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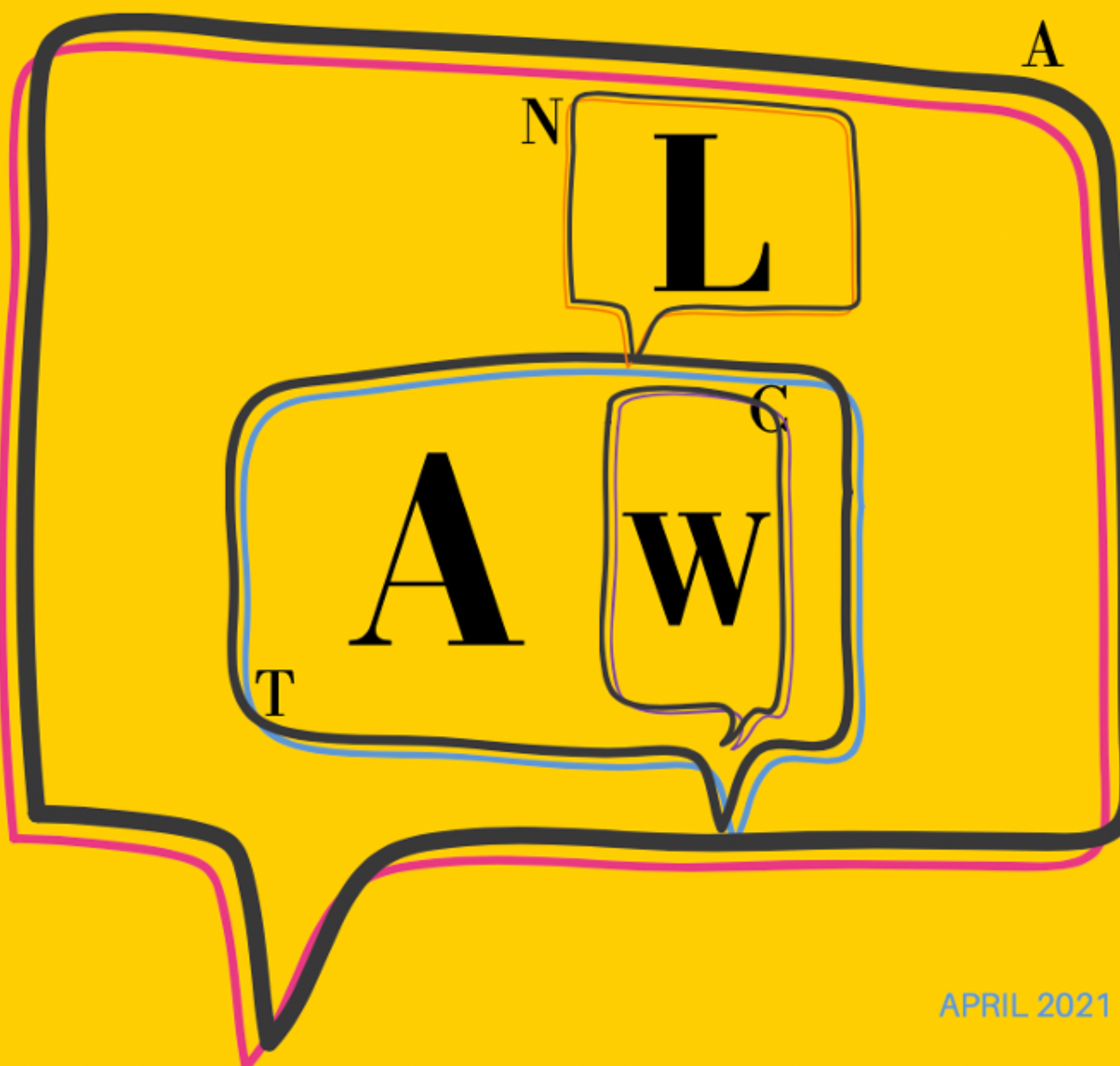
THESIS | RESEARCH MASTER LITERARY STUDIES

speaking



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Speaking Law

The need for a narratological distinction between speaker functions in Law and Literature analysis

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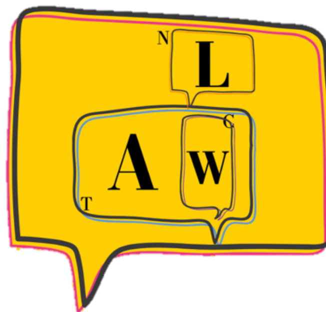
Research Master Literary Studies



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Introduction | Speaking Law

We live in a world full of case law. The era of the corona crisis, during which this thesis was written, only illustrates the more the value that people place on judgments and the authority these judgments have in both legal practice and daily life. Think of trials about the legitimisation of the introduction of a curfew in several jurisdictions. When social unrest occurred with regards to the regulations that made such a restriction possible, it was in judgments that it had to be decided whether these counted as infringements of the freedom of movement and whether those infringements could be justified. The steering effect of judgments in this and related Covid cases makes the power of case law immediately insightful. And the corona crisis is not the only crisis that case law all over the world addresses. Other broadly discussed societal issues are transformed into judgments, as well. An often-mentioned example is the *Urgenda* climate case, in which the Supreme Court of the Netherlands explicitly condemned the Dutch State for not taking enough measures against climate change (ECLI:NL:HR:2019:2006). That it not necessarily has to be the highest court of a nation that makes such an impact, is shown by the very recent verdict of the Hennepin County Courthouse in Minneapolis, which proves the former Minneapolis Police officer Derek Chauvin guilty of killing George Floyd. Like the many Covid-related cases and the *Urgenda* case, Chauvin's final sentencing – that, at this moment, still needs to be decided upon – will ultimately have the form of a judgment. A written judgment, that has a direct impact on (world) society.

Since they form such an important textual genre, judgments have broadly been studied and analysed. One of the fields in which emphasis lies on the texts of the verdicts themselves is that of Law and Literature. This discipline distinguishes between two approaches: *law in literature* and *law as literature*. *Law in literature* aims to analyse literary works with law-related themes from a literary perspective; *law as literature* emphasises the idea that knowledge of literature and literary analysis is valuable to the legal discipline (Gaakeer & Ost 2008). It is this last idea that lies at the basis of most analyses of legal judgments that are conducted in the field.[1] During the last few decades, new emphasis was placed on narrative approaches with the aim of creating more empathy in the legal domain (cf. Korsten 2021, 144).[2] Two leading scholars who are

[1] See, for example, Levinson 1982 in general; Posner 1986 in general; Ward 1995, 4 and 54; Baron and Epstein 1997; Seaton 1999 in general (esp. 479). However, like Korsten notes in his *Art as the Interface of Law and Justice* (2021, 2), the field of Law and Literature has expanded in such a way that judgments are certainly not the only objects of analysis within the field. Apart from novels – that lie at the core of most *law in literature* approaches (cf. for example Weisberg 1984) – and judgments, theatre plays, poems, maps, movies and other works of art form part of Law and Literature's corpus.

[2] On the relation between narratology and empathy specifically, see, for example, Keen 2013.

known for conducting such narratological analyses of case law are the American law professor, philosopher and literary critic James Boyd White – who is often seen as the founder of the entire Law and Literature movement – and Jeanne Gaakeer – both professor in jurisprudence and senior counsel in the criminal sector of the Court of Appeal in The Hague –, who runs the European Network for Law and Literature Scholarship.

White and Gaakeer, like most scholars in the field of Law and Literature, approach the law in general, and judgments in particular, as narrative texts, which, obviously, requires insight into the literary field of narratology.[3] In *Narratology: Introduction to the Theory of Narrative* (2009, or. 1985)*,* cultural theorist Mieke Bal describes this narratological field as "the ensemble of theories of narratives, narrative texts, images, spectacles, events; cultural artifacts that 'tell a story'" (Bal 2009, 3).[4] If narrative texts "tell a story", the question is who or what is the speaker, or in the legal context, the speaking authority in such a text.[5] Is it the author, narrator, or character – three possible speakers that Bal addresses in her book? Or could it also be – as Bal even seems to suggest in the previous quote – the narrative text itself? If judgments are analysed narratologically, one would expect these and related questions to be part of these narratological analyses. However, what is striking, is that no attention has yet been paid to the variety of distinctive narrative speaker functions that manifest themselves in the texts of legal rulings in various legal contexts, although they are seen as important in the field of (literary) narratology (cf. Bal 2009 and Fludernik 2005). What is more, when we focus on the role that different narrative speakers play in White's and Gaakeer's theory, we will find that those functions are currently intermixed, as will be shown in the next chapters. That is not desirable, for we can only get to the core of the impact that legal speakers have, if we make this distinction.

This thesis aims to examine a possible contribution to the narratological analyses as carried out within the field of Law and Literature by signalling the speaker functions in the analyses of White and Gaakeer and locating them in case law, as well. It, therefore, starts from the following, formal research question:

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[3] On the characterisation of the law and legal texts as narrative, see for example Baron & Epstein 1997, who argue that the question of whether the law is narrative is highly dependent on the question of what the term "narrative" means (141). Further, see Dworkin's influential chapter on the relation between law and literature in *A Matter of Principle* ("How Law is Like Literature", 1985, 146-166). Examples of other works on the narrative character of law are Cover 1995, Brooks & Gewirtz (eds.) 2008, Hanne & Weisberg (eds.) 2019.

[4] On this explicit choice for *Narratology*, or Bal's earliest work on narratology, see footnote 11.

[5] In *Travelling Concepts,* Bal herself literally emphasises that "[t]he question 'who is speaking' [is] central to narratological analysis" (Bal 2002, 192). Gaakeer, too, mentions the "narratological question of 'Who speaks?'" in emphasising its difficulty when applied to the judge's voice (2019, 202).

How can distinctive narrative speaker functions in judgments be recognised in the theory of James Boyd White (1990) and Jeanne Gaakeer (1998) and applied explicitly in Law and Literature analysis?

In order to answer this question, this thesis primarily examines excerpts of White's *Justice as Translation* (1990) and Gaakeer's *Hope Springs Eternal* (1998) that focus on an American tap case called *Olmstead v. United States* (277 U.S. 438, 1928). Legal (speaker) authority is, namely, overtly discussed in their analyses of this US Supreme Court case. For purposes of comparison, a Dutch Supreme Court equivalent (ECLI:NL:HR:2011:BP0344; 2011) will be analysed separately, in order to mark the difference in emphasis that lies on the several speaker functions in American respectively Dutch judgments, thus offering insight into the productiveness of distinguishing between them in narratological analyses of judgments. This is also where a seemingly formal issue becomes a rhetorically charged one.[6] My hypothesis is that the different speaking positions relate differently to legal authority in different countries.

The assumption that lies at the core of this thesis is that with the help of systematic analysis, it is possible to distinguish between four different speaker functions that manifest themselves in written case law: an authoritative *author* of legal decisions (chapter II), a *narrator* of the verdict (chapter III), *characters* that take part in the legal process and that are reflected upon in the judgment (chapter IV) and the *text of the judgment* itself (chapter V). These four possible speaking entities need to be disentangled in order to understand what authority or authorities we see when analysing judgments, which is why they are all addressed in different chapters.[7] The four chapters are preceded by an introducing chapter in which a broader introduction into narratology in the legal context and a general introduction of the case studies are presented.
After this, the format is the same for each chapter. The first subchapter positions the speaker function in question in the field of narratology, both from a literary and a legal perspective. Each second subchapter, then, is about White's and Gaakeer's theoretical reflections on *Olmstead v. United States*. Lastly, chapters II to V end with a third subchapter in which the

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[6] This thesis will first and foremost focus on offering a theoretical distinction between narrative speaker functions that can form a methodological means of analysis for the study narrative legal texts. The (possible) rhetorical aspects that an analysis focusing on the distinction between narrative speaker functions brings to the surface, invite further research. That is not to say that rhetorical analyses of legal texts are lacking in general, on the contrary. Cf. Witteveen 1988, White 1990 himself, Brooks & Gewirtz 2008.

[7] That authority is inherently related to 'who speaks' in judgments and other legal texts has been explained and illustrated by, amongst others, White 1994 in general, Gaakeer 2019, 202 and 210, Derrida 2001 and Siegel 2008.

Dutch equivalent of *Olmstead v. United States* – the Dutch tap case ECLI:NL:HR:2011:BP0344 – is analysed, focusing on the speaker function that is central to the chapter. In the conclusion, the practical and theoretical implications of the distinction between speaker functions in case law will be addressed shortly. For we should not forget that it is not just about *who speaks*; it is about who or what is *speaking law*.

Chapter I | Narratology in Law and Literature

1.1 Narratology in a legal context

The study of the relation between law and narratology has mainly been initiated in the context of the existing Law and Literature movement.[8] As stated in the introduction, this movement distinguishes between two approaches: *law in literature* and *law as literature*. *Law in literature* aims to analyse literary works with law-related themes; *law as literature* emphasises the idea that knowledge of literature and literary analysis are valuable to jurists (Gaakeer & Ost 2008). As stated in the introduction, this thesis addresses the theory of two scholars that both operate in the aforementioned field and in line with each other. Specifically: the primary objects of analysis will be two scholarly exposés by both James Boyd White – seen as the founder of the Law and Literature movement – and Jeanne Gaakeer, the most important European voice in the field – who, according to Greta Olson, "pursues a Boyd-White ethical trajectory in both her adjudicatory and scholarly practice" (Olson 340).

Like the vast majority of their scholarly work on Law and Literature, *Justice as Translation* (White 1990) and *Hope Springs Eternal* (Gaakeer 1998) explicitly deal with issues of narratology in the legal context.[9] *Justice as Translation,* subtitled *An Essay in Cultural and Legal Criticism*, contains multiple analyses of individual cases before the Supreme Court of the United States that involve the Fourth Amendment of the United States constitution. In these analyses, White approaches the process of justice as a process of translation – hence the title – in which the judge translates the Constitution, legal facts and history into a text that is part of a political and ethical reality that he shares with the audience of the judgment. It is in this process of translation that one should do justice to everyone involved. The law, according to White, is thus a cultural object more than anything (White 1990 in general). Especially the judge, who intervenes in the world of the conflicting parties with a judgment that often has broader implications, should be aware of the impact that such a translation has.[10] This is characteristic of White's work in general in its being practice-oriented; White is often said to reject (abstract)

[8] Cf. Bal 2019, 234-236; Baron and Epstein 1997 in general; Brooks 2002, 2005 and 2006 in general; Brooks and Gewirtz 1996 in general; Cover 1995 in general; Dworkin 1985 in general; Fludernik 2005 and 2014 in general; Hanne and Weisberg 2019. This list of names is, however, not exhaustive.

[9] Other influential titles by James Boyd White are, amongst others, *Acts of Hope. Creating Authority in Literature, Law and Politics* (1994), *From Expectation to Experience: Essays on Law and Legal Education* (2000) and *Keep Law Alive* (2019). Other influential titles by Jeanne Gaakeer are, amongst others, *Tijdelijk Recht* (2005) and *Judging from Experience. Law, Praxis, Humanities* (2019).

[10] On the role of the judge as an actor, see Witteveen 2003, esp. 288.

theory in favour of practical experience (cf. Gaakeer 1998, 10). Hence, he argues in favour of the disappearance of the distinction between form and content in what he calls "the literary work of the judge" (White 1990, 158).

In 1998, Jeanne Gaakeer wrote *Hope Springs Eternal* as, the subtitle of the work tells us, *An Introduction to the Work of James Boyd White*. Apart from a professor in jurisprudence, Gaakeer is also a senior counsel in the criminal sector of the Court of Appeal in The Hague. The book on James Boyd White's work began as a dissertation in Dutch, which Gaakeer defended and published in 1995. Currently, she focuses on hermeneutical and narrative foundations of jurisprudence. She especially writes about the connection between law and humanities in general and that between narratology and literature specifically. In doing so, Gaakeer, who strongly believes that one cannot study theory without experiencing practice, always attempts to make the meaning of her theoretical insights in legal practice explicit. Being the most influential voice in European Law and Literature and one of those beyond, Gaakeer is, without doubt, an equally acknowledged scholar in the field as James Boyd White. The fact that she won the J.B. White Award of the Association for the Study of Law, Culture and Humanities is only an illustration of this.

In connecting narratology with law, the *law as literature* approach that Gaakeer plays an active role in predominantly focuses on legal storytelling (cf. Loth 2015). Approaching the law narratologically, as is done in this field, not only requires insight into literary analysis of legal stories or storytelling in general, but also into the specific speaker functions that can be distinguished in the legal context. Values, institutions and rules that form the legal story are *communicated* (Cover 1995, Derrida 2001, Brooks 2006) by speakers. Legal narratology focuses on this communication as a process of *narration*. From this view, it is striking that the narrative speaker functions in what is arguably the most important document in the legal domain – the judgment – have not yet been systematically discussed nor distinguished in the prevailing views in Law and Literature theory.

My usage of the plural form – speaker *functions* – already suggests that like in literature, a speaker can have *different* narrative functions in the light of a narratological analysis. In fact, the four main categories that were discussed in the previous subchapter can be found in both White's and Gaakeer's scholarly works on the legal process. Both theorists use the concepts of "author", "narrator", "character" and "text(ual authority)" without explicitly acknowledging

that they do so and as if they were interchangeable. Since it is the aim of this thesis to locate and distinguish between the different speaker functions of the judge, the passages in which White and Gaakeer discuss the role and actions of judges form vivid examples of the theoretical gap in current narratological approaches to legal practice.

The narratological negligence of the speaker functions in judgments manifests itself on at least two different levels, that go hand in hand with the case studies chosen as topics of analysis in this thesis. First, James Boyd White neglects the distinction between author, narrator, character and textual authority in conducting legal case studies.[11] Second, Jeanne Gaakeer, who wrote an extensive introduction to the work of James Boyd White, neglects these categories in analysing, summarising and criticising White's work.

The introduction of a sharp distinction between different speaker functions in Law and Literature theory and analysis is crucial for several reasons. First, those who see the law in general and judgments in particular as a story and analyse it or them with the aid of narratology, cannot ignore these broadly acknowledged cornerstones of non-legal narratology (cf. Bal 2009 and Fludernik 2005). They imply a systematic approach within the field of law and increase the credibility of the conducted analyses in the field. Second, a lack of such a distinction leads to theoretical blind spots. For instance, the disregard of important narrative speaker functions in the field of Law and Literature can be related to what Greta Olson describes as "limitations inherent in prevailing modes of scholarship" (Olson 338). More specifically, Olson points to "an inappropriate reliance on American models of scholarship in much derivative European Law and Literature research" (Olson 339). The stories told in American, British and German legal cultures that Olson mentions differ markedly, she states; hence her plea for de-Americanization of Law and Literature narratives and to opening up their story. Taking the speaker functions into consideration would form one of the first cornerstones of this pursuit, for it can help gain insight into the difference in emphasis that distinct legal cultures put on the separate functions, that might even have different effects on the ways in which people experience law, or are shaped by it. This is why in narratology, emphasis lies on "narrative determinants of the production of meaning in semiotic interaction" (Bal 2009, 729-730).

[11] That is not to say that White does not pay attention to authority whatsoever. In 1994, he even wrote *Acts of Hope. Creating Authority in Literature, Law and Politics*, which focuses on exactly the creation of authority in the legal context.

Narratology is of importance for it helps us gain insights into the strong rhetorical effects that the several speaker functions have in practice.[12]

Then, what does the existing theoretical relationship between law and narratology look like?[13] That narratology can be related to the field of law is not surprising. Monika Fludernik, a prominent scholar in the field of narratology, called it a "master discipline" in 2005 (Fludernik 2005, 47). This has everything to do with the so-called narrative paradigm, or "the idea that we are all born into a world of stories that constitute to a large part our own lives" (Gaakeer 27). From this viewpoint, the legal system can be considered as one of those stories. Law, consisting of both written rules and case law, would thus inherently be related to narratology. This rather general conclusion has in its turn been nuanced by Monika Fludernik's "A Narratology of the Law? Narratives in Legal Discourse" (2014). In this Article, Fludernik concludes that "[c]rime is necessarily agentive and therefore can be conceived of as a narrative". However, she states, "[w]hen we get to the law code [...] the *discourse* of these texts is less immediately narrative" (Fludernik 2014, 108). The main reason for the latter conclusion is a lack of agency:

> When we turn to a contemporary law code of the type that I have taken as my example, however, the narrativity gets further rarefied. Although there is a deep-structural story somewhere, the phrasing of the law code emphasizes its non-narrativity. It sometimes eliminates direct agency for the sake of passive constructions and uses discourse strategies that are typical of instructional texts and scientific or philosophical argumentation.

Agency and narrativity go hand in hand, according to Fludernik. A narratological analysis can be fruitful, is the suggestion, as soon as there are actions and as soon as speaking subjects who tell a story are present.

This observation is in line with how narratology is understood and defined in prevailing theory. In "The Point of Narratology" (1990), Mieke Bal, another dominant voice in the field of narratology, defines narratology as "reflection on the generically specific, narrative determinants of the production of meaning in semiotic interaction" (Bal 1990 729-730). The

[12] Cf. Witteveen 1988, White 1990 himself, Brooks & Gewirtz 2008.
[13] For more extensive exposés on this specific question, see Brooks and Gewirtz 2008, Baron and Epstein 1997, Brooks 2006, Fludernik 2014.

terms "production" and "interaction" indicate the same activity as Fludernik signals. From this perspective, the text of any legal code is less narrative than a criminal process before a court. The latter, Fludernik states explicitly, "is necessarily agentive" and "will be rendered as a narrative in autobiography, including witness reports, interrogations and confessions; in trial pleas by prosecutors and defense attorneys; and partially in judges' rulings" (Fludernik 2014, 108). In this thesis, further attention will be paid to this last aspect: the narratological elements of the judges' rulings in criminal cases, through the eyes of Law and Literature theorists James Boyd White and Jeanne Gaakeer. There are multiple reasons to do so. As already stated in the introduction, judges' rulings or judgments have strong implications. Judgments have, in other words, authority in both legal theory and practice and corresponding societal effects. If that is the case, the question of who or what is speaking is crucial. The answer to this question helps us see how authority is formed – or: constructed – in legal judgments. And that, in its turn, is important with regards to commonly shared values concerning the role of judges and judgments, such as impartiality and separation of powers.

Since this thesis discusses the analyses of American Supreme Court rulings by White and Gaakeer and analyses a Dutch Supreme Court from a narratological perspective, it needs a narratological starting point. Part of such a theoretical point of reference has already been given: the theories of Fludernik and Bal are fruitful sources for narratological tools. In order to sharpen or narrow down the methodological approach that is chosen in this thesis, paying attention to Bal's narratological distinction between *aspects* and *elements* is of importance. This distinction is elaborated upon in her *Narratology* (2009, or. 1985). I am aware of the fact that after *Narratology*, which was originally printed in 1985, Bal's theory on narratology has been developed further in several directions, both by herself and by other scholars in the field.[14] Notwithstanding the value and knowledge all the works that are part of this development add to the field of narratology in general and to (inter)disciplinary research specifically, I have chosen to return to Bal's first work on this topic (*Narratology*, 1985), for it is in this work that the distinction between several speaker functions is first made. It is this framework that now needs to be introduced in the field of Law and Literature.[15]

[14] Cf. Fludernik, who called narratology a "master discipline" (2005, 47). On the use of narratology in different disciplines, see, amongst others, Heinen 2009. For the legal domain specifically, see, for example, Brooks 2002 and 2005.

[15] Of course, further nuances as made in Bal's *Travelling Concepts* (2002) and *Het Geel van Marcel Proust* (2019) can be fruitful sources for further research, as well. The same counts for more specific interdisciplinary research, such as that of Verstraten 2009 (on film narratology) and Herman 2012 (on cognitive narratology).

With *Narratology*, Mieke Bal offers an introduction to narratology which is aimed "at presenting a systematic account of a theory of narrative" (Bal 2009, ix). Important for this system are two concepts: that of *aspects* and that of *elements*. This distinction finds its origins in the idea that a *narrative text* is "a text in which an agent or subject conveys to an addressee ('tells' the reader) a story in a particular medium" and that a *story* "is the content of that text, and produces a particular manifestation, infection, and 'colouring' of a *fabula*; the fabula is presented in a certain manner" (Bal 2009, 5, emphasis mine, LvdB). A *fabula*, then, is "a series of logically and chronologically related events that are caused or experienced by actors" (ibid.). Put like this, Bal introduces a "three-layer distinction", consisting of *text*, *story* and *fabula*. It is to these three layers that the concepts of *aspects* and *elements* are connected. A *fabula*, Bal states, always consists of (the same) *elements*: events, actors, time and location. As soon as the *fabula* is translated into a *story*, the *aspects* come to the surface: traits that are specific to this given layer in the text. In Bal's own words: "[w]ith this term I indicate that the *story* – the middle of the three layers I distinguish in the narrative text – does not consist of material different from that of either the text or the *fabula*, but that this material is looked at from a certain, specific angle" (Bal 2009, 75, emphasis mine, LvdB).

The categorisations described above are useful tools in the legal context, as well. This thesis aims at analysing judgments from a narratological perspective, paying attention to both the functions of the judge and those of the text of the judgment. The judge is, primarily, an anthropomorphic figure that forms a basic element in every legal process: at the very end, it is the judge who has to decide a case. From a narratological viewpoint, however, the judge's speaker function could vary. As stated earlier, the judge can function as an author, as a narrator and as a character, whereas the text of the judgment itself can also function as a speaking entity. In the following, the case studies that are used to show the manifestation of these speaking entities in legal practice will first be introduced. The primary case studies – the texts written by White respectively Gaakeer – are theoretical texts that are part of the field of Law and Literature, in which the relation between law and narratology is extensively examined. The supporting case studies are legal cases before the Supreme Court of the United States respectively that of the Netherlands.

1.2 Case studies

In order to both sharpen narratological analysis of legal practice by introducing four speaker functions and to show the difference in focus on them, my case studies need to be introduced.

First and foremost, two theoretical pieces by White and Gaakeer will function as objects of analysis. As mentioned earlier, these will be *Justice as Translation* (White 1990) and *Hope Springs Eternal* (Gaakeer 1998). However, not the entire books deal with the role of the judge or judgments in specific cases, and discussing all cases mentioned in these two works that do so would still not fit the scope of this thesis. It is for that reason that I will focus on the reflections related to one specific case that has caused quite a stir, precisely because of the remarkable character of the actions and reasoning of the judge in this case: *Olmstead v. United States* (277 U.S. 438, 1928). What is more, this case is both thoroughly analysed by White in *Justice as Translation* and discussed in Gaakeer's *Hope Springs Eternal*, a work that in its turn reflects on White's analysis. The theoretical views on this case thus lend themselves well to a narratological analysis based on speaker functions. *Olmstead v. United States,* however, is of course a specifically American case. This is why in the following part of this chapter, not only the facts of *Olmstead v. United States* but also that of a Dutch equivalent will be presented. Both the Dutch case of 2011 (ECLI:NL:PHR:2011:BP0344) and *Olmstead v. United States* are criminal cases before the highest national court that share their main theme: wiretapping. It is in the following that the relevant facts that lie at the basis of these cases are exhibited.

Before diving into these cases, however, it is crucial to point out some institutional differences between the procedure before the highest court of the United States and that of the Netherlands. In doing this, I take Olson seriously in her criticism on the Anglo-Saxon character of the prevailing Law and Literature movement (cf. Olson 2010). This thesis offers an attempt at de-Americanization of narratological approaches in the field.

1.2.1 Procedures before the Supreme Court – the United States v. the Netherlands

The Supreme Court of the United States is – as its very name indicates – the highest court of the United States. Its jurisdiction is described in federal statutory law, more specifically in title 28 of the United States Code (U.S.C.), which forms the official codification of the statutes of the United States, consisting of 53 titles. Title 28 is dedicated to the Judiciary and Judicial Procedure. Title 28 U.S.C. §1251(a) states that the Supreme Court has original and exclusive jurisdiction over cases between two or more states. Under (b), title 28 U.S.C. §1251 creates jurisdiction to hear "all actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; all controversies between the United States and a State; and all actions or proceedings by a State against the citizens of another State or against aliens."

The importance of the Supreme Court of the United States is not only based on its role as the highest court; one that protects American citizens from their government, as is customary in most democracies. It also has enormous power in that it can review the constitutionality of national and local legislation. A vivid example thereof is the well-known landmark case *Roe v. Wade* (410 U.S. 113, 1973), in which the Supreme Court ruled that the Constitution of the United States should be interpreted in that sense that it protects the choice for abortion, which thus overturned the by then-existing abortion laws.

This practice is in sharp contrast to that in the Netherlands, where Article 120 of the Dutch constitution (Grondwet) explicitly forbids evaluation of the constitutionality of national laws. Even the highest Dutch court, the Supreme Court of the Netherlands (Hoge Raad der Nederlanden) is tied to the constitutional prohibition of constitutional review. Further, whereas the Supreme Court of the United States functions as the highest tribunal for all cases arising, the Dutch Supreme Court is the final national court in criminal, tax and civil cases only. Moreover, the Netherlands' highest tribunal is primarily occupied with cassation, which means that the Court's main task is to check whether the law is applied correctly in the contested judgments of the lower tribunal and to take a last look at the legal reasoning on which the verdicts in lower instance are based. This can be found in chapter 6 of the Constitution of the Kingdom of the Netherlands (Nederlandse Grondwet), which is about the administration of justice. Article 118 paragraph 2 of the Dutch Constitution states that "the Supreme Court shall be responsible for annulling court judgments which infringe the law (cassation)."

1.2.2 An American tap case – *Olmstead v. United States* (1928)

Olmstead v. United States (277 U.S. 438, 1928) tells the story of multiple claimants. One of the 90 applicants in this case was Roy Olmstead, a former lieutenant who was tried for conspiracy to violate the National Prohibition Act – that is: he, amongst others, was accused to have unlawfully possessed, transported, and sold alcohol. The defendant was tried on the basis of wiretapping evidence. Federal officials, in cooperation with state police, had systematically tapped the telephone wires of several people that they thought could be involved in a substantial bootlegging operation. This wiretapping evidence, however, had been obtained without a warrant. This was against the law. Under the Foreign Surveillance Act, namely, for wiretaps to be usable as evidence, the United States Foreign Intelligence Surveillance Court or, in specific circumstances, the Attorney General needs to grant approval to the federal agencies who intend

to use wiretapping. What is more, the Fourth Amendment to the United States Constitution requires a warrant to search an individual by means of wiretapping. Such a warrant was lacking in this case, which made Olmstead state that his constitutional rights to privacy were violated. This led to the question of whether the wiretapping in this case violated the defendant's Fourth Amendment rights. If that would be the case, the so-called "exclusionary rule" would apply, meaning that evidence cannot be collected or analysed in violation of the defendant's constitutional rights and that such evidence needs to be excluded from being used before a court.

The Court came to the conclusion that the rights of the defendant were not violated. This, however, was the result of a 5-4 decision. Both White and Gaakeer, as we will see, primarily address judge William Taft's opinion, which reflects the opinion of the majority, or the Supreme Court's final verdict. Notwithstanding this final decision, influential dissents were written. In this case, the dissenting opinion of justice Louis Brandeis, in which he disputes the proposition that the government could wiretap without a warrant, is both discussed by White and Gaakeer and is, besides, popular in general. In this light, it might be less surprising that about 38 years after *Olmstead v. United States*, this already much-discussed decision was overturned by what became the "real" landmark case: *Katz v. United States* (1967). This 7-1 decision of the Supreme Court held that warrants are required to wiretap payphones.

1.2.3 A Dutch tap case – ECLI:NL:HR:2011:BP0344

The Dutch tap case of 2019 has no official name, hence the ECLI-indication. This is already a telling difference, to which I will come back. In this case, the police knew that possible cocaine dealers would arrive at Schiphol Airport. That is why they started a wiretapping operation. When it became clear that the courier of the cocaine was about to arrive at Schiphol and since it could be expected that the courier would move a suitcase filled with cocaine from the secured area of Schiphol in a non-legal way, two officers present in the tap room decided to observe this courier. Shortly afterwards, the officers left the tap room and instructed an interpreter in both the Surinamese language and Papiamento to pass on the information that was coming in through the wires, thereby explicitly involving the interpreter in their investigation. They did so without having a warrant. The interpreter thus carried out investigations without being officially authorised to do so, transferring the information received by translating the wiretapping for the officers and communicating it with them. Further, the interpreter did not only overhear Surinamese conversations but Dutch ones as well. Based on the information

provided by the interpreter, the courier in question was recognised, observed and arrested. 36 kilos of cocaine were found.

The defendants claimed that the interpreter had acted unlawfully, for there was no legal base for his actions. Moreover, they claimed that their right to trial within reasonable time under Article 6 of the European Convention on Human Rights (ECHR) was violated. The Amsterdam Court of Appeal, the court at second instance, was of the opinion that the interpreter had not acted unlawfully. The Supreme Court took into account that the interpreter's acts also consisted in following the usual working method of an interpreter who intercepts statements made in a foreign pass on the Dutch language of those statements to reporting officers. With that in mind, the Court stated that the judgment by the Amsterdam Court of Appeal did not show any erroneous view of the law. It was, in the words of the Supreme Court, neither incorrect nor incomprehensible. However, in contrast to the Amsterdam Court of Appeal, the Supreme Court was of the opinion that the right to trial within reasonable time under Article 6 ECHR was indeed violated, for the Supreme Court presented its judgment more than sixteen months after the cassation appeal was lodged. The Supreme Court stated this should lead to a reduction of the eight-year sentence that was initially imposed on the defendant. This was the unanimous decision of the highest Dutch court.

In this chapter, attention has been paid to the Law and Literature movement, that has explicitly transposed narratology to a legal context. Nevertheless, four important speaker functions were not taken along on this journey. However, the two theoretical case studies mentioned above on the one hand, and the two Supreme Court cases on the other, either implicitly or explicitly refer to these functions, or provoke us to distinguish them. James Boyd White invokes a systematic narratological analysis by mentioning how the author of the opinion of the majority, Justice Taft, establishes authority by characterising the facts, the law and himself in his translation of the Fourth Amendment. Jeanne Gaakeer follows this path in her reflection on James Boyd White's analysis, without opting for a clearer distinction between the narratological layers. In the next chapter, the multiple references to authorship and authority in White's and Gaakeer's work will be discussed.

Chapter II | Speaking Authors

2.1 The author in theory – travelling from the literary to the legal domain

Since it is the aim of this thesis to locate and distinguish between the four different authoritative narrative speaker functions in both the analysis of legal judgments and legal judgments themselves, it is of relevance to first address the roles that these speaker functions play in prevalent narratological theory.

This second chapter is about the author. What role does the author play in narratology? Well, s/he doesn't. That this role is no longer the lead is something that became accepted after 1967, which was the year Roland Barthes started swimming against the tide of traditional literary criticism. In his essay with the speaking title "The Death of the Author" ("La mort de l'auteur", 1977), Barthes stated that in trying to grasp the meaning of a text, one should primarily turn to the reader and should not necessarily attribute authority to the text's founding father of flesh and blood – or: the author. Apart from the fact that we simply cannot know them, the intentions of the creators of the literary work, according to Barthes, are less important than the reader's impressions and interpretations of the work in question (ibid.).

Thus, the author becomes a mere "scriptor", who follows the author in time:

> The Author is thought to *nourish* the book, which is to say that he exists before it, thinks, suffers, lives for it, is in the same relation of antecedence to his work as a father to his child. In complete contrast, the modern scriptor is born simultaneously with the text, is in no way equipped with a being preceding or exceeding the writing, is not the subject with the book as predicate; there is no other time than that of the enunciation and every text is eternally written *here and now.* (Barthes 1977 (or. 1967), 145)

Whereas the author is thought to be placed higher in the hierarchy, then, and to precede the written work, the scriptor is an entity that operates within the timeframe of the text, in which the content of the book is announced. The reason for choosing a new subject term instead of choosing for a redefinition of the author is left implicit in "The Death of the Author" but manifests itself in Barthes's *S/Z*, which was published a few years after the famous essay. "The Author himself," Barthes writes in *S/Z*, "can or could someday become a text like any other: he

has only to avoid making his person the subject, the impulse, the origin, the *authority*, the Father" (Barthes 1975 (or. 1970), 211, emphasis mine). From this excerpt, it can be concluded that the author himself does not have to die after all, as long as the *authoritarian function* of the author is denounced. Because of the radical title of the 1967 essay, this nuance is often overlooked in literary theory.

Barthes's vibrant title, however – and the essay in general –, led to a fundamental shift in theoretical approaches to the (role of the) author, as can be seen in an equally famous text by Michel Foucault, written in response to Barthes's thought-provoking work. In "What is An Author?" (1969), Foucault studies the relationship between author, text and reader. Mieke Bal accurately summarises the four aspects of authorship that Foucault banishes: "Not only does he question the psychological idea of the author, of the authorial intention, and of the historical author as "origin" of the work, but he also jettisons the last stronghold of the concept of the author, the author-function as the centring of meaning" (Bal 2009, 15). The author, in Foucault's work, is no longer a consciously constructed whole of thoughts and intentions that forms the birthplace of the literary text, but rather a constructed centre, made by the reader who needs a main point of reference.

What Foucault proposes instead, is a process of meaning-creation in which the so-called "author-function" interacts with other functions in the discourses. As he summarises it himself: "the 'author-function' is tied to the legal and institutional systems that circumscribe, determine, and articulate the realm of discourses; it does not operate in a uniform manner in all discourses, at all times, and in any given culture; it is not defined by the spontaneous attribution of a text to its creator, but through a series of precise and complex procedures" (Foucault 1969, 309). This notion of the author being a function that is tied to an institutional system relates to what is known as the communication situation in which the author(-function) is positioned. Yet before diving into this, it is of importance to examine to what extent the aforementioned reflections on the function of the author can be transposed to the legal domain, for it is the aim of this thesis to look at the way in which narratological speaker functions are productive in the legal domain and how they attribute to the authority of the judge(ment).

What is the role of the author in the legal domain? Could we cast the author-function of the judge aside in Barthes's or Foucault's sense? This is a rhetorical question, for especially in a legal context one should, as Bal formulates it, not "deny the importance of the author or artist

as the historical subject who made the text" (Bal 2009, 16). To put it concretely: a judgment is only valid if it is written and pronounced by a judge (or: judges), which immediately proves the judge's relevance in the process that leads to the text.[16] From this point of view, Barthes's theory on the death of the (authority of) the author can only apply to a certain extent within the context of legal cases. Within that framework, namely, the author would have no authority over what is written and meant in the judgment. This, obviously, is not the case: a judge, and especially the highest court that is discussed in this thesis, has established primacy when it concerns the meaning of legal terminology.

Since this thesis explores verdicts by the Supreme Courts of the Netherlands and the United States, it is relevant to take their roles in relation to the legal meaning-making process into consideration. In the United States, this is a question of the so-called "judicial review". Although the function of judicial review is not mentioned in the text of the Constitution, it already existed before that very Constitution was put on paper, since legislative acts that conflicted with state constitutions were already overturned before 1789.[17] In 1803, the ground-breaking *Marbury v. Madison* case officially established the principle of judicial review. According to the verdict, it is the Supreme Court's responsibility to overturn legislation that is not in line with the Constitution, even when that means that it should ignore laws, statutes or governmental decisions (*Marbury v. Madison*, 5 U.S. 137, 1803). In the Netherlands, the General Provisions Act of 1829 (Wet algemene bepalingen) states in Articles 11, 12 and 13 that the judge is obliged to decide in concrete cases, based on the relevant legislation. That the judge also has a law-making task, has been the general view for the past decades (cf. Vranken 2000). This is in line with section 81 of the Judiciary Organisation Act (Wet op de rechterlijke organisatie), in which the uniform application of the law and the development of the law are mentioned as grounds for "the answering of questions of law" by the Supreme Court.
Further, law-developing has explicitly been called a primary judicial task in an important 1984 Supreme Court decision (12 October 1984, *NJ* 1985, 230).

Thus, the judges in both the United States and the Netherlands have authoritative primacy over the meaning of legislation and actively take part in the process of law-making. In this view, the judge not only functions as what Bal calls the historical subject who makes the text but also as an authority in terms of meaning.[18] This is in line with the idea that the author – here: judge –

[16] Cf. Gaakeer 2019, who writes about "the legitimacy and authority of the judge as author" (210).
[17] On this, see, for example, Edlin 2006.
[18] See footnote 16.

operates on the level of the communication situation, to be distinguished from the language situation embedded within it. The term "communication situation", introduced by Antoine Braet, refers to the interactive relationship between a speaker or writer and his audience (Braet 160-161). The writer – or author – in question is the judge, who explains in his judgment (text) how the case has to be solved. One can access this text called "judgment" in several ways (online, in magazines, in the media). However, in every case, it is an inherent part of the law in general. It functions as a medium by means of or in which the judge expresses the most recent views on legislation and its application in practice.

This qualification of the law as a "medium" implies that we can state that a judgment is a means to a goal in a specific institutional context, which entails specific genre possibilities.[19] This context has influence on the possibilities to manoeuvre strategically in a judgment; these are both limited and expanded. "Strategic manoeuvring" refers to the process of integrating formal reasoning and rhetorics into a combined effort, to reach a certain goal. Van Poppel (2008) describes the link between context and strategic manoeuvring in arguing that an utterance's institutional context is decisive for the content and form of this specific utterance.[20] We only take verdicts formulated by recognised judges seriously; besides, these verdicts are only valid when uttered in a courtroom and in line with given (textual) formalities. Thus, from an institutional and practical perspective only, a judgment does not only *know* but also *need* a specific author: a certified judge. The question of how explicitly this speaker function is dealt with in theory and practice will be answered in the following section.

2.2 The author in theory and practice – *Olmstead v. United States*

Now we have localised the author(-function) in the field of narratology and have an impression of the importance of the role of the author called "judge", we can take a look at the attention that is paid to this narrative speaker function in the analyses by Law and Literature scholars James Boyd White and Jeanne Gaakeer. As stated earlier, we will do so by focusing on one single US Supreme Court case: *Olmstead v. United States*. Whereas White analyses the *Olmstead v. United States* case in a separate chapter of *Justice as Translation* (1990), Gaakeer reflects upon this very analysis on several pages of *Hope Springs Eternal* (1998). Since this is the chronological order in which the pieces are written and because Gaakeer explicitly refers to White's analysis, these theoretical texts will be discussed in this order.

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[19] Cf. Van Eemeren 2017.

[20] She especially does so on page 309-322.

White's chapter on *Olmstead v. United States* (or: *Olmstead*) carries a revealing title: "'Plain Meaning' and Translation: the *Olmstead* Opinions". The title is telling for it emphasises the common interpretive method that can be recognised in the opinion for the majority in this case, as White argues. This method is to read the language of the Fourth Amendment "as if its meaning is plain, unproblematic, simply authoritative as composed" (White 1990, 141). However, the terms of the Fourth Amendment are not the only things that are seen as authoritative in the *Olmstead* opinions.[21]

What is first discussed in both the *Olmstead* case and White's reflections upon it, is the text of the Fourth Amendment itself. This text reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable *searches* and *seizures* shall not be violated; and no Warrant shall issue but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. (emphasis mine, LvdB).

To shortly reiterate the facts of *Olmstead*: in this case, federal officials systematically tapped the phone wires of people suspected of bootlegging without the officially required warrant. The question that lies at the core of this case is that of whether this behaviour counts as a "search" or "seizure" and thus of an intrusion that is mentioned in the Constitution. As stated earlier, a 5-4 decision led to the general conclusion that the rights of the claimants were not violated.

In his analysis, White focuses on two specific opinions: the opinion for the majority by Chief Justice Taft and the dissenting opinion by Justice Brandeis. White almost immediately begins by claiming that the text of the Fourth Amendment is not as "self-evidently clear and correct as the opinion makes it seem" (143). Hereafter, White quite extensively describes the different readings of the Fourth Amendment that are possible and that Taft, in his opinion, thus ignores. Other lines of argumentation would have been possible, White states, and White has not

[21] *That* opinions can be seen as literary texts that can be analysed in terms of narratology, is made clear by, amongst others, Ferguson 2016, esp. 115-129. Ferguson even seems to emphasise the translation process that lies at the core of White's theory, as well. Cf. "The judicial opinion molds the conflicts of a trial transcript into a cohesive narrative of judgment, turning social problem into legal incident" (123) and "A court opinion uses reason and a belief in measured form to articulate and justify the hold of the past over the present" (126). The same counts for Posner 2009, who, like Ferguson, dedicates an entire chapter to "Judicial Opinions as Literature" (329-388) and qualifies the process of interpretation of the law as "translation" (324).

addressed them. In this light, the question that follows is only logical: "If Taft did not meet such obvious arguments in his opinion, upon what did he rely to make the conclusory language [...] persuasive to his readers?" (145). The answer to this question is a vivid illustration of the main problem addressed in this thesis: the intermingling of several narrative speaker functions in Law and Literature analyses of case law. "I think," White writes,

> that he [*Taft, LvdB*] relies more than anything else upon the very power of *characterization* that he has exemplified throughout his opinion, upon the *voice of authority* with which he has been speaking. His ultimate ground is literary and ethical in nature: *who he has made himself, and his readers, in his writing*. For he repeatedly *characterizes both the facts and the law* with a kind of blunt and unquestioning finality, as if everything were obviously and unarguably as he sees them; in doing this he prepares us for the conclusory and unreasoned characterizations upon which the case ultimately turns. Rather like Justice Frankfurter in *Rochin*, *he makes a character for himself* in *his writing* and then relies upon that *created self* as the ground upon which his opinion rests (145, emphasis mine).

What we see here, is a form of argumentation that relies on different narratological levels at the same time. The judge, according to White, is not only the authoritative writer of his opinion, but also the institution that decides upon the way in which the readers, the facts and the law are described or characterised, and, additionally, the judge can be a character himself. Since this chapter focuses on notions of authorship and authority, the elements that refer to those concepts will be examined in the following. The other possible narrative speaker functions of the judge will be addressed in the other chapters of this thesis.

White has a clear vision on the hierarchical position of Chief Justice Taft: he is an "authoritarian", and that, for the most part, explains why "the method works" (145). Put more explicitly:

> The task of the judge is to be an intermediate boss, *producing* a text that has a similar structure: not reasoned, not explained, *not creating in the reader the power* that reason and explanation do – for if you are unpersuaded by an opinion that

> purports to rest upon reason, you may reject the authority of the opinion itself – but an *act of power resting upon power, pure and simple*. (146, emphasis mine)

Although in this excerpt, too, other speaking subjects can be discerned (such as "the authority of the opinion itself", which will be discussed in another chapter), the gist of this fragment concerns the authoritarian position of the author. In Barthes-related terms, one could almost speak of the resurrection of the author at the cost of the reader, who is here mentioned as the subject that should not be given power (cf. Barthes 1977 (or. 1967)). The authority of the opinion, so it follows from this part of the analysis, is primarily based on the authority of the judge, who is the author (cf. "producing", White 1990, 146) of the text and therewith re-emphasises his power over the judgment specifically and legislation in general. This is confirmed by White: "If one were to read this opinion as a literary text and ask what it is that Taft really values and thinks is important, the first answer would be his own voice and his own power" (146). Here, it is not about the judge in general or authority in the legal context in the broader sense, but about the judge of flesh and blood called Taft, who appeals to power. At the same time, "power is taken both from the text and from the reader" (147). The hierarchical relations in the earlier described institutional communication situation are underscored again: "[t]he judge is qualified for this function primarily by his position as judge" (ibid.). The reason White gives for the fact that we take this authoritative judge this seriously, strongly resembles Foucault's earlier mentioned conclusion: like the readers of literature, the readers or subjects of the law seem to need the author-function, for it is a centre of reference (cf. Foucault 1969).

After having examined the opinion of Chief Justice Taft, White moves on to what is, in his view, the "justly famous" dissenting opinion of Justice Brandeis (149). He states that whereas Taft relies on a distinct authoritative status, Brandeis functions more like a judge should – that is: as a translator that translates the original legislation to the present time. What then happens with the opinion is that "it becomes part of the Constitution itself, and this means that the judge must be able to create a constitution, with his readers, of a kind that fits with, and carries forward into the future, the earlier constitution out of which he speaks. This requires Brandeis to become a maker and remaker of language" (156). This is especially striking, for here, White seems to prefer a more Barthesian division of authority (cf. Barthes 1977 (or. 1967)) by choosing Brandeis above Taft. "It is indeed that combination – liberty, constraint and responsibility for the reader and maker of texts -," he states in the last sentence of the chapter, "that the ethical and intellectual life of the law can be found" (White 1990, 159).

In her short piece on White's analysis of *Olmstead*, Jeanne Gaakeer largely follows White's reasoning. "The Constitution in Taft's hands," she writes, is thus reduced to a mere command to be interpreted by an authoritative voice, according to White. Brandeis's dissent, on the other hand, opens up the possibility of "a conversation in which democracy begins" (Gaakeer 1998, 121). Nothing new, so far. The fact that Gaakeer follows in White's footsteps also means that in her reflection, too, different narrative speaker functions collide in the middle of paragraphs or even sentences. She relates the success of Brandeis dissenting opinion to his being a character, writing about "the treatment of Justice Brandeis, White's *persona* in the text" (127, emphasis mine, LvdB) but also refers to Brandeis as a "writer" or "interpreter" (121-122). Gaakeer, in line with White, also sees the restored balance between author and reader(s) in Brandeis's opinion: "[f]or a constitution in Brandeis's eyes is not only made by its framers, but also by its interpreters who help bring the text into the present through readers of the development of its meaning in the form of precedents" (121). However, the role of the framers is neither underexposed nor unimportant. Both White and Gaakeer signal that Taft and Brandeis stress the importance of the framers of the Constitution, who are presented as the authoritative authors of what lies at the core of legislation. These framers "also wished this text to be authoritative in other contexts" (White 151). It is in these other contexts that judges need to write their opinions and judgments.

2.3 The author in practice – *Dutch tap case*

Whereas in the United States, the Supreme Court has the possibility of judicial review, this is explicitly forbidden in the Netherlands (Article 120 of the Dutch constitution). In most judgments by the Dutch Supreme Court, one can see clearly that it is the Court's main task to check whether the law is applied correctly in the contested judgments of the lower tribunal and to take a last look at the legal reasoning on which the verdicts in lower instance are based. In this case, the court in lower instance was the Court of Appeal of Amsterdam. The Supreme Court judgment, in contrast to the opinions in the United States, is written in the third person: "The Supreme Court does A", etcetera. Thus, the Supreme Court is on the one hand explicitly positioned as the author of the judgment. However, this author-function (cf. Barthes 1977 (or. 1967)) rather has the form of an authoritative institution than that of an authoritative person of flesh and blood, like in the *Olmstead* opinions. This institution analyses the Court of Appeal's considerations concerning the claimant's statement that "the Public Prosecution Service should be declared inadmissible in the prosecution or that the discovery of the seized cocaine should

be excluded from the evidence” (ECLI:NL:HR:2011:BP0344; 2011). The claimant argues, among other things, “that the Court of Appeal failed to recognise that the interpreter carried out investigative activities without being authorised to do so.”

After a summary of the Amsterdam Court of Appeal’s reply to this statement, the Supreme Court summarises its argument: the Court claimed “that on 4 November 2006 the interpreter was alone in the tap room for some time and during that time listened to the incoming information and - where necessary translated - passed it on to the officers, in particular the officer [officer 1], via an open telephone connection. This included information about the courier's identification and pile locations from which it appeared that the (co-) suspect [co-suspect 1] was traveling from Rotterdam to Schiphol.” The Amsterdam Court of Appeal came to the conclusion “there has been no unlawful act on the part of the interpreter.” Then, the Supreme Court reflects on its authoritative position in this judgment: “That judgment does not show any wrong interpretation of the law.” It shortly mentions what is given consideration: “In doing so, the Supreme Court takes into account that the acts adopted by the interpreter, according to the considerations of the Court, also consisted in following the usual working method of an interpreter who intercepts statements made in a foreign language, immediately in pass on these statements in the Dutch language to reporting officers present elsewhere.” Further, the Supreme Court does not reflect explicitly on its own function and position of authority, apart from in the final conclusion: “Since the Supreme Court finds no ground on which the contested decision should be quashed ex officio, what has been considered above means that a decision must be made as follows.” What follows is the conclusion that the Court overturns the contested decision of the Amsterdam Court of Appeal, but only as far as it concerns the duration of the imprisonment; apparently, the fact that the Supreme Court has not found any ground on which the decision should be overturned entirely is authoritative enough to come to this conclusion.

Now, what about the conclusion concerning the author-function of the Dutch court in this judgment and in Dutch case law more in general? As we have seen, rather than as an author of flesh and blood who has written down the judgment that has impact on society, the Dutch Supreme Court is mainly presented as an institution that communicates whether the law is applied rightly on the facts given and described by the court in lower instance. The author-function of this institution, however, is, as follows from the short analysis above, marginalised, as well. Whereas in the previous subchapter, part of the conclusion was that White seems to prefer a *more* Barthesian division of authority by choosing Brandeis above Taft, it would be

safe to say that the *most* Barthesian is the judgment by the Dutch Supreme Court, putting the author in anthropomorphic form almost completely aside (cf. Barthes 1977 (or. 1967)). This anthropomorphic author is overshadowed by an authoritative institution.

Chapter III | Speaking Narrators

3.1 The narrator in theory – travelling from the literary to the legal domain

In this chapter, we move from the subject of the author(-function) to that of the narrator. According to Bal, the narrator is "the most central concept" in narratology for the indication of the narrator's identity in the text and the related choices give the text in question its "specific character" (Bal 2009, 18). By using the term "narrator", Bal refers to "that agent which utters the (linguistic or other) signs which constitute the text" (18). The narrator comes to the surface when a narrative text is formed of utterances, Bal writes (18 and 21). The term "utterances" already implies the narrator's agency, which seems to be confirmed by Bal, who appears to use "subject" and "agent" as interchangeable concepts, stating that a narrative text, in its turn, can be defined as "a text in which an agent or subject conveys to an addressee ('tells' the reader) a story in a particular medium" (5). Having connected all these definitions, the question remains of how the narrator manifests itself in these narrative texts.

Before diving into theory, an example of what such a manifestation might look like is offered by the Dutch Supreme Court in the Dutch tap case that is discussed in this thesis. In consideration number 2.5, the text of the judgment goes as follows:

> Incidentally, the claim also fails. That is necessary, given Article 81 RO [section 81 of the Judiciary Organisation Act (Wet op de rechterlijke organisatie), LvdB], no further reasoning since the plea does not require an answer to legal questions in the interest of the unity of law or the development of law (ECLI:NL:HR:2011:BP0344; 2011).

It is not entirely or immediately clear who speaks, here; the Supreme Court is only mentioned a few times and certainly not in direct relation to this specific quote, for this is a separate consideration in the judgment. In consideration 2.4, the Supreme Court is mentioned, although related to an entirely different line of argumentation. Narratologically, it is clear however, who speaks in consideration 2.5: a narrator.

How should we think and write about the narrator? In her section on the narrator, Bal immediately makes short work of traditional distinctions between two or three types of narrators based on personal deixis. Put differently: she dismisses the well-known distinction between "first-person", "second-person" and "third-person" novels by stating that "[f]rom a

grammatical point of view, th[e] narrating subject is always a 'first person'" (21). That is in line with Bal's remark that a narrator is neither a "he" or "she" but rather an "it" (15). Talking about a "third person" narrator would, from that perspective, be a *contradictio in terminis*. Bal's usage of "it", which I will follow in this chapter, also proves itself productive in distinguishing from the biographical author of the text, who can be a s/he. More concretely, "it" emphasises the distinction between the narrator – the narratological subject that actively utters the textual signs of which a text is composed – and the (implied or biographical) author, or between the story-teller and focalizor. With regards to the latter, Bal points out that the relationship between the narrator and focalizor – seen as different agents – is often of importance in narratological analysis.

If the narrator is not divided over the traditional categories ("first", "second" and "third" person), nor systematically connected to the agent that focalizes in a specific part of a novel, what manifestations of this speaking subject are possible? Bal proposes to distinguish between an external and a character-bound narrator, paying attention to the way in which a narrator refers to itself. If the "narrator never refers explicitly to itself as a character", that is what Bal categorises as an external narrator (EN). Is the narrator "to be identified with a character, hence, also an actor in the fabula", then it is to be qualified as character-bound (CN; 21). Whereas the former is talking about others, the latter is "personified" (ibid.). Apart from this main difference in meaning, there is, according to Bal, also a crucial distinction in connotation that has to be made: the CN is connected to a more explicit "narrative rhetoric of 'truth'" (ibid.). What Bal means, here, is that a narrator that connects itself to a character is more likely to emphasise that it speaks the truth about itself and the described events. A vivid example of such a narrative construction is that of the autobiography, in which, Bal explains, the narrator "pretends to be writing" the character's autobiography (ibid.). The part "pretends to be" already indicates that character and narrator, even when talking about the character-bound narrator, are not to be harmonised. That has to do with the process of embedding; the texts of characters are embedded into the narrator's text and thus manifest themselves on a different narratological level. That is why the narrator can tell us about the characters and not vice versa.

Bal brings to our attention that "narrator's text and actor's text are not of equal status" (57). The dependence of the actor's text on that of the narrator, Bal writes, is partly dependent on quantity: "the more sentences frame the actor's text, the stronger is the dependence" (ibid.). Of course, actor and character are not the exact same subjects. Whereas actors are more abstract

elements that play a role at the level of the *fabula*, characters manifest themselves at the level of the *story* and are thus considered to be *aspects*. Characters can thus be seen as subjects that are more than "structural positions" (actors; 112), for they are 'coloured' by human characteristics. However, since characters are, seen in this light, actors' equivalent at the narratological level of the *story*, characters are textually dependent on the narrator, as well.

What role does the narrator play in the legal domain?[22] This is the question of whether in legal judgments, we can find a speaker that is neither the autobiographical author of the judgment (hence, the judge) of flesh and blood nor merely an embedded character that operates at the level of the *story*. The narrator that is to be found in the text of a legal case should be the subject that utters the signs of which the text is made. As we have seen in the previous chapter, the force and effect of a judgment largely depend on the institutional context; if such a judgment is not written by a judge, there is no reason to take the text seriously as a judgment. Likewise, in more general terms, a textual judgment ought to be organised in a specific way in order to be recognised and acknowledged as a judgment. I here again bring to attention Van Poppel's observation that the institutional context of an utterance is very decisive for both the content and form of this utterance (Van Poppel 2008).[23] It is the legal institution – within the scope of this thesis: the Supreme Court of the United States respectively that of the Netherlands – that has to make sure that the requirements for a valid written judgment are met.

Still, the narrator, "that agent which utters the (linguistic or other) signs which constitute the text" (18) in the context of legal judgments thus does not have a human face, yet it has specific juridical characteristics. This constituting force is inherently embedded in the institutional context of the law. That is not to say that – in Bal's terms – the narrator of legal cases is necessarily character-bound, for that depends on the specific legal system. As will be made clear in the following subchapters, the narrator in the American legal system is more character-bound, whereas in the Dutch legal system it is, I would claim, first and foremost institution-bound. The issue at stake is what exactly this legal narrator, whether more character- or institution-bound, takes into consideration when constituting the text. Or, put differently, with what elements the narrator works in any case.

It goes without saying that the specific format – or: "given" organisation of narrative elements – of a judgment is dependent on the national legal procedure at stake. The judgments of the

[22] Here, it is noteworthy that it is hard to find any text that explicitly reflects on the role of the narrator in legal judgments.
[23] See also Van Eemeren 2017.

Supreme Court of the United States consist of one or more opinions, written by one or more judges, with which other judges either explicitly agree or disagree. This results in the fact that apart from a so-called "Opinion of the Court" (the Supreme Court's final and thus binding judgment, which is supported by the majority), we can distinguish between concurring opinions, opinions concurring in the judgment and dissenting opinions. Whereas with a concurring opinion, a judge expresses that s/he agrees with the opinion of the majority, this specific option offers the judge in question the possibility to elaborate on the grounds for this final decision. Opinions that are concurring in the judgment agree with that final decision but offer a different argumentative basis for reaching that conclusion. Dissenting opinions express the judge's disagreement with the general opinion of the Court. In the *Olmstead v. United States* case that is analysed by White and Gaakeer, Justice Taft's opinion is that of the majority and Brandeis's opinion is dissenting. Notwithstanding the category of opinion, judges are always mentioned explicitly as either the author of an opinion or as the judge who joins the opinion written by a colleague. According to this principle, in the *Olmstead v. United States* case, we can see that "Mr. Chief Justice Taft delivered the opinion of the Court" (page 277 U.S. 455) and that a few pages further down, "Mr. Justice Brandeis [is] dissenting" (page 277 U.S. 471). Apart from all opinions, judgments of the US Supreme Court generally consist of a broad, society-oriented introduction, an overview of the factual background of the case, a description of the proceedings before a lower court and the several relevant Articles and/or specific clauses.

In the Netherlands, the format of a Supreme Court's decision is more rigid. Leaving no room for extensive reflections by different judges, the Dutch Supreme Court has to come to a unanimous conclusion, which is not related to one of the judges but to the Supreme Court as a law-making institution. After an introduction of the parties, what follows is largely a quotation of what has happened before lower courts. This has everything to do with the fact that the Supreme Court of the Netherlands is, as explained in the first chapter, a court of cassation; it is the Court's main task is to check whether the law is applied correctly in the contested judgments of the lower tribunal(s). The emphasis thus lies on the legal reasoning before the lower courts and not (anymore) on the facts brought before those courts. However, these facts are still decisive. For criminal cases, like the tap case studied in this thesis, specifically, the Dutch Code of Criminal Procedure (Wetboek van Strafvordering, Sv) mentions the crucial "basis of assessment principle" (grondslagleer). This means that the court has to base its judgment on the facts brought before it.

In Articles 348 en 350 Sv, it is stated that the material and formal questions as introduced by these Articles – is the subpoena valid, does the judge have the right competence, is the Public Prosecution Service admissible, has the suspect indeed committed the offence, which crime exactly is at stake when it is proven that the suspect has committed an offence, is the suspect punishable for the crime s/he has committed and which punishment applies – should be answered on the basis of the indictment and the trial in court. Thus, both the content and form of the judgment of the court are dependent on what is brought before the judge in the form of either the indictment or documents and explanations during trial. Further Article 358 Sv, second paragraph, explicitly mentions that the judgment of the court should contain the court's decision concerning the questions of evidence as formulated in Article 350 Sv. This evidence should, according to Articles 339 up to and including 344a, be legal and convincing. That again emphasises the role of the court in lower instance in the process of establishing the facts of the case: it is the court that must be convinced. In criminal cases in the Netherlands, thus, the court (or: courts) in lower instance determines (or: determine) how the facts of the case are presented; the Supreme Court cites these facts and, in this way, makes them part of its judgment. Whereas it is the role of the lower court to 'establish' the facts, it is the role of the Supreme Court to organise these facts into a larger whole in which the legal consequences of the facts are weighed one last time in light of the prevailing law. After having done so, the Supreme Court either comes to the conclusion that it (partly or entirely) overturns the decision of the lower court, or confirms it. What happens in the judgment of the Supreme Court, thus, is that the judgment in highest instance is organised in such a way that the verdict(s) of the lower court(s) is (or: are) embedded into the larger narrative of the case before the highest court, in which all relevant facts and legislation are arranged into what should become a righteous and convincing judgment. This, the following subchapters will point out, is the work of the narrator.

3.2 The narrator in theory and practice – *Olmstead v. United States*

As stated in the previous chapter, White starts his analysis of *Olmstead v. United States* by stating that Justice Taft's opinion makes the Fourth Amendment seem crystal clear, whereas that arguably is not the case. Taking arguments into consideration that oppose Taft's reasoning, White concludes that Taft must be relying on something different than convincing argumentation in his opinion. The question is: on what? As argued in the previous chapter, the answer to this question illustrates the theoretical intermixture of narrative speaker functions that could or rather should be distinguished. For that reason, this subchapter starts with citing that very same fragment, in which White writes:

> I think that he relies more than anything else upon the very power of *characterization* that he has exemplified throughout his opinion, upon the voice of authority with which he has been speaking. His ultimate ground is *literary* and ethical in nature: *who he has made himself, and his readers, in his writing*. For he repeatedly *characterizes both the facts and the law* with a kind of blunt and unquestioning finality, as if everything were obviously and unarguably as he sees them; in doing this he prepares us for the conclusory and unreasoned characterizations upon which the case ultimately turns. Rather like Justice Frankfurter in *Rochin*, *he makes a character for himself in his writing* and then relies upon that *created self* as the ground upon which his opinion rests (White 145, emphasis mine).

In the previous chapter, I stressed the elements in this and other excerpts that refer to the authoritative author-function with which Taft is associated. However, there is more to White's text. In the quotation above, namely, White also describes how Taft's ultimate ground is "literary" in that he actively creates "himself, and his readers, in his writing" (ibid.). The latter is of importance when looking at the second speaker function that is pointed out in this thesis: the narrator. This "agent which utters the (linguistic or other) signs which constitute the text" (Bal 18) acts on the level of precisely the "writing" that White mentions. Although the words "in his writing" might as well refer to the active process of writing by a person of flesh and blood, it is here suggested that "writing" can be read as the narrative text in which not Taft, but a narrator positions and creates facts, the law and characters.

What is especially remarkable in White's text, is that the characters he mentions are not primarily the claimants and the defendant – at least, White does not mention Olmstead, nor the Government explicitly in this or related passages – but "himself", referring to Taft, and "his readers" (White 145). From a narratological perspective, then, it is not simply Taft who writes a text in which Taft positions Taft, but rather Taft-the-writer who writes a narrative text in which Taft-the-narrator utters the signs of which that text is constituted and in which Taft-the-character plays one of the major parts. That is a distinction that White does not make in his analysis, while there are many more indications of this manifestation on several narratological levels, as we will see. As for Taft's opinion, that would lead to the conclusion that in Bal's

terms, we can speak of a character-bound narrator, for the narrator explicitly connects itself to the character of Justice Taft that is created in the opinion, signalled by the word "himself".

Another indication of the narrator's activity in Taft's opinion and, correspondingly, in White's analysis, is White's observation that the judge produces a text with a specific "structure" (146), that resembles nothing less than a "detective story", with a "thrilling world of organized scale and competition" (147).[24] The opinion is thus translated into a narrative text for it is constructed in a certain way, that invites the reader to be convinced of the ideology that lies behind it. The character-bound narrator is actively trying to organise the text in such a way that its main character – Justice Taft – comes across as trustworthy (and authoritative), as is a characteristic consequence of the activity of a character-bound narrator (cf. Bal 2009, 21). In White's own words, the text is

> *designed* to elicit in us, the sense that the fourth amendment has nothing to do with what is really at stake in the case. *The narrative thus implicitly supports* the constitutional ideology he has been enacting, for *it invites us to see* power and force as real, language as simple, and government as about the struggle between the forces of good and the forces of evil (White 1990, 147, emphasis mine, LvdB).

The narrator in Taft's opinion has organised the narrative text in such a way that the ideology hidden behind it is brought to the reader as true and convincing.

Justice Brandeis's opinion, White states, steers into an entirely different direction. Whereas Taft's opinion does not leave room for questions about the status or meaning of the Fourth Amendment, White writes that Brandeis "poses a question never explicitly addressed by Taft: How are we to think about our reading of this text?" (149). Again, it is the question of whether it is Brandeis (only) who poses this question. White argues that "Brandeis uses th[e] language to define his own legal attitude" but it is mainly an analysis of the structure of Brandeis's opinion that leads White to this conclusion (150). In fact, White poses that Brandeis promotes a different approach to the law and the legal process than Taft by *showing* how a judgment, in his opinion, should be *written:* "Brandeis has implicitly committed himself to exemplifying the process that he recommends, and he proceeds to do that" (151). Thus, the text's constitution is

[24] Cf. Brooks 2017, who pays attention to "Clues, Evidence [and] Detection" in legal stories.

decisive, once again. Put differently: in Brandeis's opinion, too, the narrator is manifest. However, this narrator is less inherently connected to a character (which would be that of Brandeis, embedded in the narrative text); it is more external than character-bound. That is in line with White's statement that Brandeis only "establishes himself" in the final paragraph of his opinion (155). In that paragraph, we do not necessarily find an authoritative Brandeis, according to White: "Brandeis himself establishes his own voice as that of a teacher, a teacher who must first learn, and who by having learned may teach" (ibid.). The authority of Brandeis opinion is thus not necessarily a given because of Brandeis's person but rather constructed along with the narrative text of the opinion; which is the work of nothing less than the narrator.

In *Hope Springs Eternal*, Jeanne Gaakeer also signals the contrast between Taft's and Brandeis's opinion. She emphasises the difference in approach: whereas Taft opts for a "plain meaning" approach, Brandeis mainly focuses on intention (Gaakeer 1998, 121). In systematically discussing White's analysis of both opinions, Gaakeer comes to the conclusion that for White, Brandeis is primarily the "translator" that turns the "original context that gave rise to [*the Fourth Amendment's, LvdB*] first meanings" into the modern context (ibid.). A translator is, of course, not a narratological character *per se* in that sense that it does not explicitly manifest itself on either the level of the *text, story* or *fabula*. The question is thus what narratological position this translator could have. Since the focus in both White's and Gaakeer's analysis of the translation process lies on the creation of a convincing narrative throughout the judgment, it could be stated that it is the narrator who – in both theorists' opinions – successfully translates (or: re-arranges) the facts and rules into a new *story* that fits the specific content of the case. This, however, is again somewhat complicated by the fact that the translator could be seen as a character, as well; a point reflected upon in the fourth chapter of this thesis.

3.3 The narrator in practice – *Dutch tap case*

In comparison to the judgments of the US Supreme Court, the judgments by the Supreme Court of the Netherlands are short and rigid in the sense that they follow a strict format. As stated in the previous subchapter, a large part of the judgment consists of a quotation of what has happened before lower courts. This is the case because the Dutch Supreme Court can, in accordance with Article 120 of the Dutch Constitution, only check whether the law is applied correctly. Asking a question of "who is speaking" or "who is telling" could thus, in practice, lead to a multi-layered answer. There is, on the one hand, the narrator that organises the text of the judgment in its utterances. Embedded in that text are the facts as presented by the lower

court, which means that the lower court is presented as an embedded speaker, which, in its turn, stages the parties in this trial. However, notwithstanding the difference in length and descriptive character, the Dutch tap case, like *Olmstead v. United States*, can be analysed looking at several speaker functions.

As for the narrator, in the Dutch case, too, there can be found utterances of which the text is constituted. Firstly, Dutch Supreme Court judgments are always divided into the same categories with corresponding subtitles. This is a first mechanism of organisation that a narrative subject is using to constitute an authoritative text in which an earlier judgment – here: that of the Amsterdam Court of Appeal – is weighed. Second, the so-called "considerations" (rechtsoverwegingen) are divided into subcategories; the first part (part 1) for example contains the paragraphs 1.1, 1.2, and so on. What is remarkable is that the Supreme Court is barely referred to, or mentioned, apart from in the final decision (the last paragraph). That makes the narrator an external narrator. Only three times, the Dutch Supreme Court forms an explicit part of a consideration; it is here presented as an actor – or character, as I will discuss in the next chapter – that is accompanied by a verb. And although "De Hoge Raad" is the first part of the final sentence (the conclusion), that phrase is institutionalised to such an extent that the question is whether that makes the narrator character-bound for just a moment.

In conclusion, what we have seen is that in the American legal context, it is clearly a character-bound narrator that acts. What White does not discuss, is the fact that in the opinions of the Supreme Court of the United States, it is common that the word "I" is used. An example offers the dissenting opinion of Brandeis, which he ends by saying: "Independently of the constitutional question, *I* am of opinion that the judgment should be reversed. By the laws of Washington, wiretapping is a crime" (page 277 U.S. 479, emphasis mine, LvdB). This character-bound narrator, although it *refers* to earlier cases before the Supreme Court, barely *embeds* other texts. That is completely different for the judgement(s) of the Dutch Supreme Court, in which embedding is manifest and the external narrator plays the role of a distributor.

Chapter IV | Speaking Characters

4.1 Characters in theory – travelling from the literary to the legal domain

A passage that was already cited in the previous chapters, from White, illustrates that many subjects play a role in the judicial theatre. Let me repeat it here:

> His ultimate ground is literary and ethical in nature: *who he has made himself, and his readers, in his writing*. For he repeatedly *characterizes both the facts and the law* with a kind of blunt and unquestioning finality, as if everything were obviously and unarguably as he sees them; in doing this he prepares us for the conclusory and unreasoned characterizations upon which the case ultimately turns (White 1990, 145, emphasis mine, LvdB).

If a legal judgment is seen as a narrative text, it will, on the level of the *story*, introduce the reader to its characters. In *Justice as Translation*, White seems to suggest that at least the judge himself, the readers, the facts and the law might be possible acting forces on this narratological level. The question, then, is whether this corresponds to what is seen as a character in narratology. A follow-up question is whether these are the only possible characters within a legal context.

The character is the third speaker function that is distinguished in both narratology and in this thesis. As Mieke Bal describes in both *Narratology* and the speaking work *Mensen van Papier* (*People Made of Paper*; 1979), characters are to be seen as "paper people, without flesh and blood" (Bal 2009, 113), that are embedded in the narrative text. Being positioned as such, characters are in fact "anthropomorphic figures provided with specifying features the narrator tells us about" (112). As we have already seen in the previous chapter, characters are thus largely dependent on the narrator, for the narrator's utterances organise not only the text but also the way in which the characters are presented – or: shaped.

In her chapter on characters, Bal rejects the way in which characters are traditionally categorised. The authoritative approach that long prevailed, Bal writes, is that of Forster. In *Aspects of the Novel* (1927), Forster presents several lectures that address the theme of his book. "Any fictitious prose work over 50,000 words will be a novel for the purposes of these lectures," Forster writes (Forster 8), but as we have seen with Bal, the terminology as introduced in

Aspects of the Novel has since 1927 found its way to literary theory and criticism in general. What started as a paragraph entitled "We may divide characters into flat and round" (48), became the most famous theoretical distinction in the study of novels. The distinction is based on the level of (personal) development of the specific characters within the boundaries of a literary text. If the character does not really develop and thus is a constant factor in the novel, Forster uses the term "flat character". If a character develops throughout the text and thus paints a more complex picture, "round character" is the term we should use (ibid.)

As said, Bal dismisses this well-known distinction, stating that it is merely "based on psychological criteria" (Bal 2009, 121), which entails that whereas round characters are complex, flat characters are stable. This kind of categorisation, Bal states, has so often been mocked in literary texts (by "entire genres", 115) that it is hardly productive as a general distinction anymore. What is more, descriptions of characters that are based on this distinction, are prone to be largely dependent on ideological preferences, Bal argues. Categorisations of characters would, namely, be "always strongly coloured by the ideology of critics, who are often unaware of their own ideological hang-ups", for they are strongly related to what a specific reader considers to be "complex" or "round" (119).

Weighing the disadvantages shortly described above, Bal states that the distinction between round and flat characters does not apply anymore. Instead, she proposes to take the idea that narratives produce "character-effects" as a starting point (113). The character-effect is an effect that "occurs when the resemblance between human being and fabricated figures is so great that we forget the fundamental difference", Bal writes (ibid.). In doing so, she does not explicitly refer to the advantages of the two types of characters that Forster mentions in *Aspects of the Novel*. Where it concerns flat characters, Forster explains that "they are easily recognized" (Forster 49). That mainly has to do with the reader's recognition of flat character's proper names, which become indicative for certain roles in the text. Further, likewise, flat characters are "easily remembered by the reader afterwards," for flat characters "remain in [the reader's] mind as unalterable for the reason that they were not changed by the circumstances; they moved through circumstances, which gives them in retrospect a comforting quality, and preserves them when the book that produced them may decay" (ibid.). Round characters, or characters "capable of rotundity" (53), are "two-dimensional" (52), seem to be doing an appeal to the complexity of 'real life', or the feelings and circumstances that readers deal with themselves. Thus, readers

might feel more inclined to sym- or emphasise with them and – accordingly – follow their reasoning.

Notwithstanding the way in which characters are categorised, the question is how these "paper people" come to exist in the text. For both from a viewpoint from which "character-effects" are decisive and from a perspective in which the distinction between round and flat characters prevails, the character is "formed" in or throughout the text. Bal offers a useful description of this formation process that fits both theoretical approaches. "Repetition, accumulation, relations to other characters, and transformations," she writes, "are four different principles which work together to construct the image of a character" (127). The effect that these factors have on the character have to be related to the general "outline of the character" in "a dialectic back-and-forth between speculation and verification through open-minded analysis", is Bal's opinion.

Now, the question is how characters manifest themselves in judgments by the Supreme Courts of the United States and the Netherlands. It is important to recall that this thesis mainly focuses on the characterisation of the subject that speaks the law – so far: the judge –, rather than on the different parties that play a role in the process that has led to the trial before the highest court. These parties, however, are presented differently in Dutch and US Supreme Court judgments. A striking example hereof is the way in which titles of judgments come into being. As we know by now, the US Supreme Court carries the title of the conflicting parties: *Olmstead v. United States*. It is the dispute between parties that is reflected in the title. In the Netherlands, Supreme Court cases mainly have the European Case Law Identifier (ECLI) as a title. If not, the title often reflects the topic that is discussed. Illustrative is, for example, the well-known *Milk and Water* case (*Melk en water*-arrest, ECLI:NL:HR:1916:BG9431), which is – as the name thus indicates – about a farmer in Amsterdam that sold diluted milk as if it were full milk, which was not in accordance with Article 303 of the General Police Regulation of Amsterdam. Even the groundbreaking *Urgenda* case officially carries its ECLI as title (ECLI:NL:HR:2019:2006). It is in the media that people talk about the *Urgenda* case; in the judgment itself, "climate case Urgenda" is only part of the indication of the content and thus not the case's official name.

Back to the judge-as-a-character.[25] As we have seen, this law-speaking entity is explicitly mentioned in the American context, for the judgment of the Supreme Court overseas mainly

[25] On the role of the judge as a dramatic character, see Witteveen 1991 and Korsten 2021, 36 et passim. On a theory of judicial character (traits), see Amaya 2018.

consists of opinions that are inherently connected to the judges who author them or support them. In these opinions, they use each other's names to refer to the different opinions, thus not only invoking each other's authority as authors but also their authority as characters that play a major part in the process that leads to the final ordeal. The American judges are "characters" *pur sang*. In line with this, there has regularly been discussion in the media about the ideology and/or political background of the judges of the Supreme Court. Illustrative is the fact that after the death of Justice Ruth Bader Ginsburg, former president of the United States Donald Trump nominated Amy Coney Barrett, who is known to be a federal judge and is widely supported by the Republicans and conservative Christians, whereas Democrats opposed to her nomination. The judges of the US Supreme Court are thus also inherently connected to their political preferences. They can partly be considered as "flat characters", labelled 'judge', that are mainly related to their function, but also as complex, "round characters" that develop throughout the decision-making process that leads to the earlier-discussed Opinion of the Court. In this sense, the traditional literary distinction that Forster came up with might prove itself productive in the analysis of US Supreme Court judgments. That is not very surprising, keeping in mind that the US Supreme Court judgments are known for the fact that they are rather extensive; although most decision might not contain the 50.000 words that Forster wrote about, there is enough text involved to offer the judges-as-characters the possibility to develop their arguments – and probably: part of themselves.

In the Netherlands, the format and content of Supreme Court judgments suggest that it is the strong wish of the courts in the Netherlands *not* to show the complexity of the characters that play a decisive role in the legal procedure. Whereas the judges of the Supreme Court of the United States are known for their rather *activist* roles, the names of the judges that are part of the Supreme Court are never mentioned in the official documents containing the final ordeal. The only references to the Supreme Court in judgments are exactly that; they read "The Supreme Court". Illustrative in this light might be that most (even most Dutch) people do not even know the names of the judges that played a role in the worldwide ground-breaking *Urgenda* case, whereas the internet exploded when Ruth Bader Ginsburg died. Apart from the fact that the separate judges of the Supreme Court of the United States are well-known and play an explicit role as characters, the US Supreme Court as such can also be said to be a character, or rather a more abstract entity: what in narratology would be called an *actant*. However, since the character-effect of the individual judges is so strong, the character-effect of the US Supreme Court in general is accordingly strong. The character-effect, namely, "occurs when the

resemblance between human being and fabricated figures is so great that we forget the fundamental difference" (Bal 2009, 113). That is exactly what is the case in the context of the US Supreme Court judgments. In contrast, in the Dutch context, it is safe to say that the individual judges are unknown, which makes it harder to appoint a character-effect to the institution called "Supreme Court" of which they are a part. This remains predominantly an actor.

4.2 Characters in theory and practice – *Olmstead v. United States*

This subchapter starts with this thesis's most often quoted excerpt, for, as we have seen, it intermixes the several speaker functions that lie at the core of its theory and analyses. As it did for the author and the narrator, the fragment contains indications for the presence of characters in the *Olmstead v. United States* case. In describing the method Justice Taft uses to claim authority, White even explicitly deals with "characterization":

> I think that he relies more than anything else upon the very power of *characterization* that he has exemplified throughout his opinion, *upon the voice of authority with which he has been speaking*. His ultimate ground is *literary* and ethical in nature: *who he has made himself, and his readers, in his writing*. For he repeatedly *characterizes both the facts and the law* with a kind of blunt and unquestioning finality, as if everything were obviously and unarguably as he sees them; in doing this he prepares us for the conclusory and unreasoned characterizations upon which the case ultimately turns. Rather like Justice Frankfurter in *Rochin*, *he makes a character for himself in his writing* and then relies upon that *created self* as the ground upon which his opinion rests (White 1990, 145, emphasis mine, LvdB).

Several points can be made about the passage above. First, characterization is, by means of the comma, compared to or even described as a voice of authority. In the previous chapters, we have seen that this might imply that authority is appointed to the speaker of "power" that makes the process of characterisation possible. On the other hand, we could also read this excerpt as one in which the result of this process of characterisation – namely: the development of several characters – has authority. That is a question of asking whether authority lies in the possibility to characterise, or in the possibilities that characterisation offers. Which characters are formed in Taft's judgment? White already mentions a few of them: Taft characterises himself (so "Taft"

is a character), the readers, the facts and the law. Emphasis in this quotation of White's text lies on Taft-as-a-character: "Rather like Justice Frankfurter in *Rochin*, *he makes a character for himself in his writing* and then relies upon that *created self* as the ground upon which his opinion rests" (White 145, emphasis mine). Put like this, Taft-the-character is the subject that gives the entire opinion (for the majority) authority.

Embedded in the facts of the case are the parties that are in dispute. White does not pay much attention to them, although he qualifies Taft's description of the facts as a "detective story" (147).[26] That confirms the idea of an embedded storyline. What is more, White states that the facts are very relevant to Taft: "If one were to read this opinion as a literary text and ask what it is that Taft really values and thinks is important, the first answer would be his own voice and his own power; the second, rather surprisingly, would be the criminal enterprise itself. He describes this at great length and in glowing terms" (146). From this perspective, it is in the least surprising that White does not dive into this "description at great length" somewhat further. Apparently, he does not consider this factual description as of relevance from a narratological point of view, thus missing the chance to dive into the embedded text in which the parties of the case interact as characters.

Back to the characters that White does mention. Since this thesis mainly focuses on the authoritative narrative speaker functions of the judge and the judgment, that is what will lie emphasis on in the following. That is not to say that the other characters are not mentioned apart from in the quotation with which this subchapter started. White varies between using the term "characterisation" (cf. 148) and talking about "enactment". He asks, for example, the question of "[w]hat is the view of the Constitution, the law, the citizen, and the reader that is enacted in this writing?" (145). It is one and the same "power" – similar to the power we saw in the excerpt at the beginning of this subchapter – that "characterises": "[t]he judge is qualified for [his] function primarily by his position as judge; but also *self-qualified*, in the opinion itself, by the *skill and force with which the facts and law are stated*, and by the very force of his voice" (147, emphasis mine, LvdB).

Although he pays attention to other characters as well, the judge – here: Taft – turns out to be the most interesting one for White. Without making it explicit, White positions Taft-the-character indeed at a lower narratological level than he puts Taft-the-judge (or: author): "the

[26] Cf. Brooks 2017, who pays attention to "Clues, Evidence [and] Detection" in legal stories.

congruence or harmony between Taft's view of the Constitution and his view of *his own role under it*, between his voice and his sense of his view of *his own role under* it, between his voice and his sense of the Constitution's voice, gives his performance the great rhetorical force that arises when different dimensions of meaning coincide" (147, emphasis mine, LvdB). Taft plays a role on at least two different levels, and on one of the levels he is characterised or made into a character in his own opinion. The question is what kind of character it is.

If we stay studying Taft for another while, this character *could* be a merely authoritative character that invites a certain kind of conversation with future cases or opinions.

> What kind of conversation does it establish? The answer is, "Make any argument you want and I'll tell you what the result is." [*Taft's, LvdB*] opinion invites a conversation of countering characterizations, conclusory in form, between the judge will choose, or which he will resolve by making characterizations of his own (148).

Taft, in White's opinion, thus uses characterisation to plea for his own reading of the Constitution, namely one in which the meaning of the Fourth Amendment is "plain". One might say that, taking White's reflection into account, Taft's opinion emphasises Taft-the-character's own authority more than it does that of the Constitution itself. That is in stark contrast to how Brandeis uses characterisation, White states. "The opinion of Justice Brandeis, justly famous, is different in almost every respect" (149). Also, I would add, where it concerns the way in which characterisation is or characters are used.

> What Brandeis *asks of the judge*, and therefore of the lawyer, is not merely the ability to characterize facts and language as meaning one thing or another, but the capacity to find out what has been, what is, and what shall be, and to conceive of the Constitution as trying to provide, through its language, and through the general principles that it expresses, *a way of constituting ourselves* in relation to our self-transforming world (151, emphasis mine, LvdB).

What Brandeis asks of the judge, we read, he (thus) asks of himself. He asks Brandeis-the-character to deal with the Constitution and with law-making in general in a very specific way. "Brandeis himself establishes his own voice as that of a *teacher*," White writes: "a teacher who must first learn, and who by having learned may teach" (155). The ones from whom this teacher

must learn are the "framers" (151). That is how Brandeis explicitly characterises himself; as a judge who listens to the framers and uses the lessons he learns to apply the law in a correct way. There is, however, another term that is used for the special characterisation of Brandeis. This is where the "translator" comes in. As discussed earlier, White argues that whereas Taft relies on a distinct authoritative status, Brandeis functions more like a judge should, or as a "translator" of the original written law into a law that fits the present time.

What then happens with the opinion is that "it becomes part of the Constitution itself, and this means that the judge must be able to create a constitution, with his readers, of a kind that fits with, and carries forward into the future, the earlier constitution out of which he speaks. This requires Brandeis to become a maker and remaker of language" (156). That, in White's opinion, is the task of the judge, or, as he once again emphasises at the end of the chapter:

> To return now to my earlier claim that the distinction between opinion and result, form and content, ultimately disappears, all this means that the standards of excellence by which I have been suggesting we measure the literary work of the judge – his definition of himself, of us, and the conversation that us – are not merely technical, or verbal, but deeply value-laden and substantive (158).

Gaakeer, like White, addresses the role that the "framers" play in both opinions and in White's analysis of them (Gaakeer 1998, 121). She also pays attention to the role that White creates for Brandeis. However, instead of explicitly mentioning the translator, Gaakeer uses the term "interpreter" (ibid.). This terminology suggests a more active role for Brandeis-the-character, for he does not only translate the text of the Constitution but might also add his own views. That slight change in terminology could perhaps be explained when taking Gaakeer's own experience as a judge into account, for at the end of her passage on *Olmstead*, she writes: "should *we* adopt the attitude he promotes both with respect to *our task as interpreters* and towards one another" (123, emphasis mine, LvdB). Apart from thus relating herself and other judges to the practice that Brandeis describes in his opinion, Gaakeer does not ex- or implicitly refer to characterisations or the role that possible characters play.

4.3 Characters in practice – *Dutch tap case*

As we have already seen when talking about the narrator in the previous chapter, it is quite hard to find a character-bound narrator in the judgment of the Supreme Court. That already implies that it will be at least just as hard to write extensively about the role that characters possibly play in the Dutch tap case.

A logical first step is to try to indicate what characters might play a role in the judgment of the Dutch Supreme Court, although that role might be a minor one. Firstly, like in every legal case, on the level of the dispute, there are the parties. In criminal cases like these, the plaintiff is the district attorney, and the suspect is the defendant. The defendant has, in this Dutch tap case, brought a lawyer. These parties play a role throughout the entire judgment but mainly in the embedded part in which the facts of the case as described by the lower court (the Amsterdam Court of Appeal) are cited. It is in that last part that some other embedded characters play a role, as well. What White would – given the facts – probably call a "detective story" (147), as well, the suspect was signalled at Schiphol Airport by two investigating officers, who gave an interpreter in Surinamese and Papiamento orders to translate the information that they were wiretapping into Dutch. Although this interpreter has an important speaker function on the level of the facts, like the investigating officers and the suspect, he is barely mentioned in the Supreme Court's judgment. He is merely part of the described facts.

As opposed to Olmstead in the *Olmstead* case, the suspect in this Dutch tap case is anonymised. In the judgment, we read about a "[suspect], born in [place], on [date of birth], living in the Penitentiary Institution 'Veenhuizen, location Norgerhaven' in Veenhuizen".[27] Although in practice, it might be possible to find out who this person is, in the judgment, s/he has an almost merely formal role. One might even say that thus, one of the parties in this judgment (the suspect) is in fact rather presented as acting on the level of what Bal calls the *fabula* rather than on that of the *story* and thus functions as an *actor* rather than as a *character*. The *fabula*, according to Bal, is namely about the *actors* that "act" or "function" and "have an intention; they aspire towards an aim" (Bal 2009, 201-202). Somebody suspected of a crime 'simply' who brings his or her case before a higher court 'simply' wants to fight the verdict of the court in lower instance. This possible insight is, however, of course, complicated by the fact that on the

[27] Translation mine, LvdB. In Dutch: "[Verdachte], geboren te [geboorteplaats] op [geboortedatum] 1977, ten tijde van de betekening van de aanzegging gedetineerd in de Penitentiaire Inrichting "Veenhuizen, locatie Norgerhaven" te Veenhuizen" (ECLI:NL:HR:2011:BP0344).

level of the embedded *story* about the suspect's, interpreter's and investigation officers' deeds, the facts are more specific and the suspect might, although nameless, become a *character* acting in a *story*.

The namelessness of the parties is reflected in yet another way. Unlike *Olmstead v. United States*, the Dutch tap case carries a title that is in no sense related to parties or possible characters that play a role in the judgment. The question is even whether we can really talk of a title, for instead of names or a sweeping statement, the case is identified by its European Case Law Identifier (ECLI; ECLI:NL:HR:2011:BP0344; 2011), which indicates that this was a case before the Dutch court (NL), more specifically the Supreme Court (HR; Hoge Raad), in 2011, with a certain case number.

What about the character that decides this case? Whereas the lower court is mentioned a few times, the Supreme Court judgment only mentions the Supreme Court itself four times. Unlike the judge in the *Olmstead* case, the judge in this Dutch tap case is not really characterised, either. We only read what the Supreme Court *does* and not necessarily what it *is* in terms of characteristics. In this case, we thus see reflected what was already stated in the first subchapter of this chapter: in the judgments of the Dutch Supreme Court, it is hard to appoint a character-effect to the institution called "Supreme Court" of which they are a part. Like the other potential characters, it predominantly sticks to the level of the actors. That, however, does not necessarily mean that no jurist at all plays a part in the judgment as a character, apart from a really formal one. What is remarkable in the Dutch legal process before the Supreme Court, namely, is that there is a party that advises the Supreme Court on beforehand. The so-called Procurator General grants the Supreme Court his or her independent advice on how it has to rule in the case in question. That advice is, like the judgment of the Supreme Court, published (ECLI:NL:PHR:2011:BP0344). Such an opinion is required in criminal cases like the Dutch tap case discussed in this thesis. In the Procurator General's advice, attention is not only paid to the facts, the verdict in lower instance and legal questions that are at stake but also the existing case law and scholarly publications concerning the matter. Although the Supreme Court can ignore the Procurator General's advice, it is mostly taken very seriously. And in terms of characters, the advice of the Procurator General looks a lot more like the opinions that are part of American judgments.

Firstly, the Procurator General uses the word "I" throughout his advice; in the Dutch tap case eleven times. This "I" has an authoritative opinion, which is a fact that he sometimes emphasises, as is the case when he states: "From what I noted earlier, it can be deduced that I believe that listening to conversations that were held partly in Dutch can just as well be regarded as 'usual'" (ECLI:NL:PHR:2011:BP0344). Further, the Procurator General has a name, that is often mentioned in the advice, as well. In the Dutch tap case that is discussed here, the name of an advocate general of the Supreme Court is mentioned instead, still giving the advice a human face and thus improving the character-effect. What is more, the Procurator General is way more explanatory than the Supreme Court is. He asks questions - like "The question is what significance the circumstance, that the investigating officers leave the tap room and leave the interpreter there, has" – and answers them step by step in light of the facts of the case. What we thus see here, is that the Prosecutor General positions himself just as the teacher that White mentions in his description of Brandeis: "a teacher who must first learn, and who by having learned may teach" (White 155). All in all, we could say that although the character-effect of the Supreme Court is hard to recognise, this effect might have been moved to an earlier stage of the procedure, in which the Prosecutor General plays an important role as a judicial character.

Chapter V | Speaking Texts

5.1 Texts in theory – travelling from the literary to the legal domain

Let me start this chapter with a telling quote, again, from White, in a footnote added to his analysis of the Brandeis text:

> Brandeis here looks not to an ulterior motive or wish, not to a supposed desire, unexpressed in the language, that the framers sought to achieve by it, but rather to the kind of *'intention' that is enacted in the language itself*, in the practice or form of life of which it is part. (White 1990, 284, or 151 footnote 9, emphasis mine, LvdB).

In this case, in describing the process of translation of the text of the law into a judgment that is part of the legal tradition, White also addresses the authority that *text itself* can have. What is more, he explicitly states that text might be able to *act*. As language forms an important part of legal tradition, the question is at stake of whether the judgment, *as a text*, can indeed speak, too. Or does it always need a speaking subject?

In the previous chapters, three speaker functions have been discussed in the legal context: author, narrator and character. Notwithstanding its marginalised role in prevailing modes of narratology, the author of a legal judgment, we saw, is a judge that – especially in the highest court – has established primacy when it concerns the meaning of legal terminology and thus could not be ignored entirely. As for the narrator, Bal's distinction between the external and character-bound narrator (cf. Bal 2009) proves to be productive in the legal context, for it makes insightful what kind of position the organising speaker has in the judgment. Lastly, the characters in a judgment are given a voice on different levels. The 'characterhood' of, among others, the judge, is dependent on the character-effect (ibid.). As we have seen, it could be stated that in the American context, the character-effect of the judges of the Supreme Court is convincing, whereas in the Dutch context, the Supreme Court can be seen as an acting institution, that creates the impression of 'characterhood'.

Without having mentioned it explicitly, the basic assumption in the previous chapters was the idea that language springs from a *subject*; that it *needs a speaker* rather than that it might be *speaking* itself. The former – subject-oriented – approach indeed lies at the basis of Bal's narratology, which formed the core of the previous chapters. I do here reiterate Bal's description

of the narrative text: "a text in which an agent or subject conveys to an addressee ('tells' the reader) a story in a particular medium" (Bal 2009, 5). Her three-layer distinction of *text*, *fabula* ("a series of logically and chronologically related events that are caused or experienced by actors") and *story* ("the content of that text, and produces a particular manifestation, infection, and 'colouring' of a *fabula*; the fabula is presented in a certain manner" relies on this subjectivity, as well (ibid., emphasis mine, LvdB). Although it is called an *element* on the level of the *fabula* and an *aspect* on the level of the *story*, the "agent" or "subject" is decisive in narratology. The *fabula* is about the *actors* that "act" or "function" (201). What is more, they "have an intention; they aspire towards an aim" (202). In the previous chapter, I already discussed the possibility of categorising the (Dutch) Supreme Court as an actor, with reaching a fair judgment as its intention.

On the level of the *story*, the acting subject is called *character*. It is an "anthropomorphic" figure that is "provided with specifying features the narrator tells us about" (112). They resemble human beings in that they are ideological, social beings that are – again – acting. Both actor and character are subjects. The same counts for the narrator, which utters the organising features of the judgment. The author, lastly, although s/he does not necessarily play a role in (literary) narratology anymore, can still be recognised as a subject that forms part of the process in which law is written in the form of a judgment from the position of a legal authority called "judge". In summary: in the legal context, actor, character, narrator and author all speak *by means of* or *in* the legal judgment. Where does that leave the legal judgment itself? What is the narratological position of *text*?

It is in *Unspeakable Sentences: Narration and Representation in the Language of Fiction* (1982) that Ann Banfield explores this narratological position of the text itself. The book appeared after Banfield had published a series of controversial papers in which she criticised the prevailing modes of narrative theory by introducing a generative grammar approach of narrative sentences (cf. McHale 1983). Connecting language or text to knowledge, Banfield suggests that language can *know* and that it does not need a subject that knows for it: "The language of narrative, in particular, knows that events simply occur to be recounted or that things exist in themselves because they can so be described" (Banfield 1982, 270). If the narrative itself can know, how do broadly acknowledged subjects like characters fit this description? In order to address this question, Banfield distinguishes between two kinds of knowledge: "one subjective and the other objective, but both objectivized" (273). Narrative

fiction, Banfield states, is composed of both "statements without the intervention of a knowing subject" (270) and subject-bound statements. Starting from a Lacanian viewpoint, Banfield compares the distinction between objective and subjective knowledge with Huyghens's clock and mirror. The clock, she states, represents objective knowledge, for it, "like narration, 'tells time,' counts its discrete unites and assigns them an order" (ibid.). In other words: it 'just' tells what is at stake. The mirror, on the other hand, has the intrinsic possibility to reflect; it "captures and externalizes" and thus shows us "the means by which the world is represented to the mind, the lens which focuses an image of the world as seen" (ibid.).

Narrative's possibility to present "a reality unaffected by [...] agency" forms the core of the theoretical framework that Banfield uses to analyse the work of, among others, Virginia Woolf in *The Phantom Table* (Banfield 2000, 53). Having discussed Woolf's *Jacob's Room*, Banfield concludes that agency-lacking reality is not only a theme of the novel "but a stylistic principle" in general (ibid.). Whereas Banfield, at this point of her analysis, mainly mentions the "disappearance of the author" as the "literary correlate" of the lack of agency (ibid.), further in *The Phantom Table*, she describes how several subjects are ultimately abandoned in literary texts (cf. 164-165). What replaces the "discarded subject" (69) is the text itself. Language can know, arrive and mean something on its own terms.

The idea that the text can speak is fruitful in the legal context. As we have seen in the second chapter, the Supreme Court in both the Netherlands and the United States has a law-making task. The judgments of the Court are, from this perspective, decisive in what the constitutions of the countries mean and imply; in White's terms, these rulings "translate" the written legal tradition into rules and considerations that apply in modern case studies (cf. White 1990, 152-154). From this view, case law is an unwritten source of law that is gratefully used by judges all over the world, for it contains precedents or at least points of departure for later judgements.

Apart from functioning as a useful source, case law can, depending on a nation's legal system, also function as a mandatory source of law. This has to do with the legal principle of *stare decisis*, which means that judges are subject to precedents: legal rules that are determined in earlier judgments. The nature of the legal system at stake is a determining factor in the answer to the question of whether the principle of *stare decisis* applies. In common law countries, like the United States, the principle lies at the core of case law, meaning that precedents have the same status as written law. Here, it is of importance to note that although precedents emerge in

case law, not all case law will necessarily function as a precedent. However, all verdicts are potential precedents and treated equally so; as (potentially) authoritative documents that add to the uniformity of law.

In civil law countries, like the Netherlands, the principle of *stare decisis* is not officially part of the legal doctrine. Article 11 of the General Provisions Act (Wet Algemene Bepalingen) states that the judge is bound to the law. This Article, specifically, nor the Act in general contains an obligation to take case law into account. Instead, what is known as *jurisprudence* (*constante*) is the prevailing mechanism behind the development of the law in legal judgments. *Jurisprudence* (*constante*) means that multiple decisions that follow each other in time potentially are of large influence in later cases in which comparable legal questions are at stake. That is to say: they are of great importance, but they do not overshadow successive cases. Further, to be determinative for other judgments, there generally has to be a sequence of cases in which a legal question is answered in more or less the same way. In the Dutch legal system, case law, as it were, colours the law where it is unclear or not entirely sufficient in a specific case. However, within the system of the separation of powers (*trias politica*), the judge cannot make new law, for that is the task of the democratic, legitimate legislator.

The distinction between common law and *stare decisis* on the one hand and civil law and *jurisprudence* (*constante*) on the other is intrinsically related to the form and content of the US respectively Dutch Supreme Court judgments. As stated earlier, it is remarkable that the Dutch tap case that is discussed in this thesis is presented in the form of a rather short judgment, that follows a standard form of which all relevant facts, legal rules and considerations are part. The tap case that is discussed in this thesis (ECLI:NL:HR:2011:BP0344) contains 2413 words (title included, footnotes excluded). That is not much, in comparison to *Olmstead v. United States*. That American case consists of 9291 words (titles included, footnotes excluded). The main reason is that apart from the relevant facts and rules, extensive reflections on legislation and earlier decisions are part of the judgment. The opinions are in fact lines of argumentation that invoke a dialogue between judges that have, given the legal tradition and existing case law, a specific view on how the law should be applied. Judges are thus not bound to earlier judgments, which might sound disputable from a perspective of legal certainty and uniformity.

However, sometimes, the circumstances are unjust to such an extent that it is only praiseworthy - or: crucial - that the court changes its mind. An example hereof offers the recent Dutch

childcare benefits scandal. During the years from 2013 to 2019, the Tax and Customs Administration (Belastingdienst) falsely treated about 26.000 parents as frauds, for they had not motivated their rights to childcare benefits well enough, meaning that part of their motivation lacked gravity. Instead of asking these parents to return part of the allowances that they received, the Tax and Customs Administration claimed the entire amounts of money back, leading to scandalous financial and social problems in the affected families. Article 1.7 of the Childcare Act played an important role in this benefits affair. It states that the amount of money allowed is dependent on the financial capacity of the parents concerned and the costs of childcare. Initially, the Administrative Jurisdiction Division of the Council of State ruled that Article 1.7 should be read as an "all-or-nothing" provision, meaning that minor motivation problems would indeed lead to an entire recovery of the allowed benefits. However, after having been confronted with multiple stories of affected parents and, more importantly, the report of the Parliamentary Interrogation Committee on Childcare Benefits entitled "Unprecedented Injustice" (Ongekend Onrecht), the Administrative Jurisdiciton Division of the Council of State changed its mind, declaring that minor mistakes in the motivation supporting the allowance of benefits could not lead to setting the right to childcare benefits to zero level (ABRvS 23-10-2019, ECLI:NL:RVS:2019:3536, m.nt. A. Drahmann and D.K. Jongkind).

The short reflections on the Dutch and US legal system above point to the fact that any legal judgment, whether one with a common law or a civil law character, has legal authority.[28] Given the differences between the two systems, one might expect that for the American cases, a narratological analysis will point out a convincing emphasis on the judgment as an authoritative document. However, it should be taken to account that, in Banfield's terms, much knowledge presented in these judgments is subjective knowledge, for it is directly connected to either the author of the judgment - the well-known and positioned judge -, its narrator and its characters, as was shown in the previous four chapters. The question thus remains of how much objective knowledge there is left to find. Or, in other words: how much attention do Gaakeer and White, in their analyses of *Olmstead v. United States*, pay to the possible speaker function and corresponding authority of the judgment *as a text*? And in what sense does that differ from the way in which the Dutch tap case can be analysed?

[28] Cf. the earlier mentioned sources on authority in the legal context and, for example, Fowler and Jeon 2008.

5.2 Texts in theory and practice – *Olmstead v. United States*

We will start the analysis in this last chapter with the same excerpt that was used in the earlier ones. As we have seen, by shifting the emphasis in this fragment, other speaker functions come to the surface. Proving to be a perfect example of the intermixture of narrative speaker functions, the passage also contains references to the speaker function of text as Banfield introduced it in *Unspeakable Sentences*:

> I think that he relies more than anything else upon the very power of characterization that he has exemplified throughout his opinion, upon the voice of authority with which he has been speaking. His ultimate ground is *literary* and ethical in nature: who he has made himself, and his readers, in his *writing*. For he repeatedly characterizes both the facts and the law with a kind of blunt and unquestioning finality, as if everything were obviously and unarguably as he sees them; in doing this he prepares us for the conclusory and unreasoned characterizations upon which the case ultimately turns. Rather like Justice Frankfurter in *Rochin*, he makes a character for himself in his *writing* and then relies upon that created self as *the ground upon which his opinion rests* (White 145, emphasis mine).

Just like White implicitly addresses the author-function, the narrator and the characters that play a rol in *Olmstead v. United States* and his analysis of the case, he refers to the specific character of the text of Taft's opinion itself. He describes the opinion as "literary" "in nature", thus already giving this text a certain status or even authority. Further, he explains how the "writing" (in which he characterises himself) itself functions as "the ground upon which [Taft's] opinion rests" (ibid.). Can part of the authority of Taft's respectively Brandeis's judgment thus be found in the text itself? Do their texts *speak*? And what does that say about the entire judgment?

Before diving into these questions, attention needs to be paid to a text that – in not only Taft and Brandeis's opinion but also in that of their analyst, White – is authoritative without any doubt: the Constitution. As explained, the *Olmstead v. United States* judgment is about the text of the Fourth Amendment. That text has an extraordinarily special status in both the opinions and White's analysis. "For Taft," White writes, "the Constitution is a document that is in its own terms authoritative, telling the rest of us what to do. It has, so far as can be gleaned from

this opinion, no higher purposes, no discernible values, no aims or context; it is simple an authoritative document, the ultimate boss giving ultimate orders" (ibid.). What is striking, here, is that the text is first addressed as a document that has authority "in its own terms" and shortly afterwards as a character that is an ultimate boss, giving orders. In this specific quotation, thus, the 'plain' text is eventually made into a character.

Nevertheless, he text of the Constitution, as can be deduced from Taft's opinion according to White, has no problem speaking all by itself. Does that mean that when talking about the Constitution, we should use Banfield's term "objective knowledge"? Looking at White's analysis of Taft's opinion, it seems like we should: the text of the Constitution is, from Taft's viewpoint, full of "plain meaning" (141-145) and "in its own terms authoritative" (145). It is, however, of course Justice Taft who has to explain and emphasise this, which creates the impression of a slightly more subjective form of objective knowledge within the boundaries of Taft's opinion.

Brandeis again stresses the importance of the Constitution by going back to the framers, as we saw earlier. These framers "also wished this text to be authoritative in other contexts" (151). It is in these other contexts that judges need to write their opinions and judgments. Translating the authoritative Constitution into these new contexts, White writes, is the main task of the judge – hence the title of his book: *Justice as Translation*. The helping hand in this process of translation is, not surprisingly, the Constitution itself: "Brandeis shows that the lawyer and judge are not lost at sea but have the assistance of precedent, the set of prior translations, that themselves form a way of moving from one world to another" (154).[29] Being framed as a translator, the judge in Brandeis's opinion is seen as somebody who is aware of the fact that judges add to the meaning of the Constitution. "[P]erfect translation", however, "is impossible" and that "requires us to recognize that our own formulations of the meaning of the text to which our primary fidelity extends must be made in the knowledge that they are in part our own creation" (151). It is the Constitution to which, in White's words, "our primary fidelity extends", and it is with that in mind that judges can or should add to the meaning of the Constitution in the process of translation. What Brandeis, presented by White as the ideal judge, thus does, is "making a supplementary language for the analysis of the authoritative text" (152).

[29] Noteworthy in this light is literary critic Susan Stewart, who argues that "[t]he idealized conditions of codification – authority, genealogy, precedence, application, specificity, and transcendence – are established as qualities of a literary realm that it becomes the task of the law – as writing that is *other* – to regulate" (1994, 16).

Seen from White's perspective, both Taft's and Brandeis's opinion thus recognise that a text can consist of objective knowledge and can speak, although we might need a judge from time to time who confirms that in an opinion. That brings us to the status of the opinions: are those speaking texts and can they be authoritative in themselves? In describing Taft's opinion, White indeed mentions "the authority of the opinion itself" but immediately relates that to Taft's "own voice and his own power" that lead to this authoritative status (146). This again shows the intermixture of speaker functions in White's analysis. In discussing Brandeis, White is somewhat more explicit about the position of opinions in the legal context. "What is significant here," he states about a specific part of the opinion, is Brandeis's

> confidence in traditional legal language and categories – "ratification," "clean hands" – as his language of judgment. This embeds his opinion in the legal context [...] (155).

Brandeis's opinion, thus, becomes part of the same legal tradition that he relies on. In describing this legal process, White seems to suggest that Brandeis's "language of judgment", like the language of the Constitution, might entail some "objective knowledge" that is authoritative in itself.

In conclusion, we could state that White openly discusses the Constitution as an authoritative text that speaks. The opinions that are based on this important text might, due to the *stare decisis* principle, acquire the same status. If that is true for the separate opinions of the judgment in *Olmstead v. United States,* where does that leave the judgment as a whole? White unfortunately does not explicitly deal with this matter. However, at the end of his chapter on *Olmstead v. United States*, he presents the opinions as texts that have "interactions with each other, with other opinions in the same case [...] and with those from earlier cases as well" (159). That implies that rather than the judgment as a whole, the separate opinions, as authoritative sources, have a kind of intertextual relation with each other, in which the purpose and (possible) meanings of the Constitution are guaranteed. Looking at the judgments, White mainly sees the dialogue between the opinions, hidden behind the names of two authorities: Taft and Brandeis. And that, after all, is what an opinion is: a viewpoint of a person. That proves that, at the end of the day, it is not the text itself that speaks, not even when taking the *stare decisis* principle into consideration. The Constitution speaks as a text; the opinions speak in the person of the judges that wrote them, so it seems.

In *Hope Springs Eternal*, Gaakeer confirms the fact that the Constitution can speak and have authority in White's analyses. She, too, mentions the "faith in, as well as respect for, prior texts" in the legal domain (Gaakeer 123). However, where White mainly focuses on the authority of the Constitution, Gaakeer signals that he primarily emphasises the role of the legislator and judge in relation to this authoritative text. Paraphrasing White, Gaakeer states that "a constitution in Brandeis's eyes is not only made by its framers, but also by its interpreters who help bring the text into the present through readings of the development of its meaning in the form of precedents" (121). In further explaining this, Gaakeer explains that for White, the meaning of the text "does not coincide with the intention of its framers" but lies "in the language itself" (122). This is a reference to a footnote of White, which was already cited at the very beginning of this chapter:

> Brandeis here looks not to an ulterior motive or wish, not to a supposed desire, unexpressed in the language, that the framers sought to achieve by it, but rather to the kind of *'intention' that is enacted in the language itself*, in the practice or form of life of which it is part (White 1990, 284, or 151 footnote 9, emphasis mine, LvdB).

Here, it is stressed explicitly that the text of the Constitution exists apart from the intentions of its framers and contains a kind of objective knowledge that steers the judges who have to translate it into modern practice. Gaakeer does, like White, mention the fact that Taft's and Brandeis's opinion are in dialogue with each other, explicitly stating that "The Constitution in Taft's hands" leads to a different picture than "Brandeis's dissent" (121). And like White, she does not explicitly pay attention to what this interaction between the two opinions means for the status or authority of the entire judgment. From both White's and Gaakeer's analysis it can thus be derived that in judgments of the US Supreme Court, the focus might lie on the authoritative Constitution and the dialogue between potentially authoritative opinions rather than on the authority – and thus "speaking" – of the judgment as such.

5.3 Texts in practice – *Dutch tap case*

In contrast to *Olmstead v. United States*, the Dutch tap case does, as we have seen in the previous chapter, not carry a name. The ECLI is the cases' title and the judges are nowhere to be found as distinguishable speakers. The only thing we know – which can be derived from the ECLI – is that this was a case before the Dutch Supreme Court and that, apparently, is substantial enough. As seen in the third chapter, we could speak of a narrator that organises this text. Characters, however, the last chapter pointed out, are harder to find, since the case is anonymised and the acting forces seem to be active on the level of the *fabula* rather than on that of the *story*.

As discussed before, the largest part of the judgment consists of the facts as presented by the Amsterdam Court of Appeal and its judgment. This embedded text could, on the one hand, be compared to Huyghens's clock as Banfield describes it in *Unspeakable Sentences* (Banfield 1982, 270): it just tells the reader of the Supreme Court's judgment what happened before. On the other hand, it does so from the perspective of the Amsterdam Court of Appeal, which gives this description the characteristics of Huyghens's mirror, for it represents a specific reflection on the facts of the case. It is this specific reflection by the Amsterdam Court of Appeal that the Supreme Court responds to.

After the quotation of the judgment by the Court of Appeal, the judgment of the Supreme Court shortly evaluates its reasoning. It does so by first addressing the second complaint of the appellants and then their first. It is not made explicit why this change of order is necessary or logical. It seems as if the only subject that, given the third chapter, seems to play a convincing role in the judgment of the Dutch Supreme Court – the narrator – has been sloppy at this point, for the common format of the judgment is changed without a motivation. Does this change in structure question the authority of this narratological subject? That is no simple yes-no question. However, what we can see is that apart from a narrator that is not entirely consequent, there are barely an author or characters to be found in the Dutch judgment.

If speaking subjects are not present or disappearing throughout the text – which is what Banfield calls the text's inherent "technical problem of silencing the speaker and his authority" (274) – there are not many possible speakers left. Still, we take the judgments by the highest Dutch court very seriously. If the author and characters do not play a very convincing role in the Dutch tap case and the narrator is disappearing, what replaces these "discarded subject[s]" (69) is that

what the ECLI already indicates: the text itself. Judgments of the Dutch Supreme Court, so it seems, are above anything else authoritative *texts*. And this may be enough; or it is, in this specific cultural context, a stronger underpinning of authority.

Conclusion | Speaking of Authority

This thesis started by asking a formal question while signalling that legal judgments have authority. This authority manifests itself in different relationships. Firstly, legal judgments directly play an important role in the society in which they are written. They declare some people guilty, whereas others are set free. They criticise governments if needed. They do justice to families that lost their loved ones. Secondly, legal judgments play a distinctive role in the development of the law. They form an inherent part of the process of law-making. Given the authority of written legal judgments, the question asked at the beginning of this thesis was that of who speaks in these authoritative documents*: How can distinctive narrative speaker functions in judgments be recognised in the theory of James Boyd White (1990) and Jeanne Gaakeer (1998) and applied explicitly in Law and Literature analysis?*

With that question in mind, four different possible speaker functions that can be found in both theory on legal judgments and legal judgments themselves were examined separately: author, narrator, character and text. Each speaker function was offered its own chapter, for the functions in question needed to be disentangled. In the prevailing theory in the field of Law and Literature of which James Boyd White and Jeanne Gaakeer can be considered the leading figures, namely, this distinction had not yet been made in narratological analyses of judgments.

This thesis aimed at offering a first example of how different speaker functions can be both recognised and used in the narratological analysis of case law. It did so by contrasting an American case – *Olmstead v. United States* – with a Dutch equivalent – ECLI:NL:HR:2011:BP0344. This comparison is a direct response to Greta Olson's plea for De-Americanization of Law and Literature Narratives (Olson 2010). I hope that with the systematic distinction between speaker functions as presented in this thesis, I helped to "open up the story" (ibid.), if it is only for a tiny little bit. Further, it has hopefully helped to introduce some "adequate descriptive tools" that, according to Mieke Bal, are necessary for conducting studies of narrative texts (Bal 2009, 13). These tools are largely based on the theory of both Mieke Bal and Ann Banfield, whose literary theories proved to be more than productive in a legal context.

As for the specific case studies that formed the basis of both White's and Gaakeer's reflections and my own short analyses at the end of every chapter, some overarching remarks can be made. First and foremost: legal systems differ. Not only in their everyday practice and ways of making

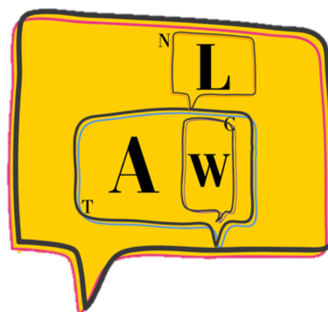
official statements but also on the level of the written legal judgment itself. The analyses of the *Olmstead v. United States* case pointed out that since emphasis lies on the judges who have written the opinions that take up the largest part of the written judgments, the author of the American judgment is not "dead" in the Barthesian sense (cf. Barthes 1977 (or. 1967)) but rather alive and kicking. The Dutch tap case illustrates that the author of the judgments of the Dutch Supreme is, apart from on an institutional level, almost left aside. Likewise, the narrator in the American context is explicitly character-bound and barely embedding other possible speaking entities, whereas the narrator in Dutch cases is mainly institution-bound and primarily organising and embedding other texts and authorities in the text of the verdict. In line with this, the American judges are characterised (or: characterise themselves) to a large extent, relying on the authority that they have as a character that plays a role in their own play. In Dutch Supreme Court judgments, the judge barely plays such a role – as it might, as we have seen, been 'stolen' from him by the Procurator General in an earlier stage. Lastly, the authoritative speaker function of the text of the judgment itself is – although the Constitution is seen as the most authoritative document ever written – hardly recognisable in the American context. This is completely the other way around for the Dutch judgments, which mainly seem to have authority in their (speaker) function of the text.

These concluding comments show, I hope, that a systematic narratological analysis based on a distinction between speaker functions is not only productive but also needed to understand the differences between the form and effect of worldly authoritative documents called "judgments". It invites further research in which other legal systems are contrasted on the level of their judgments. One could, for example, compare an American Supreme Court judgment to one of the Chinese Supreme People's Court (最高人民法院), or what have you. It could also lead to comparative research in which both the judgments of lower and higher instances are examined. It could help us to compare between different legal areas. It could be of aid in understanding the ongoing process of Europeanisation or internationalisation, during which heated discussions raise about what exactly has to lie at the core of a righteous legal system or ordeal. Think of the current rule of law crisis, in which Poland and Hungary in fact undermine the rule of law in the name of constitutional identity, whereas for many countries, the rule of law is an inherent part of that very identity and thus of their country's legal authority (Kelemen, Daniel & Pech, 2019).

For at the end, it is all about authority. It is not only about what is said but also about what or who speaks. Having said that, this might thus be the right time to reconsider Foucault. In his

discourse analysis, Foucault focuses on how authority or power is established in and by means of language, as is at stake in legal judgments. Courts form part of the authoritative institutions that Foucault both analyses and criticises. Although Foucault wrote his work with the State as his opponent and I do not necessarily want to state that we should address courts likewise, the analyses in his *Discipline and Punish* (1975) are fruitful sources for a further reflection on how apparently innocent utterances, like written judgments, play an important role in the construction of disciplinary power. That construction can have very different consequences in different legal systems, which makes it important to go back to the texts that lie at their cores.

All in all, the field of Law and Literature is a fertile field and narratology proves to be a fruitful mechanism to make it bloom. However, the explicit introduction of a distinction between several speaker functions in those narratological analyses makes it possible to gain insight into how fast the seeds are growing, exactly.



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