to the deed, enabled by the defendant’s arrest. The emphasis falls on the passing of a particular kind of sentence. Thus, while in real life, we have a story that the defendant or a journalist could tell (and which—during the trial—the lawyers on both sides must have been outlining), the text here is an instruction manual on how to impose the sentence and what kind of sentence to impose. Its narrativity is less foregrounded than in, say, a recipe where one at least goes through all the stages of adding flour, sugar, eggs etc., then baking them, and finally arrives at the end result. The officialese of this text tries to exclude any human concerns by merely declaring what the judge needs to do. Note that in this case the judge has very little power of discretion and becomes a mere executive of the government’s legislative fiat:

The term of a determinate sentence for a second violent felony offender must be fixed by the court as follows:

(a) For a class B felony, the term must be at least twelve years and must not exceed twenty-five years;

(b) For a class C felony, the term must be at least eight years and must not exceed fifteen years; and

(c) For a class D felony, the term must be at least five years and must not exceed seven years.

(d) For a class E felony, the term must be at least four years.\(^69\)

\(^{68}\) Id. § 70.04(2).

\(^{69}\) Id. § 70.04(3).
As one can see, the code has defined various types of offenses, among them felonies; and then subdivided the felonies into categories A to E, defined in theory by the length of imprisonment they entail. The classification is then attached to the list of individual offenses as set out in Part III, “specific offenses.” An example of such an offense is the following passage:

§ 120.00 Assault in the third degree.

A person is guilty of assault in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

2. He recklessly causes physical injury to another person; or

3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.70

Note how here it is the definition of several types of behavior that is equated with the label class A felony. The actions of the offender are discursively denarrativized in two ways. First, by attributing responsibility to somebody who does something, the action itself becomes a mere definiens of guiltiness of offense such-and-such, which is more or less the same as saying “assault consists in causing physical injury to another person.” Secondly, the passage evades or suppresses narrativity by eliminating all specific circumstances, thus making it difficult to picture an instance of assault. Are we talking of a bar dispute, a burglar kicking the proprietor in the head, or of a shooting spree?71 Whereas the Biblical formulae allow one to imagine a specific scenario (e.g., “Thou shalt not covet thy neighbor’s house, nor shalt thou covet thy neighbor’s wife, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbor’s”),72 here the abstract term assault is given a definition. It remains for the police and the prosecutor to attach that label to the action they want to incriminate.

The difficulty of picturing what is meant by such definitions becomes especially clear to me in the section on hazing. In defining “hazing in the first degree” (§ 120.16), the code explains that “[a] person is guilty of hazing in the first degree when, in the course of another person’s initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct which creates a substantial risk of physical injury to such other person or a third person and thereby causes such injury.”73 To those not already familiar with the term “hazing,” this definition would not make it any more comprehensi-

70 Id. § 120.00.
71 Maley, supra note 28, at 35-46, discusses at length how legal texts use either lists of possible scenarios fitting under the over-all concept of particular offense, and how general terms are created with wider definitions than those current in ordinary language.
72 Exodus 20:17.
73 N.Y. Penal Law § 120.16.
ble, and the reader might speculate about the real-world reference: university students’ clubs in which novitiates are beaten up by way of induction? This indeed turns out to be the case when one researches the term in the OED and Wikipedia. However, the definition in Wikipedia, for instance, is much clearer than the text of the penal code and allows one to imagine narratives of hazing:

> Hazing is the practice of rituals and other activities involving harassment, abuse or humiliation used as a way of initiating a person into a group. Hazing is seen in many different types of social groups, including gangs, sports teams, schools, military units, and fraternities and sororities. In the United States and Canada, hazing is often associated with Greek-letter organizations (college fraternities and sororities). Hazing is often prohibited by law and may comprise either physical abuse (possibly violent) or psychological abuse. It may also include nudity or sexually-oriented offenses.74

Although this definition is also abstract, it allows one to imagine more specific scenarios of hazing and enables one to call up associations with the practices of fraternities. The question that emerges from this juxtaposition between legalese and dictionary definition concerns the possible link between narrativity and specificity. In fact, most narratological definitions of narrativity insist on a specific time and place-bound scenario for narratives, usually in contradistinction to the atemporal fictive scenes described in poetry:

> Narrative must be about a world populated by individuated existents. This world must be situated in time and space and undergo significant transformations. The transformations must be caused by nonhabitual physical events. Some of the participants in the events must be intelligent agents who have a mental life and react emotionally to the states of the world. Some of the events must be purposeful actions by these agents, motivated by identifiable goals and plans. The sequence of events must form a unified causal chain and lead to closure. The occurrence of at least some of the events must be asserted as fact for the story world. The story must communicate something meaningful to the recipient.75

Ryan here emphasizes the “individuated” nature of story agents and the “nonhabitual” course of events. These requirements are lost in legalese, which is out to cover anybody. On the other hand, the agents in the legal framework, like those of fiction, clearly have intentions and feelings, though within the law code and jury trials such mentality is ascribed rather than enacted or represented experientially.

Section 130.05 is also notable for its elimination of agentivity: hazing is a “practice” in which the agents are not only abstract but secondary to the acts outlawed. This odd marginalization of agency can also be observed in another section of the code. In the section on sex offenses, sexual abuse is described as sexual conduct (with all the possible types of sexual behavior listed in long detail) engaged in with persons who do not consent or are “deemed incapable of consent.”76 Rather than listing the types of person likely to commit abuse, however, the code lists among those “incapable of consent” not only children and the handicapped, but those “committed to the care and custody of the state

74 http://en.wikipedia.org/wiki/Hazing
76 N.Y. Penal Law § 130.05(3).
department of correctional services or a hospital\textsuperscript{77} and only then goes on to list several types of officers who might commit such acts. Rather than explicitly saying that rape or sexual assault are particularly aggravated offenses when committed against minors, the handicapped or prisoners in custody of the correctional services, the prose subsumes prisoners into the category of the victimizable and only then provides a list of victimizers within state institutions. This procedure departs from the narrative focus on eventhood and agentivity to zoom in on the victims and then to return to a range of possible perpetrators. The definition here almost retraces the detective work by starting with the result—the abused victim—and, by determining that the victim belongs to the category of people deemed incapable of consent, surveys possible categories of actors responsible for the deed. Yet, by naming a whole list of such people, the curiosity effect \textit{à la} Sternberg gets somewhat lost since we are in a virtual scenario of a universalist framework which focuses on the type of offense and not on a specific crime whose perpetrator has to be located. The defendant accused of the deed is in fact present; the question is not that of catching the offender but of finding a category in the code to which his offense can be assigned. Although the \textit{matter} which the paragraph deals with is an eminently narrative one, the discourse presentation in this legal code undermines the inherent narrativity to convert the events into classifiable instances of punishable behavior.

This type of officialese (or legalese), and this is my final example, is moreover foregrounded in the bureaucratic classifications that reach all the way into the conception of particular offenses. Thus, escape from prison (“detention facility”) or custody (defined as “restraint by a public servant pursuant to an authorized arrest or an order of court”\textsuperscript{78}) is seen as serious to different degrees, depending on whether the escapee has been convicted of an A, B, C, D, or E felony:

\begin{itemize}
\item \textbf{§ 205.05 Escape in the third degree.}

A person is guilty of escape in the third degree when he escapes from custody. Escape in the third degree is a class A misdemeanor.

\item \textbf{§ 205.10 Escape in the second degree.}

A person is guilty of escape in the second degree when:

1. He escapes from a detention facility; or

2. Having been arrested for, charged with or convicted of a class C, class D or class E felony, he escapes from custody; or

3. Having been adjudicated a youthful offender, which finding was substituted for the conviction of a felony, he escapes from custody.

Escape in the second degree is a class E felony.\textsuperscript{79}
\end{itemize}

\textsuperscript{77} Id.

\textsuperscript{78} Id. § 205.00.

\textsuperscript{79} Id. §§ 205.05-.10.
Turning escape into a crime goes against the medieval understanding that attempting to escape is perfectly natural and is a right of the prisoner. Escape is also one of those offenses that tend to be added on to other felonies (escape, carrying arms, resisting arrest, etc.) and that are liable to result in a much higher sentence. The example illustrates how an action that from an everyday perspective would be considered the same kind of action—escape—acquires a differential status depending on how serious the offense is for which the escapee has been charged or convicted. This rationale linguistically converts the person not merely into an offender but also into a felony-type related offender, enhancing the essentializing of the perpetrator and reifying him as the member of a subcategory of legal pieces on a chess-board. In this case, too, the question of narrativity is tangential. The discourse is one of definition, although the real-world story substrate can of course be conceived of as narrative.

As we have seen in this section of examples, the law code and judgments concern what one can clearly conceive of as stories, yet the discourse treating these stories downplays their inherent narrativity or even at times warps the syntax to allow for an emphasis on categorization and procedural efficiency. Yet, as Sternberg has shown, the surface structure of such texts tends to camouflage the underlying deep-structural cause-and-effect logic of crime, which, ultimately, is a narrative matter. Does that narrative matter in law?

**IV. How Narrative Is It? Legal Codes and Narrativity**

Having provided and discussed a few examples, I would like to come to some conclusions.

Crime is necessarily agentive and therefore can be conceived of as a narrative. It will be rendered as a narrative in autobiography, including witness reports, interrogations and confessions; in trial pleas by prosecutors and defense attorneys; and partially in judges’ rulings. When we get to the law code, however, the discourse of these texts is less immediately narrative. More traditional or “classical” formulae, like the if … then mode, are easily narrativizable. They refer to two actions, involving a causal relationship between protasis and apodosis, as Steinberg has demonstrated, and give rise to an imaginative reconstruction which allows for moments of curiosity and surprise in their investigative and detective narrations.

When we turn to a contemporary law code of the type that I have taken as my example, however, the narrativity gets further rarefied. Although there is a deep-structural story somewhere, the phrasing of the law code emphasizes its non-narrativity. It sometimes eliminates direct agency for the sake of passive constructions and uses discourse strategies that are typical of instructional texts and scientific or philosophical argumentation. Yet, because the matter that the law code deals with is inherently narrative, this discourse strategy emphasizes its deliberate avoidance of specific real-world circumstances, trying to set up a web of abstract rules to which the reality of crime has to measure up.
and on the basis of which judges will then find within the conceptual framework imposed on the fluid matter of life.

I would, therefore, contend that the more contemporary law codes are quite deliberately non-narrative; they suppress the narratives that abound in the courtroom and outside it and try to transform the defendant even before conviction into the anonymous representative of a category. The law code in this manner molds the criminal into the shape that he will assume in prison, namely that of an object to be warehoused and manipulated as an instance of the category “inmate,” just as in the law code he was already subsumed under the ascription of “category A felon.” By depriving the offender of his individual agency, the law code also deprives the future inmate of personal narrativity. He will be put on hold in the pen and reacquire a genuine narrative only once he is released. In the meantime he will have lived the narrative of the state that has been imposed on him, and this narrative is a nonspecific one, a mold (or should one say Procrustean bed?) into which he has been fitted by the legal system. Through this lack of narrativity in the legal discourse, the events of the crime in the legal code also become a projection screen on which readers of the text project their versions of the cases they have been handling—real scenarios are transformed into virtual ones and become pegged as belonging to a category. Agents of the law thus also denarrativize the stories that have been told in court once the sentencing project takes over.