Special Issue – *Law's Pluralities*

Norms and Narrative

By Andreas von Arnauld[*]

Abstract

As a normative social practice, law mediates between the "is" and the "ought," between prescription and description. Obviously, narratives and narration play a role in law when it comes to describing facts and events: The testimony of a witness in court, the presentation of the case in a judgment, or (semi-)fictional cases used for legal education spring to mind. In this Article, however, the focus is on the prescriptive side of law. If, in line with the definition given by Matías Martínez and Michael Scheffel, a narrative is to be understood as a "sequence of events and actions producing at the level of [literary] action an autonomous structure of meaning,"[1] it becomes possible to identify narratives and narrative elements within legal norms and provisions. The first part of this paper will deal with grand historical—or historicizing—narratives and cast some light on how they are used to give sense and direction to the interpretation and application of, especially, constitutional principles. The second part will suggest a narratological perspective on statutory law and attempt to reconstruct the process of norm application. This Article argues that this process relies mainly on comparative methods, and that narratives mediate between the seemingly opposed spheres of law and fact. Both kinds of narratives, the *grands récits* of constitutional law and the *petits récits* of statutory law, though quite different at first sight, possess common traits. They both fit the definition of narrative just cited; they both result from a process of selection and are thus prone to exclusionary effects. Moreover, the grand narratives of constitutional law also affect statutory law, its interpretation, and its application.

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[1] MATÍAS MARTINEZ & MICHAEL SCHEFFEL, EINFÜHRUNG IN DIE ERZÄHLTHEORIE 138 (7th ed. 2007) ("Das Gemeinsame und Übertragbare von Geschichten ist nicht die Art und Weise der Darstellung in ihren sprachlichen und erzählerischen Modalitäten, sondern die Abfolge von Ereignissen und Aktionen, die auf der Handlungsebene eine autonome Sinnstruktur ergeben.").

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A. The Cover Story: Grand Narratives

I. Preambles Narrate (Hi)Stories

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. — Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.[2]

The preamble of the 1776 U.S. Declaration of Independence surely can be regarded as the model for future preambles.[3] With its blend of historical storytelling and appeal to common values, it has set the solemn tone we have come to expect from this type of text. It recounts

[2] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[3] On the relevance of the Declaration for the interpretation of the U.S. Constitution, see Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT'L J. CONST. L. 714, 719–21 (2010).

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the story of a despotic monarch, and of his subjects ready to throw off the yoke of oppression to be free in their "pursuit of Happiness." This story is linked to an argument: The breach of the *contrat social* by "the present King of Great Britain" entitles the colonies to declare their independence. Preambles primarily provide a moral background for the ensuing legal framework. Often, this moral is embedded in a story of past wrongs and aspirations for a brighter future—as also seen in the Preamble to the 1946 Bavarian Constitution:

> In the face of the scene of devastation into which the survivors of the second World War were led by a godless state and social order which lacked any conscience and respect for human dignity, with the firm intention of permanently securing for the future generations the blessings of peace, humanity and justice and mindful of its history of more than a thousand years, the Bavarian people herewith bestows upon itself the following Democratic Constitution . . . .[4]

With the rhetorical trope of a departure from an earlier "godless" period and with its double reference to the past—the dark times overcome and the traditions to build upon—this preamble employs the same phoenix *topos* as in the 1776 Declaration, one which also appears in the Preamble to the Charter of the United Nations (1945):

> We the Peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which

[4] Verfassung des Freistaates [CONSTITUTION OF FREE STATE OF BAVARIA], Dec. 2, 1946, Gesetzes- und Verordnungsblatt Bayern 1946, 333, *translation at* https://www.bayern.landtag.de/en/documents/rechtsgrundlagen/constitution-of-the-free-state-of-bavaria/. The German text reads:

> "Angesichts des Trümmerfeldes, zu dem eine Staats- und Gesellschaftsordnung ohne Gott, ohne Gewissen und ohne Achtung vor der Würde des Menschen die Überlebenden des zweiten Weltkrieges geführt hat, in dem festen Entschlusse, den kommenden deutschen Geschlechtern die Segnungen des Friedens, der Menschlichkeit und des Rechtes dauernd zu sichern, gibt sich das Bayerische Volk, eingedenk seiner mehr als tausendjährigen Geschichte, nachstehende demokratische Verfassung . . . ."

Id.

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> justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . . have resolved to combine our efforts to accomplish these aims . . . ..[5]

Once believed dead, the community of peoples is described here as rising out of the ashes of war, destruction, and abasement towards a new life and a unified future. Even if the emerging East-West conflict was soon to hinder the realization of this vision for decades to come, from a legal point of view, the grand narrative suggested by the Preamble is not a mere ornament. The spirit of commonality conjured up by that narrative shapes the Purposes of the United Nations laid down in Article 1, and, via this provision, also influences and inspires the interpretation of the Charter's binding operative clauses.[6] The system of safeguarding world peace and security as enshrined in the Charter—peaceful settlement of disputes in Chapter VI, collective security in Chapter VII, and regional arrangements in Chapter VIII—only becomes coherent against the background of the experiences that the Preamble's narration relays.

II. Constitutions as Reservoirs of Collective Identity

Preambles do more than narrate (hi)stories. The grand narrative about who we are and what unites us is also rendered by and through other legal provisions, namely those of constitutional law. As Robert Cover writes in his seminal essay "Nomos and Narrative":

> No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.[7]

Constitutional principles act as imaginary repositories for the aspirations of the society they constitute; they assure citizens of their collective, constitutionally-based identity. Described by Jan Assmann as that part of collective memory which preserves the fundamental connecting structures of a society that extend beyond the confines of autobiographical

[5] U.N. Charter pmbl.

[6] *See* RÜDIGER WOLFRUM, *pmbl*, *in* 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 15 (Bruno Simma ed., 3rd ed. 2012). Yet, the text also mentions that the instances in which the Preamble has been explicitly referenced in interpretations of the Charter have been rare.

[7] Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983–84).

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recollection,[8] cultural memory finds a prime medium of storage in constitutions. Who we are and what unites us is mediated by and through constitutional law. This is the meaning of those "epics" behind the constitution of which Cover writes. The grand narratives of departure from the past and of renewal, of tradition and origin, of our identity and that of the "others" make us collectively share the common project called the Constitution.

These foundational narratives serve three functions:[9] (1) They reduce complexity by singling out those events that lend orientation as historical landmarks and turning points while history "keeps piling wreckage upon wreckage and hurls it in front of our feet;"[10] (2) they reduce contingency by presenting history as a coherent sequence of events that has led to the here and now and that points teleologically towards the future; (3) they help to produce a sense of loyalty in constitutional subjects by appealing to common values through the construction of a "We." At the same time, the construction of "We/Us" obscures the fact that the narrative is in truth entrusted to the High Priests and Priestesses of Law. It is a specialists' tale primarily told by the representatives of power, in other words, of state authority.

The manner in which such foundational narratives bring legal norms and principles of constitutional law to bear can be seen with exemplary clarity in the U.S. Supreme Court's decision in *Boumediene v. Bush* (2008).[11] In the passage cited below, Justice Kennedy delivered the majority opinion of the Court, arguing that the plaintiff's detention in Guantanamo Bay camp had to be rendered subject to judicial scrutiny. In order to give sense and direction to the interpretation of the relevant Constitutional clause, Article I, § 9 clause 2, which reads, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it," Justice Kennedy enters into a grand historical narrative:

> The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of *habeas corpus* as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchial power. That

[8] *See* JAN ASSMANN, DAS KULTURELLE GEDÄCHTNIS 48–56 (3d ed. 2000).

[9] *See* Herfried Münkler, *Antifaschismus und antifaschistischer Widerstand als politischer Gründungsmythos der DDR*, 45 APUZ 16, 18–20 (1998).

[10] The powerful image that was inspired by Paul Klee's "Angelus Novus." *See* WALTER BENJAMIN, *Über den Begriff der Geschichte* (1940): *Theses on the Philosophy of History*, *in* ILLUMINATIONS: ESSAYS AND REFLECTIONS 257 (Hannah Arendt ed., Harry Zohn trans., 1968).

[11] 553 U.S. 723 (2008).

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> history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system. Magna Carta decreed that no man would be imprisoned contrary to the law of the land . . . .Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. Holdsworth tells us, however, that gradually the writ of *habeas corpus* became the means by which the promise of Magna Carta was fulfilled . . . .The development was painstaking, even by the centuries-long measures of English constitutional history. . . . Over time it became clear that by issuing the writ of *habeas corpus* common-law courts sought to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner . . . .Even so, from an early date it was understood that the King, too, was subject to the law. As the writers said of Magna Carta, "it means this, that the king is and shall be below the law." . . . .Still, the writ proved to be an imperfect check. Even when the importance of the writ was well understood in England, *habeas* relief often was denied by the courts or suspended by Parliament. Denial or suspension occurred in times of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them. A notable example from this period was Darnel's Case . . . .[12]

After this discussion of the history of the writ of *habeas corpus*, Kennedy proceeds to recount this "notable" case. It serves as illustration of a growing political pressure on the King's prerogatives, spurring a development that culminated in the Habeas Corpus Act of 1679.

> The Act, which later would be described by Blackstone as the "stable bulwark of our liberties," . . . established procedures for issuing the writ; and it was the model upon which the *habeas* statutes of the 13 American Colonies were based . . . .This history was known to the Framers. It no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power. The

[12] *Id.* at 739–41.

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> Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty . . . .Because the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles . . . ..[13]

In one grand historical arc, the court begins with reference to the "Barons at Runnymede" and passes by the "Framers" of the 1787 U.S. Constitution to finally arrive at the principle of the separation of powers. This principle, in turn, is introduced to argue for the judicial control over executive acts—and thus also for the scrutiny of what has been critically dubbed the "Guantanamo system."[14] Cover's connection between the narrative and the norm, between "nomos and narrative," is actually addressed openly. Justice Kennedy concludes his argument with the following words: "The broad historical narrative of the writ and its function is central to our analysis."[15]

As a continental lawyer, one might assign this kind of narrative reasoning to Anglo-American legal culture. A common law jurisprudence that reconstructs rules of law on the basis of historical precedents will obviously tend to use a more narrative style when it comes to interpreting the Constitution as *lex scripta*. Yet, the German Federal Constitutional Court also reasons in the style of legends when it takes recourse to foundational principles of the German Constitution, the "Basic Law." This can be exemplified by a passage from the court's *Wunsiedel* decision from 2009. The background of the case was an annual pilgrimage by neo-Nazi groups to the grave of Hitler's Deputy Rudolf Heß in the Franconian town of Wunsiedel. The central legal question concerned whether Section 130, paragraph 4 of the Criminal Code could be considered compatible with the right to the freedom of expression. According to Section 130, paragraph 4, "[w]hosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three

[13] *Id*.

[14] *See*, *e.g*., JEFF LEWIS, CULTURAL STUDIES 386–87 (2d ed. 2008); MARK P. DENBEAUX & JONATHAN HAFETZ, *Introduction*, *in* THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW 1, 4 (Mark P. Denbeakux & Jonathan Hafetz eds., 2009).

[15] *Boumediene,* 553 U.S. at 746.

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years or a fine."[16] Because the right to freedom of expression as guaranteed in Article 5 of the Basic Law is primarily subject only to the provisions of "general" laws,[17] thus banning laws which prohibit the expression of a specific political conviction, the Federal Constitutional Court had to resolve if and why a law directed specifically against Nazi propaganda could be compatible with the Basic Law. Eventually, the court declared the contested provision of Section 130 constitutional. In order to make its position plausible, the court made reference to what might be called the Coverean epic that—arguably—stands behind the Basic Law:

> Concerning the requirement of the general nature of laws which impose restrictions on opinions according to Article 5.2 of the Basic Law, an exception is to be recognised for provisions which aim to prevent a propagandistic affirmation of the National Socialist rule of arbitrary force between the years 1933 and 1945. The inhuman regime of this period, which brought immeasurable suffering, death and suppression to Europe and the world, has an antithetical significance characterising the identity of the constitutional system of the Federal Republic of Germany which is unique and cannot be captured solely on the basis of general statutory provisions. The deliberate discarding of the tyrannical regime of National Socialism was historically a central concern of all the powers participating in the establishment and passing of the Basic Law . . . in particular also of the Parliamentary Council . . . and forms an internal structure of the order of the Basic Law (see only Article 1, Article 20 and Article 79.3 of the Basic Law). The Basic Law can be largely particularly interpreted as an antithesis to the totalitarianism of the National Socialist regime, and from its structure through to its many details seeks to learn from historical experience and to rule out a repeat of such injustice once and for all . . . .
>
> Against this background, the propagandistic condonation of the historical National Socialist rule of

[16] STRAFGESETZBUCH [STGB] [PENAL CODE], § 130, para. 4, *translation at* http://www.gesetze-im-internet.de/englisch_stgb/ [hereinafter German Criminal Code].

[17] *See* GRUNDGESETZ [GG] [BASIC LAW], art. 5.2, *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html.

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> arbitrary force, with all the terrible factual events for which it is responsible, exerts an impact far beyond the general tensions of the debate within public opinion and cannot be covered solely on the basis of the general rules regarding the boundaries imposed on freedom of opinion. In Germany, favouring this rule constitutes an attack on the internal identity of the community and has a potential to pose a threat to peace. In this regard, it is not comparable with other expressions of opinion, and ultimately it can also trigger profound disquiet abroad. Doing justice to this historically rooted special situation by special provisions is not intended to be ruled out by Article 5.2 of the Basic Law.[18]

Thus, the Court recounts a story similar to that of the Preamble to the Bavarian Constitution quoted above: Of dark and inhuman times now overcome—"the National Socialist rule of arbitrary force between the years 1933 and 1945"—and of a new beginning, the "passing of the Basic Law." So radical is the break with the past that the Nazi period implicitly carries "antithetical significance characterizing the identity of the constitutional system of the Federal Republic of Germany." It is interesting to note that the grand narrative in this instance is not just employed to give meaning to a specific clause of the Basic Law, but instead to disregard Article 5.2 in favor of an implicit, historically inferred singular exception.

III. Hegemony and Difference

In general, such narratives remain true to the historical facts only to a limited extent, yet factual accuracy may be the wrong kind of yardstick with which to measure, anyway. As Herfried Münkler notes, "Political myths do not recount events, but ruptures in time and punctuations in history."[19] When introduced as part of a legal argument, such myths are invested with the force of law. That these narratives, however, are cloaked as a sequence of historical events, and not as storytelling, is far from unproblematic, given law's general claim to rationality. In this vein, constitutional jurisprudence even has clear examples of

[18] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Nov. 4, 2009, 124 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 300, 42–43, *translation at* http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/11/rs20091104_1bvr215008en.html.

[19] Münkler, *supra* note 9, at 18 ("Politische Mythen berichten . . . nicht von Ereignissen, sondern von Zäsuren der Zeit und Interpunktionen der Geschichte.").

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"unreliable narration."[20] Thus the Federal Constitutional Court's Second Senate narrated a seamless linear history of the incest taboo in its 2008 decision on incest between siblings; thereby, the court inserted the prohibition, as regulated in Section 173, paragraph 2, clause 2 of the German Criminal Code, in a long—a very long—tradition:

> The prohibition of incest has its roots in Antiquity. Emanations of that prohibition can be found in the Codex of Hammurabi, in Mosaic and Islamic law, in the laws of Ancient Greece, in Roman, in extended form in Canonic and in Germanic law as well as in the early German penal codes. The incest motif has been taken up by myths and legends, informative of the constitution of early legal cultures; and ever since it has had great importance in literature . . . .Model for the provision in Section 173 of the Criminal Code for the German Reich of 1873 was Section 171 of the Criminal Code for the North German Confederation which relied itself on the Prussian Criminal Code of 1851. The reason stated for introducing Section 173 into the Criminal Code of 1873 under the title 'Blutschande' ('disgrace of blood') were primarily the moral perceptions of the people . . . .
>
> The objects of punishment . . . .are backed by the legislator's conviction that a sense of wrong deeply anchored in society should be taken up and further on supported by means of criminal law . . . .The disputed provision finds its justification in joining plausible objects of punishment against the background of a societal conviction that incest deserves punishment, a conviction anchored in cultural history and still powerful today, also in international comparison.[21]

Quite in contradiction to this seemingly faultless historical narrative, the *juge rapporteur*, the Senate's then-outgoing President Winfried Hassemer, related quite a different version of the story than the one above. Reading his dissenting opinion, it becomes palpable that

[20] For explications of this concept, see Ansgar Nünning, *Unreliable, Compared to What? Towards a Cognitive Theory of Unreliable Narration*, *in* GRENZÜBERSCHREITUNGEN 53 (Walter Grünzweig & Andreas Solbach eds., 1999); Vera Nünning, *Unreliable Narration and the Historical Variability of Values and Norms*, 38 STYLE 236 (2004).

[21] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Feb. 26, 2008, 120 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 224, 3–4, 50. For the unreliability of the majority's narratives, see Andreas von Arnauld & Stefan Martini, *Unreliable Narration in Law Courts*, *in* UNRELIABLE NARRATION AND TRUSTWORTHINESS 347, 362–65 (Vera Nünning ed., 2015).

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"grand narratives" are anything but faithful representations of who we are and what it is that unites us—in other words, what is "deeply anchored in society." Such narratives represent social constructions. As a discursive practice they are situated in an area of exclusionary tension between hegemony and difference, between those who define the rules of the legal language game and those who do not.[22] The degree to which such narratives prove to be products of their time and the results of dominant viewpoints becomes clear when one compares the statements that were made by the Federal Constitutional Court about male homosexuality in the notorious 1957 judgment of Section 175 of the Criminal Code,[23] to the wording of the decision that was made on February 19, 2013 on adoption by homosexual couples.[24] In both cases the Court heavily relied on preconceptions about the (ab)normality of homosexual relationships that in both cases served as linchpin of the respective argument. While, in 1957, the court portrayed the male homosexual as driven by an irresistible sexual urge and stressed the danger of seduction of male youth, in 2013, it did not even mention any such danger as a possible reason for treating married couples and same-sex couples differently. But then, as the court recognized earlier in that decision, "it is not only the law in respect of same-sex couples that has changed considerably but also society's attitude to homosexuality and the life of same-sex couples."[25]

The fascination that the narrative construction of social coherence exerts on legal academics bored by quotidian bread-and-butter pragmatism must not divert attention from underlying power structures. The three functions of foundational narratives mentioned above—to reduce complexity, to reduce a sense of contingency, and to produce a sense of loyalty—all have an exclusionary component. Foundational narratives function to interpret events and developments teleologically and to render our present realities as part of a self-legitimizing narrative. Whoever remains outside of this narrative can only expect to be made part of the collective memory as "the Other." As Cover writes, "Once understood in the context of the narratives that give it meaning law becomes not merely a system of rules to be observed, but a world in which we live."[26] The worldview with which such narratives are imbued needs to be constantly critiqued in order to keep the "world in which we live" receptive to various

[22] *See generally* MICHEL FOUCAULT, L'ORDRE DU DISCOURS (1971); JUDITH BUTLER, GENDER TROUBLE (1990).

[23] *See generally* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], May 10, 1957, 6 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 389.

[24] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Feb. 19, 2013, 133 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 59, *translation at*: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/02/ls20130219_1bvl000111en.html.

[25] *Id.* at 55.

[26] Cover, *supra* note 7, at 4–5.

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forms of difference. Herein lies the pivotal importance of counter-storytelling [27] in constitutional law.

B. Reports from Everyday Life: Implicit Case Stories

I. What the Law Tells Me

And now for something completely different: From the *grands récits* and the lofty spaces of constitutional law to the down-to-earth sphere of statutory law. If one applies the definition by Martínez and Scheffel cited at the beginning of this Article, narrative structures can also be detected outside of constitutions in certain "complete" legal norms. [28] This, in turn, justifies the reconstruction of the process of norm application through narratological means.[29] This argument can be made vividly clear by evaluating a penal provision—Section 221, paragraph 1 of the German Criminal Code—concerning the crime of abandonment:

> Whosoever
> 1. places a person in a helpless situation; or
> 2. abandons a person in a helpless situation although he gives him shelter or is otherwise obliged to care for him, and thereby exposes him to a danger of death or serious injury shall be liable to imprisonment from three months to five years. [30]

If one engages for a moment in the experiment of reading this provision as a narrative, the perpetrator—the person who abandons someone else—and the victim—the person who is abandoned—lend themselves as characters. In the second alternative for which the law provides, both are connected by a special relationship—shelter or some other obligation to care. A potentially tension-fraught constellation begins to become apparent. Two

[27] *See generally* Richard Delgado, *Storytelling for Oppositionists and Others*, 87 MICH. L. REV. 2411 (1989); Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989); PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW (1992).

[28] Statutory provisions are of a different shape and character. According to the classification in German legal doctrine, "complete" legal norms possess an "if-then" structure. The following observations only apply to them. There would be less use for a narratological approach to, e.g., sets of statutory definitions. Moreover, one has to take into account differences in legal cultures: In the German regulatory tradition, the substantive provision (the "command," so to speak) is usually kept separate from provisions that define its elements. In the Anglo-American tradition, however, both functions–command and definition–are typically blended into one detailed and complex provision. For a skeptical account of the narrative quality of this kind of statutory law, see Monika Fludernik, *A Narratology of Law?*, 1 CRITICAL ANALYSIS OF LAW 87, 101–07 (2014).

[29] Meir Sternberg, *If-Plots: Narrativity and the Law-Code*, *in* THEORIZING NARRATIVITY 29 (John Pier & José Angél García Landa eds., 2008).

[30] German Criminal Code, *supra* note 16, at § 221, para. 1.

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temporally ordered events[31]—the abandonment and the danger of death or serious injury—are causally connected ("thereby"), which renders the events as a story with a plot in outline. At the moment of the victim's abandonment—in the narrated moment, that is—the story becomes "enplotted;"[32] it becomes worth telling and legally relevant.

A further story looms on the horizon: Not only are the two events connected in terms of the conditional elements of the offence (*Tatbestand* in German), but there is also a connection between these elements and their legal consequences (*Rechtsfolge*). In that it stipulates the consequences of a given offence, the legal provision anticipates the punishment of the perpetrator. In this case, the law's specific focus on the "ought" rather than the "is" appears to diverge from other types of narratives. The connection between events is different from narrative literature in that it is neither empirical-causal nor numinous-final or "fateful."[33] Rather, the event of "punishment" is connected in a normative-causal way with the events narrated beforehand. This, however, does not altogether differ from the form of other everyday narratives. For James Boyd White, the point of stories, generally, is to trigger a reaction that seemingly lies outside of the story itself:

> The meaning of the story, uncertain as it is, extends into the futures, in the law and elsewhere, for stories about the real world are told as grounds of action. The injury requires revenge; innocent suffering requires compassion; and so on. The idea of Hume and others that domains of fact and value are by definition distinct—"one can't get an 'ought' from an 'is'"—is certainly not supported by our experience of narrative and moral action. It is from the "is" from the story told a certain way, that we get our most important "oughts": our sense that a particular story is incomplete without a certain ending, which we can supply.[34]

That the perpetrator "ought" to be punished, that they "shall be liable" as the statute commands, is the very ending "We, the People"—as the democratic sovereign—supply in

[31] *See* WILLIAM LABOV, *The Transformation of Experience in Narrative Syntax*, *in* LANGUAGE IN THE INNER CITY 354, 361 (1972) ("[A] minimal narrative is defined as containing a single temporal juncture.").

[32] For the structure of "plots," see JURIJ LOTMAN, THE STRUCTURE OF THE ARTISTIC TEXT 231–39 (Gail Lenhoff & Ronald Vroon trans., 1977). It defines an event as the "movement of the plot" that "always involves the violation of some prohibition and is always a fact which takes places, though it need not have taken place" i.e. "the shifting of a persona across the borders of a semantic field." *Id.* at 233, 236, 238.

[33] For these conventional narrative models, see Martínez & Scheffel, *supra* note 1, at 111–19.

[34] BOYD WHITE, HERACLES' BOW 175 (1985).

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the case of our penal provision. Finally, one might add that law, like religion or magic, employs declarative speech-acts that can effect a change in reality.[35] In declaring that the perpetrator shall be punished,[36] law connects its own narratives to acts of transformation.[37] In this manner, law functions reminiscent of what Vladimir Propp describes in his analysis of Russian folktales.[38] In the words of Katharina Sobota, "Like creatures, rights can effectuate, found, constrain, dispense, transfer—they can exist, confound, be extinguished, and resurge again."[39]

II. Laws as a Reservoir of Case Stories

For some, these speculations about law as a narrative may appear too farfetched. They might seem to be the mental exercises of a legal scholar led astray by fancy. In their functional appearance, modern laws seem miles apart from what we expect to find in a narrative, particularly a good one. The inherent justification of a narratological perspective on legal norms might, however, be made plausible by starting with historical legal texts which are dressed up in a more narrative style than are modern statutes. Thus in Justinian's *Corpus Juris*, we find stories from Roman history that are partially mythical and partially real.[40] The customary laws of early thirteenth-century Saxony are repeatedly presented in Eike von Repgow's *Sachsenspiegel* in a highly narrative fashion.[41] In fact, the lavish illustrations of legal acts in this manuscript appear to be precursors of modern-day comic strips.[42] Historical legal rules appear to be more colorful than current ones due to their more casuistic nature. These rules do not possess the level of generalized abstraction, characteristic of modern statutes in civil law systems like in Germany. They take their inspiration from concrete events, real or imagined, which are then retold as guidance for

[35] *See* JOHN R. SEARLE, SPEECH ACTS 175–98 (1969). For specific comparison between law and magic, see Andreas von Arnauld, *Recht – Spiel – Magie: Hommage à Johan Huizinga*, *in* RECHT UND SPIELREGELN 101, 108–09 (2003).

[36] This is even more palpable in German, where the law generally states that the perpetrator "is" punished (*wird bestraft*). *See*, *e.g.*, German Criminal Code, *supra* note 16, at § 221, para. 1.

[37] For a closer analysis, see Andreas von Arnauld, *supra* note 21, at 29–31.

[38] VLADIMIR PROPP, MORPHOLOGY OF THE FOLKTALE (1928) (Louis A. Wagner ed., Laurence Scott trans., 2nd ed. 1968).

[39] Katharina Sobota, *Stimmigkeit als Rechtsstruktur*, 77 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 243, 253 (1991) ("Rechte können wie Lebewesen etwas bewirken, begründen, hemmen, lösen, übertragen, – sie können bestehen, zusammenfallen, zugrunde gehen und wieder aufleben.").

[40] *See generally* MARIE-THERES FÖGEN, RÖMISCHE RECHTSGESCHICHTEN (2002).

[41] *See generally* HENRIKE MANUWALD, *Narrative Bilder in Rechtshandschriften*, *in* AUSBILDUNG DES RECHTS 168 (Kristin Böse & Susanne Wittekind eds., 2009).

[42] *See id.*

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future cases.[43] Yet the structure of describing the normative conditions of the case (*protasis*) and stating the legal consequences of a given deed or act (*apodosis*), typical of today's legal norms, is already in place. Thus, we find in Moses 2 (Exodus), 22:5: "If a man do hurt field, or vineyard, and put in his beast to feed in another man's field, he shall recompense of the best of his own field, and of the best of his own vineyard."[44] Much in the same vein, Section 833, clause 1 of the German Civil Code orders that: "If . . . a thing is damaged by an animal, then the person who keeps the animal is liable to compensate the injured person for the damage arising from this."[45]

Whereas the Old Testament refers to actual events that may have occasioned that rule's creation,[46] the Civil Code in its abstraction is less vividly colorful. Yet both laws share a common structure. Stories are also enshrined in the modern statute.[47] The normative legal text finds its origin and purpose in an experience processed through narrative means.[48] According to Bernard Jackson, this stylistic alteration in modern law took place due to processes of bureaucratization and specialization.[49] For legislation in civil law systems, one can additionally point to the Enlightenment idea of the generality of the law as well as the notion of a comprehensive legal order that encompasses every conceivable case. If an animal damages the neighbor's garden, Section 833 Civil Code can be directly applied. On the basis of Moses 2, 22:5 one needs to draw an analogy to fields and the vineyards.[50] Even more than "Continental" law, common law jurisprudence is still based on the kind of

[43] *See generally* Simon Teuscher, ERZÄHLTES RECHT (2007).

[44] Translation taken from the Geneva Bible of 1599.

[45] BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 833, para. 1, *translation at* http://www.gesetze-im-internet.de/englisch_bgb/index.html.

[46] However, this already occurs with some level of abstraction. James Boyd White finds the cause for such abstractions in the limited capacities of human memory, be it individual or collective: "We normally deal with this problem by making skeletal outlines or formulas, which we can remember and which we use to organize the rest of what has happened and what will happen." WHITE, *supra* note 34, at 171.

[47] *See* BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE 97–101 (1988). Jackson refers to a 1985 draft of criminal code in England in which the abstract rules were complemented in an appendix by illustrative examples of the kind: "D, a doctor, finding P trapped and unable to speak after a road accident, injects a pain-killing drug." *Id.*

[48] *See* Cover, *supra* note 7, at 5.

[49] *See* Jackson, *supra* note 47, at 3, 106.

[50] On atypical ("difficult") cases, see *id.* at 106–10 ("These are characterised by their significant deviation from the story that stands behind the norm. While a casuistic system can more easily accommodate such cases, in dealing with statutory law it can become necessary to avoid untenable results of generalisation by extending or reducing the ambit of the norm."). For the limits of legal hermeneutics in unusual cases in which our everyday language fails, see Gerhard Struck, *Die Menschenwürde gilt als unantastbar: Zur Rhetorik der juristischen Fiktion*, 12 ZEITSCHRIFT FÜR SEMIOTIK 179, 185 (1990).

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reasoning typical of ancient, especially praetorian law.[51] Here, specific cases serve as reference for an "application" of the law drawing on analogies between the precedent and the cases at hand. Unsurprisingly, there used to be a close connection between law and historical narratives in England. The most distinguished legal scholars were legal historians in quite a specific sense; they were initiates of a common "law of the land," embedded in historical tradition and the retelling of the *causes célèbres*.[52]

III. Narrative Patterns: Mediating Between Text and Practice?

The comparison between the German civil code and Moses 2 shows that modern statutory law no longer records case stories with the same vividness and directness as in ancient times. Through its generalization, the law brought various possible constellations of cases together. To achieve this, the legislator takes recourse to an iterative model that is the abstraction of real incidents from the past, which at the same time may serve as blueprint for adjudicating future events. Rather than being narratives in the strict, narrow sense, statutory norms like Section 833 of the Civil Code or Section 221 of the Criminal Code record narrative patterns.

What do these insights entail for the narratological reconstruction of norm application? Traditional continental legal methodology is still based on a syllogism according to which the facts of a case taken from real life are to be subsumed under a textually-constituted legal norm.[53] First, the conditional elements of a statutory provision are interpreted. This stage of adjudication is governed by hermeneutics.[54] Then follows the subsumption stage, the assignment of the facts of the case to the stipulations of the legal provision, a step generally presented as a logical process. Though this model has been frequently criticized and modified,[55] the prevailing view still clings to the idea that there is a certain point of transition between the text, or the law, and the practice, or the facts, while still abiding by the classic dichotomy between "is" and "ought." Karl Engisch attempted to blur the lines between the norm and the facts with his famous metaphor of "glancing back and forth" (*Hin- und*

[51] *See* EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 271–96 (1913) (Walter L. Moll trans., 2002).

[52] *See* DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS 1578–1616, 115–38 (2014).

[53] *See*, *e.g.*, KLAUS F. RÖHL & HANS CHRISTIAN RÖHL, ALLGEMEINE RECHTSLEHRE 123–24, 151–53 (3rd ed. 2008); ROLF WANK, DIE AUSLEGUNG VON GESETZEN 16 (5th ed. 2011); REINHOLD ZIPPELIUS, JURISTISCHE METHODENLEHRE 79–80 (11th ed. 2012). For a deeper analysis, see generally JOCHEN BUNG, SUBSUMTION UND INTERPRETATION (2004).

[54] CHRISTOPH ENGEL, *Herrschaftsausübung bei offener Wirklichkeitsdefinition: Das Proprium des Rechts aus der Perspektive des öffentlichen Rechts*, *in* DAS PROPRIUM DER RECHTSWISSENSCHAFT 205, 232–33 (Christoph Engel & Wolfgang Schön eds., 2007). *See also* Gaakeer chapter in this volume (discussing the hermeneutics of the adjudicative process in this issue.).

[55] *See generally* BERNHARD SCHLINK, *Bemerkungen zum Stand der Methodendiskussion in der Verfassungsrechtswissenschaft*, 19 STAAT 73 (1980); ROBERT ALEXY, THEORIE DER JURISTISCHEN ARGUMENTATION 17 (1987).

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Herwandern des Blickes).[56] While the norm is interpreted with a particular case in mind, the legal norm and the facts are synchronized in a step-by-step process. Still, according to traditional legal methodology, the transition between the text and practice remains a categorical one. Herein lies the lawyer's alchemical art.

If one accepts, however, that legal norms record narrative patterns, the operation of moving from norm to fact appears far less mysterious. Let us assume, for example, that a judge must assess whether, per Section 221, paragraph 1 of the Criminal Code, a train conductor has committed "abandonment" by forcing an un-ticketed minor to get off a train. To interpret the term "helpless situation," the judge will determine whether being under age can be considered the cause of helplessness. Other possible causes of helplessness, such as fainting or the influence of drugs, will be considered irrelevant to the judge's task. Statutory construction with a specific case in mind thus reflects a process of selection. From all the potential case stories inscribed in the norm, one will be culled, step by step. At the same time, the outline of a concrete narrative emerges: The story of the abandoned child. One may describe this case-oriented concretization of the norm as a process of 'fading-in' (to use a cinematographic metaphor). In a reciprocal manner, a wealth of facts is turned into a 'case' according to a reverse process of selection. Here, the case is cleared of factual elements without any relevance to the application of the law. These include the child's shoe size, for instance, which is as irrelevant to our case as is the child's hair color. Relevant facts, by contrast, include the minor's exact age, the time at which the event took place, et cetera. During this process, irrelevant facts are "faded out." In the end, two narratives reduced through a selective process are examined in terms of their congruence. When reconstructed in such a fashion, the subsumptive operation entails a comparative process, matching two narratives according to their similarities.[57] The narrative mediates between text and practice and can thus overcome the—at least superficially existing[58]—categorical difference between the facts and the law. On another level, the act of matching these two narratives can be conceived of as producing yet another meta-narrative. Law and the application of laws are thus always "entangled in stories," to quote the title of a book by the German philosopher and legal scholar Wilhelm Schapp.[59]

[56] *See* KARL ENGISCH, LOGISCHE STUDIEN ZUR GESETZESANWENDUNG 14–15 (3rd ed. 1963). For an elaboration on Engisch's concept, see Marijan Pavčnik, *Das Hin- und Herwandern des Blickes*, 39 RECHTSTHEORIE 557 (2008).

[57] For a similar reconstruction, see Walter Grasnick, *In Fallgeschichten verstrickt*, ZEITSCHRIFT FÜR RECHTSPHILOSOPHIE 192, 197 (2003).

[58] A different solution is proposed by Ino Augsberg. *See* INO AUGSBERG, DIE LESBARKEIT DES RECHTS (2009). Augsberg (following Deleuze's lead) proposes an isomorphic structure of law and facts in reconstructing both as texts.

[59] *See* WILHELM SCHAPP, IN GESCHICHTEN VERSTRICKT (1953).

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C. *Grands Récits*, *Petits Récits*

At first glance, the two parts of this Article may appear to be utterly disconnected, apart from the fact that both mention stories and narratives. The discerning reader will note that quite different notions and concepts of narrative were referred to: The first part dealt with grand narratives that conjure up and create a sense of community and connectedness, while at the same time entailing the danger of constructing difference from the norm as deviance.[60] Such a 'culturalist' notion of narrative relates more to narrative contents or to semantic meaning, including foundational myths, traditions, turning points, and to the summoning power of appeals to the exceptional.

The second part of the essay, by contrast, led the reader into far less lofty everyday legal interpretive practice. The notion of narrative cited here was informed by a structuralist approach based on the definition by Matías Martínez and Michael Scheffel explained as a "sequence of events and actions producing at the level of [literary] action an autonomous structure of meaning."[61] This definition encouraged the search for the hidden narrative structures in statutory law. While norms of constitutional law with their textual openness and their reference to moral aspirations are especially close to the solemn narratives used to construct collective identities, the more earthbound statutory provisions are better suited for illustrating precisely how legally inscribed narrative patterns direct the legal norms. Has this Article presented two isolated reflections after all—a culturalist investigation of constitutional law and a structuralist narratological dissection of statutory law?

At second glance, however, these pursuits are more closely related. First, the grand narratives discussed at the beginning of the article can also be described as "sequences of events and actions" that produce "an autonomous structure of meaning." This applies to the conceptions of history in the quoted preambles as well as those constitutional narratives that serve to link the norms of constitutional law with historical recollection. Second, both types of narrative possess exclusionary effects. The reduction of complexity and contingency by the grand narratives is the result of a process of selection, and selection processes also figured largely in the second part of this article. The exclusionary drift of legal narratives may have been less apparent in the examples given in the latter part, but it is present nevertheless. This becomes apparent when the judge in our example has to decide if the sex or the skin color of the abandoned child is relevant (or irrelevant) for "making the case." Every narrative fixes a course of events or the meaning of a law and thus obviates everything that failed to become part of the story. This is why Robert Cover writes about the judges' task to adjudicate authoritatively: "Judges are people of violence . . . .Because of the

[60] For a warning of this danger, see, e.g., LUTZ NIETHAMMER, KOLLEKTIVE IDENTITÄT (2000); Andreas von Arnauld, *Die Wissenschaft vom Öffentlichen Recht nach einer Öffnung für sozialwissenschaftliche Theorie*, *in* ÖFFENTLICHES RECHT UND WISSENSCHAFTSTHEORIE 65, 92–93 (Andreas Funke & Jörn Lüdemann eds., 2009).

[61] Martínez & Scheffel, *supra* note 1, at 138.

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violence they command, judges characteristically do not create law, but kill it . . . .Theirs is the jurispathic office."[62]

In this process, the grand narratives of constitutional law also influence the everyday practice of norm application, as constitutional and statutory law are not unrelated. Constitutional law affects statutory law, its interpretation, and its application. Considering once more the example of illegal abandonment, imagine that an individual is taking a train to an academic conference in Germany.[63] Because of a train drivers' strike, the ride ends suddenly and in an irregular fashion, and all passengers are forced to disembark the train at a station in the middle of nowhere. The conference attendee is unfamiliar with the place and feels somewhat 'lost in transportation'. Was he abandoned in a situation of helplessness? In a heated discussion, one of the passengers states that the real culprit is the chairman of the train drivers' union, "that Mr. Weselsky." He was ultimately responsible for their situation and should be punished accordingly.[64] Imagine further, that a judge would consider in earnest to hold Mr. Weselsky criminally liable. In this case, she could not apply the Criminal Code without recourse to the German constitution. The right to strike is constitutionally guaranteed by Article 9, paragraph 3 of the Basic Law, acknowledging the right "to form associations to safeguard and improve working and economic conditions."[65] The right to form associations encompasses the right to actively pursue the aims and purposes of that association and also encompasses the right to strike, which cannot be derived from the wording of Article 9, paragraph 3 of the Basic Law. It is, however, implied, as the Federal Constitutional Court has explained in its judgment on worker participation from March 1, 1979 that:

> Basic Law does not belong to the "classic" human rights. The freedom of association was established only under modern industrial working conditions having developed in the course of the 19th century. When interpreting this right, the recourse to a traditionally fixed content is therefore possible only to a limited extent. Indications for specifying the norm can be derived from the historical development which dates back to the almost

[62] Cover, *supra* note 7, at 53.

[63] The paper upon which this essay is based was first presented at a conference that took place during a large-scale strike by the train drivers' union of Germany GdL (*Gewerkschaft der Lokführer*). I apologize for the occasional resulting pun.

[64] Of course, I am hiding here behind a nameless passenger so as not to arouse the righteous scorn of criminal lawyers by expressing this deviant legal opinion myself.

[65] GRUNDGESETZ [GG] [Basic Law], art. 9, para. 3, *translation at* http://www.gesetze-im-internet.de/englisch_gg/. It was translated by Christian Tomuschat and David P. Currie, as revised by Christian Tomuschat and Donald P. Kommers in cooperation with the Language Service of the German Bundestag (March 21, 2016).

> identical Article 159 of the Weimar Constitution. In this sense, the Federal Constitutional Court . . . has always stressed that in determining the scope of this right its historical development has to be taken into account. As the wording of Article 9 para. 3 Basic Law and the historical development show, the freedom of association is primarily a civil liberty . . . .Elements of the guarantee are the freedom to found and join an association, the freedom to leave and to stay away from it as well as the protection of the association as such and its right to pursue the aims mentioned in Article 9 para. 3 Basic Law by certain specific activities. These encompass the conclusion of collective agreements through which the relevant associations regulate in particular wages and other material working conditions . . . in their own responsibility and in general without interference by the State; insofar the freedom of association is serving a reasonable order of working life . . . .In principle, Article 9 para. 3 Basic Law leaves to the associations the choice of means which they deem suitable to attain their goals.[66]

Perhaps less "grand" than in the *Wunsiedel* decision presented earlier in this article, the Federal Constitutional Court once more grounds its legal argument in historical story telling. The judges find the basis for the right to freedom of association in the history of industrialization and thereby connect it to the narrative of the nineteenth century's 'Social Question' and the trade union movement. Based on "the wording of Article 9 para. 3 Basic Law and the historical development," the right is constructed as a civil liberty directed against interference by the State, leaving "to the associations the choice of means which they deem suitable to attain their goals," in other words, the right to strike. Now, where does this story lead us? Can we supply that "certain ending"[67] to the story which makes it complete? The narrative cited above suggests the following conclusion: the right to strike is constitutionally guaranteed, and it fulfills a reasonable social purpose that has a historical foundation. The State should not interfere with the pay dispute and should also refrain from taking any coercive measures against "that Mr. Weselsky."

Omitted above is what follows in the Federal Constitutional Court's judgment. In the ensuing passages, the judges stress the importance of implementing the freedom of association

[66] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Mar. 1, 1979, 50 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 290, 366–68.

[67] WHITE, *supra* note 34, at 175.

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through legislative means, the necessity to respect the particularities of the respective economic sector, and the necessity of protecting competing legal interests. Thus, another possible narrative may be derived from this judgment. It certainly should not involve prosecuting the union's chairman, but it could move in the direction of regulating labour conflicts in important areas of infrastructure, like the railroad, by means of legislation. By only quoting portions of the judgment, this narrative conclusion has, however, been purposefully obviated by the present unreliable narrator.

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