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Table of Contents

Donato Carusi, Da una terra di confine [From a border land]

Nuria Rodríguez Gonzalo, About resentment

Jeanne Gaakeer, Practical Wisdom and Judicial Practice: Who’s in Narrative Control?

Marcílio Toscano Filho & Maria Francisca Carneiro, I sapori del diritto. Una libera congettura sul gusto della giuridicità. (“Menu Degustazione in Quattro Portate”). [Tastes of the Law. A guess about the taste of juridicity. (A four courses tasting menu)]

Geo Magri, Tra diritto, giustizia e regole sociali. La trilogia Mozart–Da Ponte [Between law, justice and social rules. Mozart/Da Ponte trilogy]

Domenico Sivilli, Il mito di Prometeo: disobbedienza, dono e ordine politico [The myth of Prometheus: disobedience, gift and political order]

Jaime Francisco Coaguila Valdivia, ¿Es el juez realmente un poeta? Algunas palabras en voz alta sobre la antología “Jueces en la Literatura Chilena” de Aristóteles España (Is the judge a poet?)

Annalisa Verza, Aspetti e dinamiche della sfida migratoria nel capolavoro di F. Brusati Pane e cioccolata (1973) (Aspects and Dynamics of the Challenge of Migration in Brusati’s Masterpiece Bread and Chocolate)

Teresa Pasquino, Antigone, Creonte e il Coro. Tra νόμος e άγραπτα νόμιμα (Antigone, Creon and the Chorus. Between νόμος and άγραπτα νόμιμα)


Reviews

PRACTICAL WISDOM AND JUDICIAL PRACTICE: WHO’S IN NARRATIVE CONTROL?

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Abstract
In this article I focus on the Aristotelian requirements for the art of good judging in connection to the suggestions made for the role of emotion in adjudication as developed in the interdisciplinary fields of Law and Literature and Law and the Humanities: how to combine the heart and the head in legal practice by finding inspiration and guidance in literary works, and in the suggestions more recently made in cognitive narratology. Or, in other words, how to incorporate empathy and literary-legal imagination into a judicial methodology in such a way that the requirements of the rule of law (rather than of men, i.e. the subjective persuasion of the judge) are fulfilled.

Key Words: Practical wisdom/phronèsis, judicial practice, empathy, narratology.

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Practical Wisdom and Judicial Practice: Who’s in Narrative Control?
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‘Give therefore thy servant an understanding heart to judge thy people, that I may discern between good and bad’ (1 Kings 3:9, AV)

‘This, Fiona decided as her taxi halted in heavy traffic on Waterloo Bridge, was either about a woman on the edge of a crack-up making a sentimental error of professional judgement, or it was about a boy delivered from or into the beliefs of his sect by the intimate intervention of the secular court. She didn’t think it could be both.’ (Ian McEwan, The Children Act, London, Jonathan Cape, 2014, at 91)

1. Introduction

In 1 Kings 3:9 (AV) we read that Solomon when asked by his God what he would like most begs to be furnished with an understanding heart in order to be a good judge. Aristotle in his Poetics suggests that an essential quality of a good tragedy, the site of difficult decisions par excellence, is that it arouses fellow-feeling, or philantropia, a contested term that refers both to an empathetic stance with respect to the fate of the protagonist, and to a form of justice.1 Taken together these sources not only suggest that the topic of the 2015 IVR Conference, Law and Emotion, has a rich literary history, but also that the concept of empathy, discussed in the fields of Law and Literature and Law and the Humanities since the late 1980s2, and proliferated since the publication of Martha Nussbaum’s Poetic Justice, merits our further attention. I say so for the simple reason that what James Boyd White wrote in 1985 obviously still goes for our legal culture of argument, ‘Law and literature are alike in that they both give voice to the voiceless and

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thus aim at “the extension of our sympathies”\(^3\), but that so far, given the Anglo-American roots of the literary-legal approach(es), both the legal-theoretical and the judicial implementation of this proposition has predominantly been geared toward a common law judicial setting with a focus on the competing narratives of judicial opinions\(^4\). What is more, the paradigm shift in common law adjudication toward Holmesian favourites such as economics and statistics, or, as Robin West calls it, ‘scientific judging’, has lead to, ‘the demise of judicial empathy … as a piece of the collateral damage in the movement from traditional, moralistic, and particularistic reasoning, to forward-looking scientific adjudication. Empathy is as irrelevant to the new paradigm of judging as it was central to the old”\(^5\).

This calls, I suggest, for a search for shared elements of judging, i.e. irrespective of common law or civil law orientation. Obviously conceptual clarity as far as the use of emotion in a legal setting is concerned is of great importance. As Terry Maroney’s pathbreaking research on law and emotion has already outlined, we need to be crystal-clear about what we focus on when we “do” law and emotion, or law and empathy. For purposes of this article I find inspiration in what Maroney calls the ‘legal-actor approach’, one that, “… focuses on the humans that populate legal systems and explores how emotion influences and informs, or should influence or inform, those persons’ performance of the assigned legal function“\(^6\). Given my own field of expertise in Law and Literature and the fact that I am a sitting judge, I will restrict my attention to the judge as a legal actor, not least because most common law oriented research usually takes the jury as object of inquiry.

Now emotion may seem to be a strange bedfellow if we consider that the demands of legality in contemporary jurisdictions order the judge to stay clear of her subjective persuasion so that the rule of law rather than of men can be guaranteed. In other words, is the emotion of empathy to be accepted as an essential and/or normative component of the art of judging, more specifically so in hard cases when the law, if not silent, is not particularly outspoken? That is to say, with Thomas Hobbes’ *Leviathan* in mind\(^8\), can the judge then give her discretion, coloured by private emotion, free reign? The threat to the logocentric reasoning that we have cherished since the Enlightenment looms large for those of legal-positivist denomination. So the question would be

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5 Cf. West, R., ‘The Anti-Empathic Turn,’ in: Fleming, J. E. (ed.), *Passions and Emotions*, *Nomos*, LIII, 2012, pp.243-288, at 288. The contributions to the ‘Passions and Emotions’ volume address issues of emotion in moral judgment as well as emotions in legal interpretation. On the political level, it is interesting to note that presidential candidate Hillary Clinton spoke of the necessity to promote empathy (she used the word literally), also as imagining being in someone else’s shoes, in order to fight racial discrimination (speech at the National Urban League meeting held at Ford Lauderdale, Florida, 31 July 2015, CNN Newsreel 31 July 2015).


7 Cf. Maroney, supra note 6, at 120, ‘A core presumption underlying modern legality is that reason and emotion are different beasts entirely’.

8 I am thinking here of chapter 21 of Thomas Hobbes’ *Leviathan* (London, J.M. Dent and Sons, Everyman’s Library, 1987), where Hobbes discusses the situation in which the legislator is silent, i.e. there is no specific rule, and the subject therefore at liberty to use his own discretion.
whether empathy and a literary-legal imagination can be incorporated into a judicial methodology such that the requirements of the rule of law are fulfilled.

In the first part of what follows I will return to, and build on my recent arguments about the Aristotelian requirements for the art of judging well, in connection to the suggestions made for the role of emotion in adjudication as developed in the interdisciplinary fields of Law and Literature/ Law and the Humanities, how to combine the heart and the head in judicial practice by finding inspiration and guidance in literary works, and for what reasons. I do so also on the view put forward by William J. Brennan jr., that already in the early twentieth century, ‘Cardozo drew our attention to a complex interplay of forces – rational and emotional, conscious and unconscious – by which no judge could remain unaffected. … this interplay of forces, this internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality’. Thus my perspective in this part is geared toward empathy as a second-order emotion, i.e. as a, ‘mode of being in touch with the emotions, feelings, expectations, and vulnerabilities of others,’ and as ‘the capacity to make morally significant decisions in the light of empathy with the first-order emotions of others’. In other words, on what from a literary-theoretical point of view is delineated as the combination of aesthetic empathy, i.e. empathy felt for a person whom we know to be fictional, say Effi Briest or Anna Karenina, and the empathy that we ourselves develop as a character trait. The latter’s success, also in view of Benjamin Cardozo’s famous thesis about the unity of form and content of legal texts, and more specifically judicial decisions, can be deduced from the reaction of those affected by such a decision. When the judicial text is logocentric and cold, this can evoke violent emotion.

Recently in the Netherlands, a father who heard the decision of a lower court with respect to the defendant-car driver who ran over and killed his two-year-old daughter and both her grandparents while they were cycling on a bicycle track, threw a chair to the judge reading the decision out of sheer disappointment and frustration. The decision itself was correct in terms of traffic law and criminal law, also as far as the sentencing was concerned, but did not at all, or rather not explicitly, recognize the enormous suffering of the parents of the little girl. In other words, the judicial decision performed its legal function of decision-making and criminal law dispute resolution in the abstract sense only, and failed in its communicative and societal function because it did not show an empathetic stance towards the bereft parents who had understandably hoped for a severe punishment of the offender by way of retribution. As a concomitant result, the general audience felt with the parents; it did not accept the decision as fair. Thus the performativity of the (text of the) judicial decision is intimately connected to the narrative identity of the judge taking the decision, whether this identity is consciously chosen or not. An interesting fictional example can be found in Ian McEwan’s novel The Children Act to which I turn in more detail below in paragraph 3. Judge Fiona Maye’s opening remark in the hard case of the Siamese Twins is this: “This

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court is a court of law, not of morals, and our task has been to find, and our duty is then to apply, the relevant principles of law to the situation before us – a situation which is unique. This suggests the need for legal practice to at least consider the suggestions made by Law and Literature.

Then, in paragraph 4, I turn to the suggestions made in contemporary cognitive narratology in order to highlight the consequences for judicial practice of findings with respect to narrative conventions at work in all of us, such as script and schema. Then the first-order emotion of the judge, e.g. her fear, anger or distress, comes central stage as the objective of other people’s narrative goals. The topic is acute not least because contemporary neuroscience suggests that the mechanisms at work in the development of empathy are neural, and, ‘… science now suggests that, even in law, it is emotion or empathy, that motivates compliance …’

2. Narrative empathy in literature and law

It is my firm conviction, based on some seventeen years of experience on the bench, that in every case that comes before a judge emotions are involved in at least two related ways. To start with, the first-order emotion of the parties usually triggers the legal conflict, even though in corporate and commercial disputes this is mostly couched as a rights discourse involving money. In criminal law, the emotion of victim and perpetrator rather than the other party in the case, the state, are central stage. The judge has to be aware of these emotions and act upon that awareness. But, more importantly, the judge has to be aware of the “subtext of a case”, the stories of the litigants that matter to them personally but that are all too often filtered away in the course of the proceedings, geared as they are toward the finding of legally relevant facts in light of possibly applicable legal rules and norms. This requires of the judge a legal imagination that includes a concrete reflection both on what is and what is not actually argued, in either oral or written form, and what the emotional aspect “really” is. And since judges too, ‘… suffer the slings and arrows of outrageous fortune’, such imagination would include professional and personal self-reflection on what she recognizes and accepts as valid, and on what remains unacknowledged given her own blind spot(s). For the stories in law as much as the stories in literature the claims about the necessary capacity of second-order empathy, made by scholars and legal professionals alike, are to be considered in connection to existing character traits in the reader, and these include her first-order emotions.

What Stephen Breyer claimed about the need for judges to seek nourishment in literature19 in order to correctly fulfill law’s requirement of professionals to have ‘both a head and a heart’20, is intimately connected to who judges are and how they view their societal role and function, and their legal persona in daily practice. It also calls for continued attention in legal theory to the relation between law and morality in its connection to theories of adjudication21. Or, as Steven Winter suggests, ‘A literary turn of mind is vital to morality because it is through narrative enactment that we imagine how various situations might be carried forward and, thus, are able to assess their ethical implications22.

Both aesthetic and practical empathy thrive on emotion. To me, the claim put forward by Patrick Colm Hogan that, ‘Our emotional response to stories is inseparable from our empathic response to the characters, their situations, actions, capacities, and so forth’23, is relevant in both literature and law, especially since different forms of aesthetic empathy can help feed the legal imagination24. One cannot be a good judge without that, and I wholeheartedly agree with Gary Watt when he writes that, ‘Too much respect for law and a lack of humane imagination is a terrible thing in a judge’25. The 2009 confirmation hearing of Supreme Court Justice Sonia Sotomayor, however, shows that this is not a universally accepted truth. Or rather, that a nominee for the bench risks vilification if she deviates from the enlightened path of rationality as the predominant factor in adjudication. When her views on the importance of her personal identity in its connection to empathy as criterion for judging were challenged, Sotomayor was quick to

19 ‘Each of those stories involves something about human passion’ ... ‘And so sometimes I’ve found literature very helpful as a way out of the tower.’ Hearings before the Committee on the Judiciary, 103rd Congress, 2nd session 232-233, 1994, statement of Stephen G. Breyer, Supreme Court Nominee.
20 The reason for the combined heart and head being that ‘… when you are representing human beings or deciding things that affect them, you need to understand, as best you can, the workings of human life’ … ‘Only the most difficult cases get to the Supreme Court, those cases where perfectly good judges come to different conclusions on the meaning of the same words. In those difficult cases, it is very important to imaginatively understand how other people live and how your decisions might affect them, so you can take that into account when you write.’Stephen Breyer on Intellectual Influences http://thebrowser.com/interviews/stephen-breyer-on-intellectual-influences, <accessed 1 January 2013>.
21 Cf. Brennan, supra note 9, at 9, footnote 20, referring to Thomas Jefferson’s Dialogue between my Head and my Heart, and remarking that, ‘An appreciation for the dialogue between head and heart is precisely what was missing from the formalist conception of judging,’ i.e. the nineteenth-century Langdellian formalism that Benjamin Cardozo reacted against, one that not incidentally in the early days of Law and Literature was taken up by Brook Thomas and Robert Ferguson when they drew our attention to the period in which law in the U.S. was still part and parcel of the humanities, in Cross-Examinations of Law and Literature (Cambridge, Cambridge University Press, 1987) and Law and Letters in American Culture (Cambridge Mass., Harvard University Press, 1984), a period that in Europe, roughly put, can be situated before the great codifications of national legal systems of the late eighteenth and the nineteenth century (cf. Gaakeer, J., ‘European Law and Literature: Forever Young. The Nomad Concurs,’ in: Porsdam, H. and Th. Elholm (eds), Dialogues on Justice: European Perspectives on Law and Humanities, Berlin, De Gruyter, 2012, pp.44-72).
23 Hogan, supra note 11, at 276.
24 ‘Empathy may involve imagining some other person’s experience as such (allocentric empathy), imagining oneself in his or her situation (projective empathy), or imagining some relevantly standard person in that situation (normative empathy).’
join the traditional ranks, i.e. while she acknowledged judicial emotion, she dismissed it as harmful in actual decision-making. And neither did President Obama’s warm plea for the empathy criterion survive the public debate. Such vilification is not new. One only has to think of the empathetic interpretive stance employed by Supreme Court Justice Blackmun who joined Justice Brennan’s dissenting opinion in *DeShaney v. Winnebago County Department of Social Services*, and added a voice of his own when he wrote, “Today, the Court purports to be the dispassionate oracle of the law, unmoved by “natural sympathy” ... But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts. ... the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. ... I would adopt a “sympathetic reading”, one which comports with the dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging. ... Poor Joshua, ... It is a sad commentary upon American life, and institutional principles that this child, Joshua DeShaney, is now assigned to live out the remainder of his life profoundly retarded ...” Blackmun was widely taken to task for his first-order emotional exclamation “Poor Joshua”, and his so-called ‘jurisprudence of sentiment’.

And yet I would agree with Martha Nussbaum when she claims as her epistemological position, “... that certain literary texts ... are indispensable to a philosophical inquiry in the ethical sphere; not by any means sufficient, but sources of insight without which the enquiry cannot be complete’, and that we need literature, ‘that talks of human lives and choices as if they matter to us all’. This position originates in Nussbaum’s earlier work in which she combines ethical philosophy along Aristotelian lines with the suggestion to study the narrative and emotional structures of novels, and

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26 Confirming that the, ‘[T]he job of a judge is to apply the law. And so it’s not the heart that compels conclusions in cases, it’s the law.’ Nomination of Judge Sonia Sotomayor to Associate Justice of the Supreme Court before the Senate Committee on the Judiciary, 111th Congress, 1st Session, July 14, 2009. Cf. Maroney, T., ‘Emotional Regulation and Judicial Behavior,’ 90 California Law Review, 2011, pp. 1481-1551, at 1485; Sotomayor first brought forward the identity argument in a 2002 speech at Berkeley, see Martin Alcoff, L., ‘Sotomayor’s Reasoning,’ 48 The Southern Journal of Philosophy, issue 1, March 2010, pp.122-1238. See also McArdle, supra note 4.

27 489 U.S. 189 (1989). In 1984, Joshua DeShaney was subjected by his father, with whom he lived after his parents had divorced, to a battering so severe that he suffered permanent brain damage. He was profoundly retarded for the rest of his life. The evidence showed that the Winnebago Department of Social Services (DSS) knew what happened in the DeShaney home. After the final beating, Joshua and his mother brought suit against the county, the DSS, and several of its workers. They complained that Joshua had been deprived of his liberty in the sense of bodily integrity without due process of law, in violation of his rights under the Due Process Clause of the Fourteenth Amendment, because the DSS et al. had failed to intervene to protect Joshua against his father’s beatings. The majority opinion of the Court held that failure to protect an individual against private violence does not constitute a violation of the Due Process Clause, because no affirmative obligation is imposed on the State to provide this type of protection. The Court also held that the State’s knowledge of Joshua’s dangerous situation did not itself establish a special relationship which might give rise to such an affirmative obligation either, since the State did not hold Joshua in its custody during the final beating, which incidentally was not by a State official but by his father.

28 *DeShaney*, supra note 27, at 212-213.


ties up with Nussbaums’s construction of the truly moral judge founded in the good aristotelian judge, whose virtue lies correctly applying the equity of the flexible ruler. He is, ‘... a judge of practical wisdom, rather than being unreflectively subservient to law, [who] will apply it in accordance with his very own ethical judgment ...

The combined argument about the literary-legal construction of a good judge is that real judges should read fiction because the lessons it teaches can directly be applied to decision making. The argument runs like this. Literary works with legal themes, however remote perhaps from the traditional jurisprudential themes, can give us insight into the struggles and tensions that are created by law by the very way in which it regulates society and the lives of individuals. This is because literature differs from the abstract propositions of doctrine and jurisprudence. Literature is always an experience of the imagination, never a string of propositions. Literature’s “capacity” to contribute to the professional lives of lawyers makes it also an indispensable medium to learn about law. The experience of viewing the world of the text and its inhabitants empathetically can be transformed into a norm for judging human relations in general, or, as Nussbaum puts it, for ‘our social existence and the totality of our connections’

Thus, reading literature can make us aware of the complexity of the human condition and can help promote an empathic ability, i.e., ‘... to imagine the concrete ways in which people different from oneself grapple with disadvantage...’ At the heart of her approach, therefore, is the emphasis on the particularity of human experience rather than an abstraction formulated on the basis of presuppositions that are hard to test. Nussbaum’s term to denote, ‘the ability to see one thing as another, to see one thing in another’, is ‘fancy’. This requires from the reader as the most important characteristic, ‘... the power of imagining vividly what it is like to be each of the persons whose situations he imagines’.

What, then, does this mean for the judge in actual legal practice? This ‘narrative imagination’ as Nussbaum also calls it, obviously has to be translated to the language of judging, for literature and law are alike in that they need ‘... a language that is expressive of the kind of imagination that’s capable of perceiving the individual humanity of the people involved and their circumstances; recognizing that each has a complicated story with factors that make it not the same as anyone else’s’.

This argument returns in Nussbaum’s defense of the arts and humanities against the instrumental profit motive pervasive in contemporary science and technology where she

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32 Nussbaum, supra note 30, at 99.
33 See also Heald, P.J., ‘Law and Literature as Ethical Discourse,’ in: Heald, P.J. (ed.) Literature and Legal Problem Solving, Durham (North Carolina), Carolina Academic Press, 1998, pp.3-13; Heald, P.J., ‘The Death of Law and Literature,’ Comparatist, 33, 2009, pp.20-28. Given the scope of this article I refrain from addressing questions of the dominance of Western culture and canon in Nussbaum’s works. Cf. the critical note in Morawetz, supra note 10, at 520-521, ‘For her [i.e. Nussbaum], the relevant moral community is Western culture as it has evolved over recent millennia rather than the Balkanized subcultures of contemporary cultural discourse’.
34 Nussbaum, supra note 30, at 171.
35 Nussbaum, M.C., Poetic Justice, the literary imagination in public life, Boston, Beacon Press, 1995, at xvi.
36 Nussbaum, supra note 35, at 36.
includes, ‘… the ability to imagine sympathetically the predicament of another person’\(^{40}\), as a salient characteristic to be able to voice other values (including those of citizenship and democracy). Not only is the very idea of ‘narrative imagination’ applicable in a concrete manner in any act of judgment since to Nussbaum emotions are rational, so that in common law and civil law jurisdictions alike it makes sense for juries and judges to try and imagine as best as they can the other’s situation before “doing justice”\(^{41}\) by means of a final judgment, it is also essential when reading, as is mostly the case in civil law jurisdictions, the paper files, since words can never fully describe the emotions at work in, for example, the story of what happened by a witness of a terrible crime.

In the sense that the working of narrative imagination is based on the metaphoric process, its resulting empathy can be fruitfully connected to the legal-philosophical concept of \textit{phronēsis} from Aristotle to Paul Ricoeur. In the spectrum of the intellectual and moral virtues Aristotle places \textit{phronēsis} in the category of intellectual virtues (distinguished from \textit{épistēmē}, i.e. theoretical, conceptual knowledge aimed at “knowing that”, and from knowledge of how to make things, \textit{technē})\(^{42}\). Perceptual and dispositional in nature, \textit{phronēsis} is the capacity to see what the situation demands and act upon it, i.e. it includes the application of good judgment to human conduct, “knowing how”\(^{43}\). It is characterised by deliberation (or \textit{bouleusis}), primarily with oneself but when transposed to the realm of the juridical, especially in legislation and equitable judging, also with others. \textit{Phronēsis} is also a matter of \textit{ethos}, character, in the sense it is the ability to apply understanding and insight gained in specific situations to new contexts. Understanding and \textit{phronēsis} are about the same objects\(^{44}\). Since a judge has to reflect on what works and what doesn’t in legal interpretation and application, the professional quality of \textit{phronēsis} is crucial\(^{45}\). \textit{Phronēsis} as knowing and being at the same time, enables the judge to bridge the gap between the generality of the rule and the particularity of the situation. As an actual form of reflective human judgment, it is a form of self-reflection that ideally leads

\(^{40}\) Nussbaum, supra note 38, at 7, endnote omitted.
\(^{42}\) Aristotle starts his analysis with a definition of the prudent man, the \textit{phronimos}: ‘We may arrive at a definition of Prudence by considering who are the persons we call prudent. Now it is held to be the mark of a prudent man to be able to deliberate well about what is good and advantageous for himself [...] as a means to the good life in general’ (Aristotle, \textit{The Nicomachean Ethics}, Harvard University Press, Cambridge (Mass.) and London, 2003, V1iv.1, 1140a24-29, p.337) [...] But no one deliberates about things that cannot vary, nor about things not within his power to do. Hence inasmuch as scientific knowledge involves demonstration, whereas things whose fundamental principles are variable are not capable of demonstration, because everything about them is variable, and inasmuch as one cannot deliberate about things that are of necessity, it follows that Prudence is not the same as Science. Nor can it be the same as Art. It is not Science, because matters of conduct admit of variation; and nor Art, because doing and making are generically different, since making aims at an end distinct from the act of making, whereas in doing the end cannot be other than the act itself: doing well is in itself the end. It remains therefore that it is a truth-attaining rational quality, concerned with action in relation to things that are good and bad for human beings’ (Aristotle, \textit{The Nicomachean Ethics}, VI. v. 3-4, 1140a32-1140b7, p.337). For an extensive treatment of \textit{phronēsis} in Aristotle and Ricoeur, see Gaakeer, J., ‘Configuring Justice,’ \textit{No Foundations, An Interdisciplinary Journal of Law and Justice}, 9, 2012, pp.20-44, and Gaakeer, J., ‘Futures of Law and Literature: a Jurist’s Perspective,’ in: Hiebaum, C., S. Knaller, and D. Pichler (eds), \textit{Recht und Literatur im Zwischenraum/Law and Literature In-Between, aktuelle inter- und transdisziplinäre Zugänge/contemporary inter- and transdisciplinary approaches}, Bielefeld, transcript Verlag, 2015, pp.71-103.
\(^{43}\) ‘Prudence deals with the ultimate particular thing, which cannot be apprehended by Scientific Knowledge, but only by perception.’ Aristotle, \textit{The Nicomachean Ethics}, VI.viii.9, 1152a27, p.351.
\(^{44}\) ‘it [Understanding] is concerned with the same objects as Prudence’, Aristotle, \textit{The Nicomachean Ethics}, VI.x.2, 1143a8, p.359.
\(^{45}\) Aristotle, \textit{The Nicomachean Ethics}, VI.iv.1, 1140a24-29 and VI.v.3-4, 1140a32-1140b7, p.337.
Jeanne Gaakeer, Practical Wisdom and Judicial Practice: Who’s in Narrative Control?

to self-knowledge: why do I think that this rather than that is what is required under the circumstances?

In Paul Ricoeur’s work a connection between phronèsis and metaphor can also be discerned and it can be fruitfully connected to Nussbaum’s arguments. The first step in Ricoeur’s argument is to understand imagination as the insight into “likeness” that is both perceptual and cognitive, a seeing and a thinking. Here we recognize the combination of thinking (including theoretical knowledge of doctrinal law in the case of judicial phronèsis) and seeing the particularity of the new situation as comprised in the quality of phronèsis. Both phronèsis and metaphor depend on our imaginative capability to “see” what connects that which we already know (or, see below paragraph 4, think we know) to a new meaning of the particular. It is here that the empathetic emotion as delineated by Nussbaum works. In short, Ricoeur connects the input from the humanities with the development of the judge’s narrative imagination and intelligence by pointing out its interrelation with justice in terms of phronèsis. Literature offers us exemplary performances and thus helps us understand the importance of insight in what it means to write a story, or any other text for that matter, in a specific way. Phronèsis also teaches us not to arrive at final decisions too quickly, i.e. the metaphoric aspect demands what Ricoeur calls suspension of judgment, and as Ammon Reichman suggest, that is literature’s more important contribution to the act of judging.

On Ricoeur’s view that there is a, ‘… close tie established by Aristotle between phronèsis and phronimos, a tie that becomes meaningful only if the man of wise judgment determines at the same time the rule and the case, by grasping the situation in its singularity’, I turn to the relation of the deliberative aspect of phronèsis and the idea of narrative transfer: in what way, then, do specific types of narrative transfer their stories in law and literature, for this too depends on making explicit the similarities and dissimilarities in a particular situation? And how do narratives influence our (empathatic) emotion? In doing so I keep in mind Ricoeur’s view about, ‘[A]n essential characteristic of a literary work […] is that it transcends its own psycho-sociological conditions of production and thereby opens itself to an unlimited series of readings, themselves situated in different socio-cultural conditions. In short, the text must be able, from the sociological as well as the psychological point of view, to “decontextualise” itself in such a way that it can be “recontextualised” in a new situation – as accomplished, precisely, by the act of reading’. Why? Because what judges do in their act of reading and giving meaning to what they read in the form of a decision, is

47 ‘Imagination, accordingly, is this ability to produce new kinds by assimilation and to produce them not above the differences, as in the concept, but in spite of and through the differences,’ Ricoeur, P., ‘The Metaphorical Process as Cognition, Imagination, and Feeling,’ Critical Inquiry, 1978, pp. 143-159, at 148 (italics in the original).
49 Reichman, A., ‘Law, Literature, and Empathy: Between Withholding and Reserving Judgment,’ 56 Journal of Legal Education, nr. 2, 2006, pp. 296-319, at 297, ‘I propose that the benefit of literature as a learning tool is not that it makes readers judge empathetically; rather literature teaches one to withhold judgment so that when judgment is ultimately rendered it is more profound and meaningful’.
50 Ricoeur, P., Oneself as Another, Chicago, University of Chicago Press, 1992, at 175.
precisely that type of dealing with the texts of others. With this in mind I return to McEwan’s fictional judge Fiona Maye whose emotional trials and tribulations are, or so I would suggest, both an exemplary performance of the arguments made so far, and a warning.

3. **Empathy unbound or unbounded empathy?**

The opening scene of the novel portrays our fictional legal actor, High Court judge Fiona Maye, professionally the paragon of legal rationality, recuperating from the shock of her husband Jack’s declaration that at fifty-nine he wants to have a love affair with a young woman named Melanie as a last shot because he longs for the physical intimacy he no longer has with Fiona. Even now Fiona prioritises her professional duty for she starts to work on the decision that has to be ready the next day. This case is exemplary for the novel's main storyline: the choice between religion and life. It is a divorce case in the Jewish Chareidi community in which contrary to religious custom the mother Judith Bernstein wants an education for both herself and her children, so that Fiona writes, ‘The court must choose, on behalf of the children, between total religion and something a little less. Between cultures, identities, states of mind, sets of family relations, fundamental definitions, basic loyalties, unknowable futures’ (at 13).

When writing about the moral differences between the litigants, Fiona, ‘… listed some relevant ingredients, goals towards which a child might grow. … and having at the centre of one’s life one or a small number of significant relations defined above all by love,’ and becomes painfully aware of the fact that, ‘Yes, by this last essential she herself was failing’ (at 15). But the work comes first, ‘Her judgment must be ready for printing by tomorrow’s deadline, she must work. Her personal life was nothing’ (at 16). The topic of religion versus life returns in Fiona’s musings about a high-profile case she decided some weeks earlier, that of the conjoined twins Mark and Matthew that the hospital needed judicial permission to separate in order to save Mark whose chances of leading a normal life were highest, Matthew being unable to live independently from his sibling. The parents refused because they did not want to interfere with God’s purpose. In both cases Fiona’s decision favours life.

Then, at 22.30 hrs on the same night, the phone rings. Fiona who is on duty as a Family Division judge gets another case, that of a hospital looking for a court order to proceed with the transfusion of a leukaemia patient, seventeen-year old Adam Henry, against the wishes of his parents who are Jehovah’s Witnesses. Even at this time of night and under these specific personal circumstances, Fiona immediately instructs her clerk what to do, as her husband leaves for his lover. Next day, at the Royal Courts of Justice, however, Fiona thinks back on her successful career and how she has held back for years to decide about having children; she realises ‘… the game was up, she belonged to the law as some women had once been brides of Christ’ (at 45). For Fiona, the law is her religion. During the hearing later that week, the expert statement of the

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52 ‘Among fellow judges, Fiona Maye was praised, even in her absence, for crisp prose, almost ironic, almost warm, and for the compact terms in which she laid out a dispute.’ The Lord Chief Justice describes her as having, ‘Godly distance, devilish understanding, and still beautiful’ (at 13).

53 ‘… before I drop dead, I want one big passionate affair’ (at 5).

54 Cf. the next day in court, moments before the hearing, upon seeing the neat stack of paper on her desk, when Fiona realises, ‘She no longer had a private life, she was ready to be absorbed’ (at 63). In sharp contrast with Fiona’s decisions are two miscarriages of justice in the novel. Mr Justice Sherwood Runcie who tried a murder case four years ago: a mother, Martha Longman, was accused of the death of two of
haematologist Carter gives Fiona reason to believe that without transfusion Adam Henry will soon die a horrible death. Adam Henry, it is established, is extremely intelligent and fully aware of the consequences of his refusal of treatment. His parents dote on him, but their faith and his is so strong that they accept he will die. Fiona announces that she will go to hospital to hear from Adam Henry himself, or rather, to find out, ‘… his understanding of his situation, and of what he confronts should I rule against the hospital,’ and to tell him, ‘… that I am the one who will be making the decision in his best interests’ (at 89). Here Fiona’s private persona comes to the surface, since it is the social worker rather than the judge who does such visits. Is the pleasurable period she herself spent in hospital when she was thirteen the trigger? Or is it her (maternal?) interest in ‘young Adam’ (at 69), this ‘young patient’ (at 97) ‘a lovely boy’ who seems to be ‘one confused little puppy’ (at 98), because he is intelligent and writes poetry? In hospital Adam immediately tells her that, ‘… he had known all along that she would visit him’ (at 100). Their conversation goes smoothly and within minutes Fiona is telling Adam about a court case of parents prosecuted for satanic abuse of their children which proved totally unfounded, and she knows, ‘… she had strayed onto his ground. Satan was a lively character in the Witness construction of the world’ (102-103). She also realises that by asking, ‘Would it please God, to have you blind or stupid and on dialysis for the rest of your life?’, ‘… her question overstepped the mark, the legal mark’ (105).

The intimacy between them develops when Adam asks Fiona whether he can call her ‘My Lady’, the honorific court term that he obviously uses more in the chivalric and private sense. They discuss his poetry, he reads to her and plays the violin to her, Benjamin Britten’s setting of the Yeats poem ‘Down by the Salley Gardens’, one of the encores Fiona habitually plays with the barrister Mark Berner when they perform together at the Inns of Court. This triggers her to sing along with him. Back at the court, later that evening, Fiona gives her decision. She sets out the facts, acknowledges that Adam Henry, ‘… possesses exceptional insight for a seventeen-year-old,’ (at 121) and then when everything seems to go in to the direction of finding for Adam and against the hospital, Fiona suddenly points out that her decision is, ‘… not ultimately influenced by whether he has or doesn’t have a full comprehension of his situation. I am guided instead by the decision of Mr Justice Ward… ’ (at 123). In short, Fiona reverts to the legal domain by employing the basic principle derived from this precedent that the welfare of the minor is the concept guiding the decision. So Adam Henry, ‘…. must be protected from his religion and from himself’ (at 123).

This oscillation between public role and private feeling will ultimately lead to professional transgression. It starts when Fiona gets a letter from Adam. He has had the transfusion and his parents are joyful. Why? Because Adam lives. They remained her children, since the chances of a child dying from Sudden Infant Death Syndrome were ‘nine thousand to one’ (at 50) according to the prosecution’s expert witness. This case is based on the Sally Clarke case as Ian McEwan explains in an interview in The Guardian, Friday 5 September, 2014, http://www.theguardian.com/books/2014/sep/05/ian-mcewan-law-versus-religious-belief <accessed 26 November 2014>, in which only by the second appeal it became clear that the pathologist had withheld vital evidence of a fatal bacterial infection in one of the children. Clarke was released but the vilification by the media and the bullying in jail had broken her.

The second case McEwan uses in the novel (at 183-190) is that of the son of a close acquaintance of McEwan’s who was caught at the edge of a pub brawl, but charged with “joint enterprise” and so sentenced for offences committed by others to two-and-a-half year in prison. 55 ‘She would have liked to see this boy for herself, remove herself from a domestic morass, as well as from the courtroom for an hour or two… ’ (at 35).
faithful, so the blame can be put on the judge and the legal system. It becomes clear from what Adam writes that he has developed feelings for Fiona and that the Yeats poem is immensely influential in that development. Fiona writes a short and cool letter, impersonal to the core, that she then does not send. A second letter from Adam arrives, now at her home address. Fiona asks the social worker Marina Greene to go and see Adam, who is doing fine at school. ‘A week later, on the Monday morning she was to leave for the north-east of England, there occurred a minuscule shift along the marital fault lines…,’ (at 143) her husband with whom relations had been strained since his return, offers Fiona coffee which she accepts. Later that day, in Newcastle, when Fiona is having dinner at Leadman Hall, her clerk tells her that Adam Henry is there. Fiona goes to see him in the kitchen. He has followed her to thank her for saving his life as she saved him from his religion. He’s eighteen now and has left home. It is immediately obvious that he is smitten with Fiona, and that the Yeats poem about ‘The Salley Gardens’ has been instrumental in the development of his feelings for her. Baffled when Adam announces that he wants to come and live with her, Fiona knows no better than to respond that she will ask her clerk to bring Adam to a hotel. However, before he gets into the taxi, ‘… she took the lapel of his thin jacket between her fingers and drew him towards her. Her intention was to kiss him on the cheek, but as she reached up and he stooped a little and their faces came close, he turned his head and their lips met. She could have drawn back, she could have stepped right away from him. Instead, she lingered, defenceless for the moment’ (at 169). She senses that it was ‘… more than the idea of a kiss, more than a mother might give her grown-up son’ (at 169).

So their brief encounter ends. Fiona probes her state of mind and immediately swings back in the legal mode, ‘[S]he was not prone to wild impulses and she didn’t understand her own behaviour. She realised there was much more to confront in her confused mix of feelings, but for now it was the horror of what might have come about, the ludicrous and shameful transgression of professional ethics, that occupied her. The ignominy that could have been hers’ (at 172). Back at her London court, she receives a poem from Adam Henry. It’s a ballad reminiscent of “The Salley Gardens” that ends with Jesus saying to the protagonist, ‘Her kiss was the kiss of Judas, her kiss betrayed my name’ (at 180-181). Even though Fiona realises that his infatuation differed from hers, she dismisses the idea that she is the Judas of the poem, convinced as she is that he will move on, do well at university and forget about her. Again the presumed rational response.

In December, however, she breaks down after a concert with Mark Berner, with whom as we have read earlier on, she forgets the law when they play together. The trigger is their playing “The Salley Gardens” combined with a phone call from the social worker Marina Green that Adam is dead, having refused a transfusion after the leukaemia came back. Fiona has admit to herself that she was ‘… the treacherous creature that led the poet astray and kissed him’ (at 203). With Adam too, “The Salley Gardens” made Fiona forget the law, but this oblivion comes at a high cost. She realises that, “[H]er transgression lay beyond the reach of any disciplinary panel’ (at 212) because as a human being she has failed Adam completely. She has kissed him on an impulse and left it at that; she has failed to read the message in his poem and now he’s dead. Fiona then confesses to her husband, ‘… her shame, [of] the sweet boy’s passion for life, and her part in his death’ (at 213).

I suggest that the importance of McEwan’s novel is that it is literally and figuratively a ‘mirror for judges’, and one that gives food for thought to legal professionals as John Wigmore described one of the reasons why jurists should turn to
Jeanne Gaakeer, *Practical Wisdom and Judicial Practice: Who’s in Narrative Control?*

literature, a view adopted in contemporary *Law and Literature*. Its documentary character as far as the choice of legal cases is concerned, based as that choice is on McEwan’s view on the parallels between the legal and the writing profession, as well as the development of the main character Fiona Maye together offer a basis for judicial self-reflection on professional behaviour and judicial regulation of emotion, in and out of court, as much as on the demand to balance the private and the public persona. This is also to say that the ‘ethics of the story told’, or rather the reading for the message, should be complemented by the ‘ethics of reception’, how the narrative influences us, as James Phelan suggests when he writes, ‘Narrative ethics explores the intersection between the domain of stories and storytelling and that of moral values. Narrative ethics regards moral values as an integral part of stories and storytelling because narratives themselves implicitly or explicitly ask the question, ‘How should one think, judge, and act – as author, narrator, character, or audience – for the greater good?’

What, then, is it that judges especially can learn from reading *The Children Act* if they read the novel with the necessary narrative empathy? Following Terry Maroney, I suggest that it is that they should concern themselves more than is done to date with the normative issue of the role of emotion in judicial decision making. The story of Fiona Maye shows how her completely internalised legal methodology of distinguishing the relevant facts is predominant. It also shows her initially second-order, allocentric empathy for the individuals whose lives she decides about, long remains the normative, legal kind as she looks for legal precedents to decide the cases, the recognition of relevant precedent being a metaphoric process of dealing with similarities and dissimilarities so that one arrives at the imaginative creation of the standard person in that specific situation. It changes into first-order empathy, however, as a result of triggers in her personal life. From a judicious spectator of the kind Martha Nussbaum delineates in *Poetic Justice*, Fiona Maye changes into a judge who loses her phronetic capacity to act and judge correctly under the circumstances. Would she have acted the way she did if she had had children of her own, and/or if she had not met Adam Henry in the vulnerable emotional state that she was in as a result of the problematic relationship with her husband? What is the emotional trigger of the song “The Salley Gardens”?

Thus, we as readers are asked whether we can feel with her, i.e. can we develop aesthetic empathy for her, and whether we ourselves can develop empathy as a character

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57 Cf. Interview with McEwan, supra note 54, in which McEwan tells how at a dinner he attended, Alan Ward ‘… got up and took a volume of his own judgements from a shelf,’ one that upon reading McEwan greatly admired, ‘It was the prose that struck me first. Clean, precise, delicious. Serious, of course, compassionate at points, but lurking within its intelligence was something like humour, or wit, derived perhaps from its godly instance, which in turn reminded me of a novelist’s omniscience.’


61 See Hogan, supra note 11.
trait. And that is perhaps also to ask whether we can feel for fellow-judges like her in real life.\(^{62}\)

Much depends on who we ourselves are and that would include not only our professional\(^{64}\), and cultural but also our private values, which for judges are, mildly put, usually solidly middle class. And it would include earlier experiences that add to our emotional colouring, from youth, for example, just as much as from professional life. Our being hermeneutically situated and culturally determined is an inescapable fact of all human life. In other words, it is important to be knowledgeable about how narrative works to activate our deep frames of (re)cognition, because what affects us in a fictional narrative may be indicative of what affects us in other texts as well, and such affect has consequences for the way in which judges impose narrative coherence on defendants’ and litigants’ acts against the background of the normative system, i.e. the applicable rule\(^{64}\).

4. Narrative Control: Judging and the Cognitive Turn in Narratology

The topic of how to influence the judge’s mind and decision has been with us since Aristotle and Cicero’s *De Inventione* already deals with the topic of the plausibility of a narrative, i.e. what it is in the narrative that convinces those who judge. Judicial narrative imagination and phronetic intelligence therefore need an education in narrative affect heuristics, in order to be able to recognise the narrative techniques that are used in any text to deliberately guide the judge-reader’s perception and cognition, her “seeing and thinking” as discussed above in paragraph 2, including an empathetic stance.\(^ {65}\) To this end, the expansion of literary-legal studies into the domain of what is called the “cognitive turn” in narratology is required. Not only to offer guidance in what it is that can trigger judicial emotion – necessary also because judges need to fullfil the requirements of impartiality and equal treatment under the rule of law\(^ {66}\) –, but also to help the judge in suspending judgment, i.e. to recognise what anti-suspension elements

\(^{62}\) In the 2015 course “Language, Literature and the Judiciary” that I co-designed in collaboration with the Dutch Training and Study Centre for the Judiciary as part of Dutch professional judges’ permanent education, *The Children Act* was the set novel. Responses to the character Fiona Maye widely differed; while most of my fellow-judges responded empathetically, recognizing the dilemma’s she faces and the circumstances she finds herself in, some found the story of Fiona and Adam utterly implausible since “no real judge would do a thing like that”.

\(^{63}\) Cf. Cardozo, B.N., *The Nature of the Judicial Process*, New Haven, Yale University Press, 1921, at 178, on the ‘subconscious loyalties’ to the group(s) we belong to.

\(^{64}\) Cf. Desanctis, C. H., ‘Narrative Reasoning and Analogy: The Untold Story,’ *Legal Communication and Rhetoric: JALWR* 9, 2012, pp.149-171, at 159, that stories, ‘work to activate deep frames – cognitive principles that are so fundamentally a part of our identity that, once activated, evoke subconscious reactions that can lead us to real decisions.’ Cf. McArdle, supra note 4, at 180, n.41, ‘For empathy – when its relevance is recognized – to be effective, it must tap into the cultural narratives and expectations that are meaningful for others’.


\(^{66}\) See also Minow, M.L. and E.V. Spelman, ‘Passion for Justice,’ 10 *Cardozo Law Review*, 1988, pp 37-76, for numerous suggestions and criteria to diminish the risk of personal judgments.
The topic of narrative as operative in how we construct “the world as we know it” is important given the risk all humans run because of their psychological make-up in the sense of their minds’ natural proclivity to structure reality by means of narratives, and that is the risk to fall into the pitfall of narratives becoming set stories and in the judicial environment of applying them as set rules. The judge’s past experience of specific situations (and the people in them) can engender expectations with respect to human behaviour that will, in turn, guide her application of such expectations in future cases. It can lead to psychological errors such as confirmation bias and belief perseverance when on such basis the judge, for example, “reasons away” either incriminating or disculminating evidence, and then errors of judgment are sure to follow.

As the findings of neurosciences suggest, emotions have a basis in “… mirror neurons, which fire both when a person performs an action or feels an emotion and when that person views someone else having the same experience,” and at the same time they are also context- and culture-dependent. This suggests even more to be alert to subconscious activation of the judicial mind as far as the phenomenology of perception and judging is concerned. As Richard Gerrig suggests, human beings are guided in...
their life experiences as much by intuition as by reflection, and their general cultural knowledge affects their reading, i.e. the narrative processing of information. As a result, resonances of such knowledge in any given text help trigger our memories, tap the schemas that are present in us, the ‘organized clusters of information in memory,’ and these would include genre-expectations in experienced readers.

The latter is of course immensely important in the setting of legal texts that given substantive, doctrinal and procedural constraints constitute a highly specific genre of text. In contemporary cognitive narratology, research centres on various questions that may fruitfully be used in judicial surroundings. For example, as Fludernik and Olson suggest, the question of how narrative functions as a mode of mental access and ‘how narratives reveal the phenomenology of perception, […] how they control the decision-making processes by which we intuit how stories are most likely to turn out’. This would include attention to ‘[F]rames, and particularly scripts, i.e. culturally recurring sequences of actions or processes, … since they concern ingredients of plots’. Frames are the expectations on how domains of experience are structured, for example, how we recognize a room as a university classroom rather than a cell in a penitentiary institution. If we consider that in acknowledging or recognizing some sequence of events as a script, our natural inclination is to fill in the blanks of the unfolding story, or rather fill in the blanks (or the plot holes) and thereby structure the narrative into something we can deal with. In law, this is of great importance to acknowledge. What does the presumption of innocence actually mean if the script suggests that a masked man running out of a bank with a satchel of money is likely to be the bank robber who robbed the bank. The schemata or “textual” clues of such a narrative may ease judicial doubts too soon! This is dangerous on the view that the judge is the one constituting


77 Fludernik and Olson, supra note 76, at 10. Cf. Herman, D., ‘Cognitive Narratology,’ in: Hühn,P., J. Pier, W. Schmid, and J. Schönert (eds), Handbook of Narrative, Berlin, De Gruyter, 2009, pp. 30-43, at 33, defining script as, ‘a type of knowledge representation that allows an expected sequence of events to be stored in memory,’ and that includes an expectation of how story in the sense of a sequence of events is supposed to unfold, ‘supposed’, that is, on the basis of prior experience.

78 Herman, supra note 77, at 33.


81 I draw this example of a script from Herman, supra note 75,’Cognitive Narratology’. Cf. Toolan, M., ‘Coherence,’ in: Hühn, P. et al. (eds), The Living Handbook of Narratology, Hamburg, Hamburg University, http://www.lhn.uni-hamburg.de/article/coherence <accessed 1 December 2014> Cf. also Turner, supra note 70, at 16, that we recognize objects, events, and stories by means of ‘image schemas’, ‘skeletal patterns that recur in our sensory and motor experience.’ E.g. the idea of ‘motion’ suggests the presence of a ‘path’. 
what are to be deemed the relevant “facts” from the information on events that is presented to her, and she does so always with the legal norm and rule in mind. That is to say, the masked man with the satchel is probably irrelevant to the coherence of the story if the legal case before her is about a traffic incident.

From a point of view of legal theory, we may also look upon precedent as a form of script. For example, the ‘reasonable man’, or ‘my neighbour’ as found in the ‘neighbour principle’ in tort, a.k.a. ‘my brother’ as in ‘my brother’s keeper’ guide the search in a new case put before the judge, and the same of course applies to other fields of law. In basing one’s decision on precedent too, what does not fit the script (also: as deliberately presented by litigants) gets filtered away. Viewed from another angle, that of presenting evidence in a court of law in a specific sequence, narrative knowledge is important because empirical research shows that people more easily accept evidence as ‘true’ when it is presented in ‘story order’ rather than when presented in ‘witness order’, regardless of the actual veracity of that evidence. So whether or not the judicial ‘sweet spot’ is deliberately or unconsciously influenced by means of narrative in order to activate judicial empathy, what matters most is that it may lead the judge to confabulate, explain away anything inconsistent with the story, and a posteriori create the illusion of there being good reasons for specifically this decision by way of legitimation. It is hard to change one’s mind once one has literally and figuratively “made it up”! All this becomes even more important in hard cases, and that is irrespective of one’s theoretical standpoint on judicial discretion, nightmarish as many legal theorists think that is.

By way of conclusion, I would therefore suggest that when it comes to law, empathy and emotion, the legal professional can greatly benefit from what literature and narratology can offer by way of education and caution. And since as human beings we are all prone to mistakes – after all, to err is human –, in doing so it behooves us to keep before our mind’s eye Franz Kafka’s remark in a letter to his friend Oskar Pollak, ‘Many a book is like a key to unknown chambers within the castle of one’s own self’.

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82 As developed in the case Donoghue v. Stevenson [1932] AC 562.

83 Lempert, R., ‘Telling Tales in Court: Trial Procedure and the Story Model,’ 13 Cardozo Law Review, 1991, pp.559-573, at 561, story order, being ‘… in the temporal and causal order that matched the occurrence of the original events, and witness order being a succession of witnesses testifying ‘in turn’, i.e. ‘each told the jury everything she knew about the events regardless of where that information fit into the unfolding story of the events that occurred’.

84 Chestek, K.D., ‘Judging by the Numbers: An Empirical Study of the Power of Story,’ Journal of the Association of Legal Writing Directors, 2010, pp. 1-35, at 34, ‘Focusing on the story of the case is the most likely route to finding that sweet spot where a deep frame is activated (becoming the foundation of persuasion) without it being so obvious that the reader’s natural defenses are triggered’.