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LEGAL WHISPERS
Narrative Transformations in Dutch Criminal Evidence

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Criminal Evidence

Monica C.W. den Boer
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TO MY MOTHER AND TO MY FATHER
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INTRODUCTION

Today's world is an institutional world. Knowledge and interest seem to be increasingly differentiated and segregated, crystallised and standardised. The legal institution is a perfect example of this phenomenon. This dissertation adopts the view that the performance of any legal or semi-legal institution, be it a criminal court or prison, is carried out by virtue of a specialised discursive network, which provides legal agents with a language and a conceptual apparatus.

Although many of today's institutional discourses have grown independent from their surrounding general discourse, there seems to exist a curious tension between the various institutional bastions and everyday life. On the one hand, terms, concepts and patterns of thinking are transposed from the one to the other discourse. For example, the criminal justice system frequently integrates medical or psychiatric categories, whereas everyday life is penetrated with legal concepts, such as "contract" or "will". But on the other hand this free discursive traffic is alternated with a discursive closure, especially on the side of the legal discourse: it makes itself inaccessible to concepts and interpretations which diverge from its own traditional reservoir, thereby protecting its autonomy and stability.

Despite of the latter tendency, an institutional discourse is never totally detached from the everyday discourse. Instead, the discourses always "overlap", because social agents regularly take part in both due to their profession, training or infirmity. In this sense, one could almost speak of a "discursive contract". However, in one or the other way the contract which we have concluded with the institutions has got out of control. Suddenly it seems as if the everyday discourse is governed by institutions: insurances, therapies, diets, mortgages and courses have an ineradicable position in our lives, with the unavoidable effect that we perceive the world around us in institutional frameworks and categories. Institutional discourses therefore dominate the everyday discourse in a massive, though "latent" way. The power of the institutional definition is omni-present.

It is because of this discursive penetration that it is difficult to prove with any scientific accuracy that there is a genuine difference (others call it "rupture" or "distortion") between the everyday and the legal discourse. The "cleavage" between the two discourses therefore remains entirely hypothetical. It nevertheless constitutes the major
backbone of our primary assumption, namely that this stipulated cleavage between the legal and the everyday discourse (demonstrating itself for example in a knowledge-asymmetry) needs to be bridged by means of a series of discursive transformations. When institutions willingly or unwillingly intervene, symptoms, questions and complaints are translated and categorised, interviews with clients are canalised and standardised and information is selectively recorded.

An important preoccupation of each institution is to safeguard its contract with society, or in other words, to preserve the belief of the individual. This means concretely, that the individual expects expertise from the institution, and not degradation. The only way the institution can legitimise its unindividual style of information-processing is by disguising the transportation of the "real" to a different world. It acts as if life-experience is unmediated when it enters the legal discourse. Our second assumption is therefore that institutional discourse imitates and exploits a common discursive pattern, the narrative, in order to conceal the discursive mediation (change, shift or jump) from the critical eye. A stronger version of this assumption is that the legal discourse depends on the narrative as a universal discursive pattern for the passage of experience and the recapture of the past.

If the legal discourse is essentially a narrative practice, the positivist pretention that the legal discourse stands in direct and unmediated contact with everyday discourse becomes hard pressed. Instead, the synthetic character of the narrative eliminates the possibility to find out whether the legal discourse truly represents reality. Consequently, legal argumentation does not concern the canvassing of "the real", but of interpreted and reported narrative reconstructions. Crimes are therefore assumed to be legal-discursive constructs, rather than ontological experiences.

This dissertation concentrates on the performance of narrative-discursive transformations after the initial transfer of events to the legal discourse. We will therefore avoid to discuss the construction of crimes from scratch and start with the first narrative sediments (statements and testimonies) in the police record. The focus will be on the reconstruction of the reconstruction, thereby emphasising the performance of narrative transformations in the course of a succession of legal-professional interpretations. We will hence assume that each legal agent who is involved in the criminal procedure launches a role-
defined interpretation on the available narrative material. That assumption explains both the title of this dissertation and our working-method.

The title "Legal Whispers" is chosen as a metaphorical play on the name of a game. "Chinese Whispers" is a game in which a group of people form a figurative chain. The person at the beginning of the chain contrives a word which s/he whispers in the ear of his/her neighbour, who then whispers the word which s/he understood in the ear of his/her neighbour and so on. The guess is on the outcome of the chain: sometimes the word is preserved throughout its repeated reproduction, and at other times the word is transformed into a new one. Provided that the participants of the game know each other fairly well, they may guess the potential scope of the devised word, or they may speculate what the word was if they 'missed' it.

Also this speculative aspect of the game could be used to describe yet another important assumption about the performance of a succession of narrative transformations, namely that the legal agents who take part in the construction of a crime anticipate a narrative outcome, that is: on the basis of their professional knowledge and experience they are able to make speculations about the acceptability of the narrative, and to tune in their performance of transformations onto the imagined scope of that acceptability.

The conception of law as a narrative-interpretative enterprise has become a commonplace among many legal philosophers and legal theorists. A multitude of recent publications bear witness of a growing intimacy between jurisprudential and semiotic interests, which also constitutes the inspiration and context of this dissertation.

Most of the theoretical insights and methodological choices in this dissertation originate from the flourishing German discourse analysis. Various ideas sprouting from this tradition, which unfortunately are to a large extent under-exposed in the Anglo-Saxon world, have infused life into many of the questions raised. In its turn, discourse-analysis has been inspired by ethnomethodology (from which it has borrowed the idea of "fieldwork", realised by the making of tape-recordings and subsequent transcripts of living speech situations), ordinary language philosophy (from which it learnt to study language as a form of action)
and hermeneutics (from which it has inherited its interpretive-qualitative "method" and its mission to be a critical reading-strategy). In short, discourse-analysis could best be characterised as a pragmatic analysis of communicative performance.

Despite its discourse-analytic preponderance, this dissertation hails questions and insights put forward by philosophers of law and history, criminologists, epistemologists and narratologists. This heterogeneity of views will mainly be reflected in the Part I of the text, in which we will elaborate our assumptions (see above) and refine our argument. The first chapter intends to be a sociologically-inspired exploration of the scope of problems and issues which we will encounter. In a way, this chapter sets the framework of the dissertation, because it discusses our perception of legal language, legal agents and legal procedures. Although it focuses on the institutional aspects of legal-discursive information-processing, it also presents features of the Dutch criminal procedure which will become relevant in a later stage. The emphasis of the second chapter is on the epistemological aspects of crime-construction: a discussion of controversial criminal cases and a review of different schools of thought will clarify our view that criminal evidence should not be defined as a linguistic representation of observations, but as a dynamic pragmatic construction. In the third chapter we will elaborate the thesis that law is a narrative discourse; a collation of narrative theories helps us to make a choice in favour of a theory which emphasises the pragmatic aspects of storytelling instead of a theory which is confined to the structural and formal aspects of narrative text. The fourth chapter sets out to redefine the concept of narrative coherence as a the extension of a pragmatic judgement, thereby functioning as a guideline for the performance of narrative transformations. This results in our main hypothesis, namely that the performance of narrative transformations support a desired end-result, which is that the produced narrative will be accepted by the legal-professional community. Chapter 5 is devoted to a discussion of various transformational theories, which paves the path for a formulation of a method which allows us to analyse transformations empirical discourse.

Part II of the dissertation is entirely devoted to a diversity of case-studies. Subject of these analyses are documents and tape-recordings which were obtained from a Dutch criminal court (the "politierechter"; see Appendix 1). Five cases were selected for further
analysis (see Appendix II). Due to lack of space we have restricted the presentation of the transcripts and documents to a selective quotation from and translation of analysed fragments only: Appendix III-VIII contain original texts, translations and sequential analyses, and are referred to in the text.

Chapter 6 is possibly the only exception to a limitation we have imposed on ourselves, because it focuses on a series of narrative transformations which are performed when an event is initially recorded by police officers, namely when the crime is still in a legally premature narrative state. The remaining chapters examine the performance of transformations in the subsequent stages of the criminal procedure. Chapters 7 and 8 have in common that they both concentrate on processes of discursive transposition. Firstly, we will analyse the "oralisation" of documents in court: the integration of quotations, paraphrases and summaries during the trial brings us onto the track of transformations which are either the result of text-processing or of rhetorical strategies (chapter 7). Secondly, attention will be paid to the manner in which the clerk "scripturalises" the oral situation in court. The focus will be on the selection which the clerk exercises on written and spoken information and on the conversion of handwritten notes into an official trial-record. Chapters 9 and 10 both start from the assumption that the construction of crime in court is based on a narrative hypothesis. In the first case it is assumed that the judge seeks to eliminate contradictions between testimonies in order to accomplish narrative coherence (chapter 9), whereas in the second case it is assumed that the selective concentration on one aspect of the narrative (criminal intention) facilitates the process of crime-construction (chapter 10). The dissertation will be concluded with a general summary of the findings and an outline for future research.
PART I: THESES ON LEGAL DISCOURSE
CHAPTER 1: INFORMATION-PROCESSING BY THE LEGAL INSTITUTION

1.1 Introduction

The legal discourse is to a high extent institutionalised by virtue of its own construction of a complex network of roles, rules, actions, norms, meaning-domains, procedures, rituals and special interactive settings. This thesis intends to focus on just a fragment of this legal discursive bulwark, namely on the forensic discourse which lodges the Dutch criminal justice system. The purpose of the criminal justice system is to give effect to legal rules and their interpretation (Wells 1970: 100). More in particular, the purpose of the criminal procedure is the establishment of guilt of suspects in relation to criminal facts. It thereby has created a dichotomy between guilty and non-guilty persons (Snel 1977: 10).

Forensic discourse interprets, absorbs and isolates social dispute and determines its nature with the help of relatively fixed procedures. In its role as mediator and arbitrator, it seeks to remove the burden from society, which results in the autonomisation of judicial decision making, the reciprocal alienation of everyday dispute versus legal problem solving and the legal institutional repression of mundane reasoning. This assemblage effectuates a social asymmetry of language, knowledge and control.

Legal agents know the language and the order of rituals inside out, whereas suspects have to cope with a deficit vis à vis the institutional order and their own situation (Carlen 1976: 82ff; Bottoms & McClean 1976: 55; Van den Bergh and Broekman 1979: 47). Surrounded by the performers of symbolic authority, suspects easily miss out on chances to exploit interactional opportunities and thus accept decisions and solutions offered by professional agents.

Although this asymmetry will be taken into account in the analysis of forensic discourse, major attention will be paid to the above-mentioned discursive processes such as the interpretation, isolation, absorption and determination of social disputes. The view adhered throughout this thesis purports that social disputes become subjects of a discursive transformation when lifted out of their original context and transposed to another discourse. The term "discursive transformation" implies a change or shift of various linguistic and textual features in the
course of discursive transposition, such as language, rationality and relevancy. On the long run, a process of "skimming off" certain aspects of everyday discourse facilitates the establishment of legal-professional consensus, which will be discussed in chapter 4.

The general purpose of this chapter is to explore various issues involved in legal-institutional information-processing. More in particular, it seeks to coin a preliminary basis for an institutional theory of legal-discursive transformations. After emphasising the constitutive role of language for the legal-institutional discourse (section 1.2), we will undertake an excursion to legal-institutional recording practices and procedures (1.3), legal-institutional roles (1.4), intertextuality (1.5) and interpretative frameworks (1.6). Not only are these subjects relevant for a study of legal-discursive transformations (1.7), they are also a useful introduction into various discursive aspects of the (Dutch) criminal procedure.

1.2 The Linguisticality of the Legal Institution

Actions in court, school or church are generally linguistic (O'Barr 1981: 388), which may be explained by the fact that that institutions operate as forms of societal traffic for the processing of societal goals; they therefore eo ipso require communication between the actors (Ehlich and Rehbein 1980: 338).

Institutions are social units with a durable character and with a continuous drive for self-legitimation. Aspects of the institution have to be explained and justified (Berger & Luckmann 1984: 79; 111). The realisation of predefined institutional goals requires the objectification and conservation of significations and processing schemata, for example in the form of an institutional vocabulary (id: 110).

This specific, technical or professional vocabulary, often allied to a fixed range of rhetorical devices, is ultimately characteristic of all institutions. Legal agents employ a "kinship vocabulary" (Berger & Luckmann 1984: 112) as a symbolic means to border their professional territory, to guarantee institutional process-economy and to legitimise their performances. Ehlich and Rehbein (1980: 342) note that institutional speech is generally organised in repetitive runs ("Abläufen"). This leads to a fixation of speech forms. The fixation can reach so far
as that these speech forms must be performed to render an institutionally specific speech-act successful (think of rituals in religious institutions and procedures in court).

One may question the distinction which is often made between institutional and everyday speech. According to Ehlich and Rehbein, the distinction can only be justified if it is possible to pinpoint the absence of institutional links with everyday life. However, many domains of social life are penetrated by institutional patterns. Furthermore, a look at the other side of the shield manifests that most institutional action is interwoven with everyday speech and knowledge (Ehlich and Rehbein 1980: 342; Sauer 1989: 79; Rehbein 1977).

In spite of arguments that a distinction between institutional and everyday language cannot be drawn but arbitrarily, sociolinguistics (the discipline which analyses language use in the context of society and culture; Appel et al. 1981: 12) has identified codes as forms of speech with a 'particular' style and a 'particular' jargon (or vocabulary). The style is determined by the situation of the talk-exchange; the jargon is specific for certain situations. Codes may vary along different combinations of situational factors. These situational factors are: the participants (for example the difference in status between speaker and hearer), the subject of the conversation, the verbal context, the medium of language production (written or spoken language) and location and activity in which the conversation takes place (Appel et al. 1981: 99).

Forensic language, or legal language on a more general level, has been identified as a "social register" (vocabulary, jargon), being a store of specific legal terms belonging to the lawyer's profession (Frank 1949: 258). Danet (1985: 275) calls legal language a register because it shows a correlation with "formality"; this register consists of technical terms due to specialisation, common terms with an uncommon meaning, archaic expressions, doublets, unusual propositional phrases, frequency of any, vagueness and overprecision (Danet: 1985: 279; 1980: 476f). Charrow, Crandall and Charrow (1982: 175) claim that legal language is a professional jargon to the extent that it is a sublanguage (see also Probert 1961: 244: judicial language is a kind of sublanguage of the mothertongue). Mellinkoff (1963: 17) employs the term "argot" to characterise legal language: "(...) a specialized vocabulary that is common to any group"; and "(...) law argot is a
code divorced from the common speech." (id: 18). Argot shows a frequent use of formal words (id: 19), a deliberate use of words and expressions with flexible meanings (id: 20f) and attempts at extreme precision (id: 22). Mellinkoff describes legal language as a language which is "dull", "pompous", "magesterial" (1963: 3f) and as a language which contains "vague archaisms" and "long sentences" (id: 304ff). Most of these characteristics may be categorised as lexical.

As far as the semantic level is concerned, forensic communication has been associated with vagueness and ambiguity. Legal words may "mean one thing to the eye or ear of the non-lawyer, and may mean something completely different to the lawyer." (Mellinkoff 1963: 11). Examples are the words "counterpart" (duplicate of a document), "instrument" (legal document), "motion" (formal request for action by a court) and "prayer" (form of pleading request addressed to court) (id: 12).

Finally, it is widely recognised that especially written legal language contains long, sheer endless sentences (i.e. Mellinkoff 1963: 25f; Hager 1959: 78). Hiltunen (1984: 109) found 6.74 clauses per sentence in the British Road Traffic Act of 1972; his results show that syntactic legal English is dominated by the employment of embedded clauses in advance of embedded clauses. Other syntactic features of legal language are the frequent use of nominalisations, passives, conditionals, prepositional phrases, unique determiners, impersonality, negatives, binomial expressions, parallel structures and unusual anaphora (Danet 1985: 281ff; 1980: 477-82).

As far as the forensic discourse is concerned, the employment of a particular style and jargon mainly occurs among legal agents. In situations where laypersons are involved, lawyers sometimes "fall out of their role" and employ ordinary language. Yet, the change of codes in courtroom is not completely accidental, but may be employed functionally or even instrumentally. An example of a functional change of codes can be found in the subsequent fragment 3:
A 1.08

21 J well, it's
22 J more than twice as much as allowed, isn't it?
D (3.9)
23 J 0.5 is the maximum.//

38 J yes: (1.0) hh but ah, yes but you know that you ahm..
39 J may not drink more than ah: tha/that you then
40 J have an/an ahm amount of ah alcohol in your blood
41 J of zero point five. and that goes very fast.
D that I don't know//

80 J but yes: you also had
D /he starts to/
81 J too (.) much (.) (1.2) because/ because zero point
D is too much.
82 J five/then ah you're not allowed to have more than two glasses
82a J of beer//

These are translated fragments from a transcript of a Dutch 'politierechter' trial on infringement of the legally allowed maximum amount of alcohol while driving a car (art. 26-2 Dutch Road Traffic Act): one is not allowed to drive a vehicle after such a consumption of alcoholic drinks, that the amount of alcohol in the driver's blood after examination (breathalyser and blood test) turns out to be more than half a milligramme of alcohol per millimetre blood.

The case (A 1.08) is particularly interesting because the defendant is a foreign guest worker. The judge automatically presupposes that the defendant is not accustomed with the Dutch legal provisions (this lack of knowledge is initially admitted by the defendant in 41), and therefore starts to explain the provision concerning alcohol abuse after the public prosecutor has read out the summons and after the interpreter has asserted the defendant's confession (in 21/22). In the course of the trial, the judge notices that the defendant still has not properly understood that 0.5 percent is the maximum of alcohol (40), and therefore explains and simplifies the norm again by implying that one "quickly" attains this legal maximum (41). The judge repeats the explanation in the stage that the defendant makes his understanding explicit (81), but now by concretising the maximal percentage: 0.5% is equal to two glasses of beer. The change of codes, from legal to ordinary, or from complicated to simple, has a functional meaning: the defendant simply does not seem to understand the legal code and the trial halts. But the change of codes has a moralistic meaning as well: the repetition of an explanation, even while the defendant shows that
he understands what the provision is about, is the demonstration of a lack of credibility; the judge moralises and blames the defendant for lacking the knowledge every citizen ought to possess. This is an example of an instrumental change of codes.

The question is obviously again what the criterion should be for the distinction between ordinary and legal language. Attempts to describe legal language are foremost stylistic attempts which do not try to scratch beneath its surface. Due to lack of objective criteria, categories have been established on the basis of intuition and observation. Caesar-Wolf (1984: 19) justifiably argues that for instance sociolinguistic research has not found the necessary criteria for the distinction between common and institutional language:

"Such studies have viewed forensic interactions primarily in terms of their similarities or differences to often highly simplified and idealized models of 'normal' everyday communication in informal settings. This has led investigators to classify legal communications merely in a negative way, as 'deviations', frequently described with a pejorative undertone (e.g. as 'distorted', 'absurd' or even 'pathological' communication), particularly since most of these studies have taken as their subject criminal or related types of cases."

It should be made explicit that the analysis of transformations which is undertaken in this study does not aim at a description of the discrepancies or frictions between common and legal-institutional patterns of speech. In fact, although in the course of our analysis differences between lay language and legal professional language will be brought to the fore, the previously discussed interests central to the sociolinguistic camp will be taken for granted. Our view is that the analysis of legal-professional codes and vocabularies largely fails to explain the legal-institutional rationality which underlies the performance of transformations. We therefore opt for an analysis of legal language which implicitly unmasks aspects of legal reasoning (i.e. Legault 1979: 20). This alternative approach bears upon the assumption that instead of describing the facial character of legal language it is more fruitful to focus on the law as a transmitting body of communicative messages (i.e. Kevelson 1982: 122). Such a shift of attention entails a radical change from semantic to pragmatic questions. The latter domain covers issues ranging from rhetorical and argumentative aspects to interpretive and creative aspects of (legal)
discourse, thereby detaching itself from questions concerning the semantic reference of language to reality (i.e. truth and falsity of propositions).

1.3 Protocols and Procedures

In the context of a discussion about the transformation from "everyday" into "legal discourse" it is certainly not an illegitimate question to ask whether we can speak of a kind of "institutional processing of everyday discourse". Such an expression presupposes that institutions are merely there to reproduce everyday reality. But one could argue with the same rigour that medical, criminal and insurance problems are conjured up because of the very existence of institutions: categories and solutions invented by the legal institution are implanted in everyday reality. In other words, our knowledge is already institutionalised even before the institution intervenes. However, institutional recording practices are responsible for the expropriation of the reality of the individual. After this initial "expropriation", protocols and records preserve the created institutional reality.

Protocols or recording procedures enable institutional agents to standardise the 'translation' of an amplitude of everyday knowledge. The largely predetermined structure of the police record facilitates the uptake of details relevant to the institution, "such as time, place, those present, details of breaks, etc." (Zander 1985: 99). Recording is thus a way of creating institutional order out of everyday chaos. Problems, complaints, reports need to be registered, diagnosed and solved. The massive employment of protocols has made the 'translation' of everyday knowledge and the subsequent problem-solving more efficient. Information stored on records and forms can easily be exchanged among the agents of the institution, even when the one who originally recorded the event disappears: protocols make institutional agents mutually interchangeable (Seibert 1981: 33). Furthermore, the exploitation of records and forms immunises institutional action against the "newness" or originality of events. The institution does not need to modify its policy whenever it confronts a new situation (Seibert 1981: 33): the margins of interpretation are narrow (Grosse 1980: 14). Besides, protocols offer other advantages, such as the prompt availability of data each time a client is brought up (Garfinkel
1984: 198), the comparison and measurement of individual features which allows for a definition of collective problems (Foucault 1977: 190) and a lesser but certainly not absent risk of manipulation of information.

The vast reliance of institutions on protocols is partly the cause, partly the result of the construction of a stock of knowledge about individuals who become a "client" of the institution, whether s/he is a patient, a prisoner, a criminal or an insurance buyer. Characteristic of institutional recording then, is the individual biography (Foucault 1977: 252; Goffmann 1986: 62), or the narrative biography ('t Hart 1983: 452) of the suspect, patient, or inmate. We have entered "the age of the infinite examination and of compulsory objectification" (Foucault 1977: 189). A social archive, a "power of writing" has emerged, a system of "intense registration" and of "documentary accumulation" (id: 189). The emergence of disciplinary writing has made it "possible to classify, to form categories, to determine averages, to fix norms" (id: 190). It is undeniably the case that a client loses a fair amount of control as soon as the institution intervenes, absorbs and evaluates his or her personal data (Carlen 1976: 93). As a matter of fact, the record contributes to the transformation of individuals into institutional cases (id: 92). The legal case has to be recognisably individualised to the actions of one agent.

Institutional information about individuals is overdetermined in the sense that institutions store more information than is directly needed for the realisation of immediate purposes (this residue of information is still relevant for the pursuit of institutional goals). Criminal records for instance do not merely contain 'juridically codifiable' information (Foucault 1977: 18). Instead, one judges the 'soul' of the offender by delivering an assessment, diagnosis, prognosis and normative judgement about that particular individual (id: 19). It is therefore a misapprehension to believe that diagnosis (the process in which symptoms are related to causes) and prognosis (the process of predicting or forecasting the future of the client) are confined to the medical discourse. For example, in the forensic discourse the criminal past and future of the suspect is stored on a crime sheet; the origins of the offence are related to possible trouble at home or at work; social and psychological circumstances are of importance in the probation report; and judges decide on sentences after weighing and estimating the defendant's likely future: will there be a relapse into
crime or not? Such prognoses are therefore relevant to conditional sentencing. Judges and public prosecutors seem to be rather sensitive to information which reveals that the defendant has undergone a positive change between the committal of the crime and the trial. Hence, criminal procedures are similar to aetiological chains-structured as past-future dichotomies (Sauer 1989: 88-94).

Forensic, psychotherapeutic, medical and other institutional discourses are not only notorious for the standardisation of recording procedures, but also of interview procedures. Interviewing-techniques and advice on the employment of social skills can be found in every handbook for police officers, social workers and therapists. The purpose of such standardisation is maximal obtainment of information while adapting that to the institutional framework of interpretation and problem-solving.

Let us have a look at the specific features of the police interview. The interviewing officer is responsible not only for the form, structure and content of the interview, but also for the division of power and control. Banscherus (1977) claims that the police interview is roughly divided into three parts. The interview normally starts with a so-called Vorgespräch, which is a conversation preceding the fact-oriented interrogation in which a form of 'pseudo-symmetrical' communication is established (id: 53ff). In principle nothing of what is said during this particular conversation is recorded as an official statement. Such a release of pressure aims at a stimulation of suspect or witness to express personal interpretations of the event. To the police officer the Vorgespräch is a means to sketch a first picture of the event which consequently erases dubious interpretations of the event. The Vorgespräch is characterised by a non-institutional interactive style (f.e. informality), but which at the same time is determined by formal structural conditions. The police officer who conducts the interview must be able to alternate patterns of coercive communication with patterns of pseudo-symmetrical (everyday like) communication (id: 65). In order to activate the everyday-like pattern of communication, the police officer must accept the suspect as a communication partner (a precondition for the variation of roles throughout the interrogation), s/he must be prepared to let go the monopoly of initiating the questions (a relaxation which is still goal-oriented; the pressure should not be released totally) and s/he must be
able to decide at which moments of the interrogation the alternation of levels of communication is desired or permitted (Banscherus 1977: 64).

The next stage of the interview contains the interrogation of suspect and witnesses, which is the initial step to be taken in the establishment of the criminal fact. The aim of this fact-oriented interrogation is to achieve a maximally reliable and truthful picture of the event (Fischer 1975: 105). The result of this reconstruction must enable the public prosecutor and the court to draw conclusions for the criminal process by forming a notion of the factual succession of events and the degree of the suspect's guilt (id: 105). As a result, criminal records must contain a literal and accurate representation of the interrogation (id: 178), which is supposed to increase the credibility of evidence (id: 191). Naturally, the police record is much more a summary of the "salient features of the interview" (Zander 1985: 99), which is an important source of transformations which occur in the recording of criminal facts.

The ratification is the final phase of the police interview: the suspect, witness and police officer who are involved sign the statement. Before signing the document, the person interviewed has the opportunity to elaborate his/her statements, to correct formulations or not to accept the police record (Banscherus 1977: 82). The asymmetry of knowledge, language and pressure plays a vital role. Especially verbally weaker speakers eschew the offered opportunity to correct their own testimonies. They have confidence that the police officer reflects their statements at least similarly to what they have in mind. At that particular moment most of the interrogated people do not realise what the consequences of this confidence may be for the trial (Banscherus 1977: 83).

1.4 Legal Roles and Legal Whispers

Every agent of the legal institution, whether s/he is a police officer or a judge, continuously interprets the interpretations of others, be they suspects, witnesses or colleagues. Although these interpretations are supposed to function as "neutral messages", that is as factual statements which are circulated and transmitted within the institution, it is conceivable to view these interpretations as speech acts which bring about the argumentative and rhetorical character of legal
discourse. Therefore, except for "factual statements" being professional evaluations, they are employed as arguments which seek to persuade or dissuade other agents from certain interpretations. In such a goal-oriented institutional context, it depends on the interpretations of the institutional role performer whether the intentions of the mediator of the message are understood and realised.

Transformations - which will be discussed in 1.7 - occur because evidence is passed from the one legal agent to the other, but also because each stage of the criminal factfinding process accentuates a different aspect of the evidence. The Dutch criminal procedure, designed as an inquisitorial system, comprises pre-trial investigations in which the evidence is profoundly screened; this may eventually lead to a dismissal of the charge. This has the effect that criminal evidence is 'narrowed down' to relevant and defensible material. This section intends to discuss legal-institutional role-performance in connection with the circulation, interpretation, evaluation and manipulation of institutional messages, the content of which relates to the construction of criminal evidence. In line with the view that the forensic discourse is an exemplary of chained interpretations which causes the existence of various interpretative filters (i.e. Paychère 1988: 284), we will avoid to discuss the judge's activities as the principal role performance. Instead, we will not discriminate between various institutional roles but claim that within the "context of discovery", the role of the average police officer is as strategic as that of the judge. The judge is certainly not alone in judging. Subsidiary authorities are involved in every criminal procedure. They are "psychiatric or psychological experts, magistrates concerned with the implementation of sentences, educationalists, members of the prison service" and they "all fragment the legal power to punish" (Foucault 1977: 21).

Therefore, instead of limiting the discussion to judges and their performance in courtroom, the criminal justice system will be taken as a whole, that means with implication of the preparatory and administrative actions undertaken by various agents in relation to a criminal fact (Steer 1980: 125; Snel 1977: 10). For the sake of convenient arrangement, we will successively highlight the performance of the police, the public prosecutor, the lawyer, the probation officer, the clerk and the judge according to the chronology of a Dutch
criminal procedure. The focus will be on the interpretative and interactive side of their institutional performance.

**Police**

The "gatekeepers of the criminal process" (i.e. Steer 1980: 3), as the police are sometimes called, are the group of legal-institutional agents responsible for 'giving birth' to a crime. Apart from the detection and unravelment of crimes, which implies observation and inquiry, the police is responsible for the recording of events, which is a first - but not decisive - step in the characterisation of the event in terms of the law (e.g. chapter 6). The detection and recording of crimes involves a great deal of decision-making and interpretation. As with regard to decision-making for example, the seriousness of the crime needs to be estimated and the nature of the crime must be defined in summary (the charge in nucleus) to enable the prosecutor to assess the situation and to decide whether prosecution of the alleged offender is eligible or not. Police discretion is an indisputable necessity, because full law enforcement is neither possible nor desirable (Bottomley 1973: 37). The very interpretive character of the police's tasks and functions, along with the ability to make choices as to what the priorities in enforcing the law are, thus permit the police a greater discretionary power than the law actually provides (Finnegan 1978: 64).

Interpretive capacities are performed when conducting an interview: the police officer has to have directive clues as to how and why the crime took place and must pursue these in order to achieve a coherent picture. Interpretation is also a crucial element when recording the crime or complaint, in the sense that the officer must distinguish 'relevant' from 'irrelevant' information and produce a well-structured, coherent and plausible report.

The mediatory, interpretative and discretionary role of police officers can therefore be best described as that of an active communicative medium (Banscherus 1977: 27f), by virtue of which the police occupy an often underestimated strategic position in the (re-) construction of crime (Bottomley 1973).

**Prosecutor**

An important filter in the criminal procedure with regard to the construction of the evidence is the interpretation and decision-
making of the public prosecutor. It should be made clear in advance that the role which we discuss is that of the prosecutor in the continental legal system. The Dutch public prosecutor\textsuperscript{16} is a representant of the "Openbaar Ministerie" (Home Office). This body is formally independent of the judicial powers, and is in charge of the preservation of the legal provisions, the detection and prosecution of criminal facts and the implementation of penal sentences (Snel 1977: 14f).

In the context of this definition of tasks, the public prosecutor makes crucial decisions. The first decision is whether to prosecute or not: rules for that are laid down in Articles 167 and 242 Dutch Code of Criminal Procedure\textsuperscript{17}. If the public prosecutor reaches the conclusion that prosecution is not desired, s/he dismisses the charge, either conditionally or unconditionally (Snel 1977: 15). This decision relates to the assessment of both formal and informal factors. The formal factor relates to the quality of the evidence: only if the preliminary investigations result in a sound suspicion against a certain person (in the sense that the evidence is strong enough that it will almost certainly result in a conviction), the prosecution is in the position to decide whether the charge should be maintained or a judiciary inquiry ("gerechtelijk vooronderzoek"; Article 149 Dutch Code of Criminal Procedure) should be initiated. The aim of such an inquiry is to subdue evidence to a preliminary test, which further clarifies the nodal points of the crime and facilitates instantiation of a trial. The informal factor relates to gender, income, class, education, age, health, domestic problems, family-life, repeated offence and the time span between the committal of the offence and the prosecutor's assessment (i.e. id: 16; Berlins & Dyer 1989: 88).

A second highly important task of the prosecutor is to design the charge. Here also, the prosecutor must forecast and weigh the success or failure of a conviction. In other words, his or her application of norm-definitions (i.e. the Criminal Code) to the criminal fact is success-oriented. The charge will be formulated in its strongest defensible and justifiable form. Such implies again strategic interpretative tasks, namely selection (which norms or statutes are more applicable than others), combination (the process of interweaving the formulation of the norm with the evidence) and also anticipation (the 'prediction' of agreement on the formulation of the charge). Concretely, the prosecutor stands for the task to remove all doubtful,
implausible, weak or objectionable elements and to formulate a 'watertight' case. S/he prepares the facts the judge shall have to pronounce for. In doing so, the prosecutor sets the parameters of the interactive exchange during the trial: nothing beyond that will be subject of discussion (the precondition is that the charge cannot be changed (Article 348 and 350 Dutch Code of Criminal Procedure; Snel 1977: 16).

Finally, the public prosecutor conducts the charge in the trial. The factual interrogation by the judge is preceded by the prosecutor's reading of the contents of the charge ("dagvaarding"; see 1.5). Furthermore, s/he presents a requisitory as to the defendant has been interrogated by the judge, which is an exposition of the reasons to maintain or withdraw the charge, upon which a sentence-proposal is formulated. The mode in which the prosecutor interprets the outcomes of the trial-interrogation and the subsequent integration of these outcomes into his requisitory are the subject of analysis in section 7.3.

Counsel

Generally speaking, the role of the counsel is the bridging of the defendant's knowledge-gap with respect to the legal world. Via the counsel, the defendant gains "access to legal expertise" (McBarnet 1976: 188); the defendant is provided with professional assistance to prepare his or her case without "ignorance of the law". The counsel has a surplus of knowledge in at least three domains, namely the interpretation of evidence in light of the law, the procedural conduct during the trial and the ability to employ legal formulas and definitions.

In that respect, what the service clients "buy from lawyers is a kind of insurance policy against unpredictable interpretations." (O'Barr 1981: 400); "(V)iewed from this perspective, one of the most important qualities of a lawyer is his ability as an interpreter (id: 401). Although this may be entirely true, it is in our view a misnomer to call the counsel an interpreting or translating medium between the client and the criminal procedure. The counsel much rather performs a role in which s/he exploits ambiguities, apparent gaps, malpractices and applicable metaphors. In other words, we regard the counsel as a legal agent capable due to his/her antagonistic role of turning the
evidence upside down and challenging the prevailing interpretation of that evidence.

The task of a defence counsel is naturally to present the evidence in a way which is most favourable to the defendant: the counsel has "to argue the interpretation that should be placed" on the facts (Ingraham 1987: 122). It has to be admitted however that in the inquisitory system it is difficult for the counsel to achieve a withdrawal of the charge, since the evidence has been thoroughly screened before being presented in trial. Yet, numerable standard pleas are at his/her disposal, such as the negotiation on the sentence, the plea to diminished culpability or mitigating circumstances or the appeal to principles of humanitarian justice.

Despite the fact that the counsel is expected to present the facts in a way which are most beneficial to the client, it is deceptive to presuppose that the interests of client and counsel coincide. Although the counsel's service may be advantageous to the client because it consolidates the defence, it may be argued that the client does not enjoy a growth of knowledge about the criminal procedure. Instead, the personal experience of the client is 'abducted' by the counsel as soon as the client communicates it. This has the effect that the client loses control over his/her experience as it is transferred to a discourse in which relevancy-criteria alien to him or her dominate the scene. It should therefore be emphasised that the role of the counsel is as much a ritualistic "Herren"-performance as that of his/her professional colleagues, the judge and the Prosecutor, at least in the sense that s/he offers a constructive, rather than a destructive contribution (sometimes by means of a deconstructive method; see chapter 10) to the success and legitimation of the trial.

**Probation Officer**

Very much the same can be said about the role of the probation officer in the criminal procedure. S/he too is often associated with the idea of being a mere extension of the client's interests (Blumberg 1967; Brogden 1982: 68). Instead, the probation officer is required to perform his or her role according to the rules of the court game. However, the information-providing and bargaining character of the job puts the probation officer into a dilemmatic position between representing the interests of the client and those of the criminal court. Carlen (1976) even suggests that probation officers may employ
friendly professional relationships to manipulate the attitude of legal agents in favour of the defendant (see also Blumberg 1967; Brogden 1982: 68).

The dilemmatic position of the probation officer requires that s/he employs compromising writing skills when drafting a social inquiry report. On the one hand, the probation officer attempts to maintain his/her loyalty towards the defendant and seeks to produce a report advantageous to the defendant. On the other hand, the probation officer attempts to maintain a professional outlook, which encourages him/her to draft a report which is to the point and appreciated by the judge and the Public Prosecutor (Carlen 1976: 79f).

The interpretive aspect of the probation officer's role comes to light when looking at the conduct of the interview and the translation of the interview into the social inquiry report. It is inherent to the nature of the probation officer's role-definition that s/he does not interpret the facts of the crime, but the defendant's character in relation to the committal of the crime. In the previous section we mentioned diagnosis and prognosis as processes which structure the criminal procedure. It is in particular the probation officer who practises diagnostic skills with clients (Carlen 1976: 49), which aims at providing the court with an image of the defendant's social past and future (Brogden 1982 69). The establishment of a diagnosis and a prognosis entails the appeal to standardised interpretations, such as typologies of defendants (Spencer 1988). Furthermore, it should be stressed that probation officers are not the kind of "passive listeners" when interviewing the client. Rather, in their role as negotiators, they attempt to convince the defendant of the acceptability of their sentencing recommendations (Spencer 1988: 67).

As with regard to the draft of the report, the probation officer selects information (id: 62). Objective factors which are always mentioned as a matter of routine are age, profession, former offences and marital state of the defendant. The evaluative representation of subjective characteristics comprise the defendant's attitude with regard to the offence and the possible sanctionary consequences thereof (id: 63).

Clerk

The clerk, who is in charge of assisting the judge in finding a way through a mound of dossiers and of registering the events during the
trial is often backshadowed as a person who fulfils a marginal administrative task within the court. But again it must be emphasised that his/her role is to interpret and select passages from the trial interrogation (such as the requisitory, the plea, but also the answers given by defendant and witnesses). As we will see in chapter 8, where the clerk's record ("proces-verbaal") is being analysed, the clerk focuses on the outcomes of professional debate rather than on the origins, translates the looseness of common language into impeccable legal language and re-orders the questions and the answers into a smooth sequence.

Judge

The judge, who has the key-task of putting all the evidence together and deciding on its truth-value (or directs the jury upon that), is regarded as an assistent-legislator or -lawmaker, although this is more the case in private law than in criminal law. Different views are held as to what extent the limits of the legislative power of judges reach, depending on political or philosophical views.

Philosophical considerations mainly concern the creativity of the judge's interpretation. One of the most persistent questions within the philosophical camp is whether it is possible to apply statutes of the law to concrete cases without either changing the legislator's intentions or changing the meaning of the words of the law. Political considerations on the other hand relate to the desirability and justifiability of maintaining the authority of the legislator's will. The change of social circumstances - be they changes in ethical thinking, crime-patterns or income-distribution - may cause obsolescence of the law, which raises the question whether apparent consensus among members of society may be taken as a durable justification for the modification of the law, this consensus being reflected in a Parliament which decides about reformations of the law. The segregation of powers has arranged that it is the Parliament, not the judges, who create new law.

Some people argue that the judge's discretion to create new law is greater in countries where written constitutions are absent, like in England. Others argue that it is as easy for a judge in a codified legal system to create new law, because according to them, the code shows gaps, is ambiguous and loses actuality. Nevertheless, it is in both systems -codified or not- the task of the judge at least to
clarify the meaning of a parliamentary statute or a code in case its meaning is unclear. And in that task lies a huge potential of judiciary creativity.

The judge's influence and control are most concretely visible in and around the courtroom. The difference between adversary and inquisitorial system is relevant here for the description of the judge's role. In criminal cases in the adversary system, the judge is normally assisted by a lay jury, except for in the Magistrate's court (i.e. Carlen 1976: 42). The judge's role in the adversary system has often been described as that of an arbiter, whereas in the inquisitorial system, the judge is both examiner and adjudicator in the sense that besides being the chairperson who directs the turn-taking process, s/he interrogates the defendant. This implies a difference in the nature and amount of information with which the judges in the two systems are confronted. In the adversary system, the judge does not know more than the pleadings, "which contain a bare statement of the issues in the case" (Devlin 1979: 55). The remainder of the information has to be collected in the course of the trial. In the inquisitory system however, the judge has prepared him/herself by reading through the complete dossier, which has been made available by prosecution and defence, and conducts the interrogation in courtroom on the basis of the image which s/he has formed about event and suspect.

Devlin (1979: 63) thinks that both systems have an advantage in this respect. He argues that in the adversary system, the advantage is that the judge

"has the whole story, as it were, played out in front of him. He can resolve on the spot the small point that worries him whereas the dossier cannot be questioned. He can form an opinion of the sort of man the witness is and so get an impression, more lively than any dossier could give, of how he is likely to have behaved in the events he is narrating."

The advantage of the inquisitory system on the other hand, Devlin argues, is that the judge is not restricted in terms of the amount or quality of information presented to him/her (1979: 61): "the judge can find out what he wants to know". However, something curious happens with this argument. On the one hand, Devlin argues that in the inquisitorial system, "the dossier cannot be questioned", whereas on the other hand "the judge can find out what he wants to know." That means that in Devlin's eyes the continental judge is not restricted to the
contents of the dossier, but may ask beyond the written documentation as it was presented in court. The fact is, nevertheless, that the trial in the continent has the function to test the truth-value of the collected evidence, not to collect new evidence. Although the criminal procedure in the continent arranges that the burden of proof is for the judge (and not for the prosecution and defence), the judge never refers to the crime (i.e. the event which took place) that has been committed, but to the qualified fact in the charge or summons which is issued by the "Openbaar Ministerie" (Home Office) (Articles 348, 350 and 261 Dutch Code of Criminal Procedure). An important consequence is therefore that the judge is not allowed to conduct the examination beyond the evidence as it is fixed by the parties (Melai 1968: 83).

It is in both systems for the judges to decide how the defendant who has pleaded guilty or who has been convicted by a jury ought to be sentenced, which is a task demanding for arbitration. The judge's decision about the sentence does not play a predominant role in this dissertation, because the analysis concentrates on the judge's active involvement in the argumentation of the reported facts.

1.5 Intertextuality

Written language was introduced in courts under the influence of the Church which traditionally had "(...) a more ancient and intimate contact with the rudiments of literacy, (...)" (Mellinkoff 1963: 116). Gradually, writs became more relied upon than spoken pleadings (id: 115). The revolution of the record was prompted by the growing active involvement in 'guiding' the contents of the pleadings: written pleadings were prepared outside of the courtroom (Mellinkoff 1963: 139). Furthermore, the cristallised social organisation of knowledge and the transfer of (textual) information from one speech situation to the other caused an increasing reliance on written documents (i.e. Ehlich 1983).

This has culminated in a situation in which the making of simple judicial decisions is impossible without consultation of supplements, jurisprudential notes, clauses, criminal records and probation reports. More specifically, the accumulating texts within the institutional archive are all interconnected, relating to the transfer of information among the responsible legal agents. Not only the internal labour-
division within institutions has prompted intertextuality, but also the intensive cooperation between the institutions (i.e. Handel 1982: 22f).

It has gone without explicit mentioning that the criminal procedure in the continent is predominantly inquisitorial, which means that the defendant is subject of examination in a state-directed inquiry, rather than a party in a dispute. In contrast, the English criminal procedure has a predominantly adversary character and has adopted methods such as cross-examination, stemming from the dialectical methods of the ancient Greek philosophers who held the view that a conflict between alternative contentions was the best way of conducting an inquiry and guaranteeing a true outcome (Stone 1984: 104). In any case, the crux of this difference is that the centrepiece of the adversary system is the trial, whereas that of the inquisitorial system is the dossier (Devlin 1979: 54f; i.e. Berlins & Dyer 1989: 94). As said before, the inquisitorial system is designed as to invest a great deal of time in the preparation of the case before it goes to court: 'irrelevant' matters can be disposed of in an early stage which consequently prevents a waste of court time (Devlin 1979: 62). Ingraham (1987: 121) calls this the "screening phase" (...) "where a careful investigation ensures the correct determination of factual guilt."

The Dutch criminal procedure arranges protection of the defendant against the use of documents by virtue of the so-called principle of immediacy ('onmiddellijkheidsbeginsel'). This principle (Article 297 Dutch Code of Criminal Procedure) arranges that the defendant is entitled to a presentation of documentary evidence in his/her presence (in court). It determines that all documents ought to be read over during trial, or at least that a summary of the contents ought to be announced. A verdict is therefore impossible if the proof is based on documents unknown to the defendant (Van Bemmelen 1984: 66f). Obedience of the principle of immediacy is part of the motivation of the verdict, which can be checked after a record of the court-proceedings is issued. Due to reasons of institutional process-economy, the available evidence is in most trial sessions (e.g. the politierechter-trial) not fully read out, but summarised, paraphrased, commented upon or simply referred to (Articles 297-4 and 377 Dutch Code of Criminal Procedure). This also happens in courts of appeal, where previously used evidence may be summarised (Articles 417-1/2 and 422-2 Dutch Code of Criminal Procedure). When documents are summarised, paraphrased or mentioned instead of being literally quoted, there is a certain risk that the
reference differs from its original text. Experience tells for example that it happens every time again that statements referred to during the trial deviate from the statements which were recorded by the police.

Part of the reason why the "original" and the "reported" text differ from each other is because the "reported" text needs to be adapted to its new discursive context. We will see in chapter 7 for example that when one integrates a written text in the trial, one not only selects, but also interweaves the reference with the current argumentative dialogue, to the effect that strings of words are being introduced, deleted, stressed and replaced by common language.

However, this suggests that deviations, or transformations as we will call them, are caused only by the transposition of textual passages from the oral to the written discourse and vice versa. But deviations naturally also occur when written texts are being referred to in a written discourse, or when oral texts are being referred to in an oral discourse. For example, scientific authors often 'paraphrase' the words of colleagues while following the purposes of their own argument, while in daily life, the chain of gossip adds much to the original story (if it is not pure imagination altogether).

Therefore, an important source of the transformative capacity of intertextual references is that the integrated texts are evaluated in the light of human curiosity, scientific argument or - in our case - institutional interest. Commentary is added to texts all the time, and often interwoven to such a degree that the original text (provided that we know the original text) becomes irrecongnisable (see sections 3.6 & 3.7).

References to texts during trial sessions are often made explicit however. In fact, the sequence of the trial-protocol makes it predictable which text is the subject of interrogation or argumentation. The remainder of this section discusses which texts from the dossier pile are bound either to be interwoven with the oral discourse in the courtroom or to provide judge, prosecutor and counsel with interpretive clues as to form an image of the defendant and the crime.

A criminal file or dossier is composed of several documents which vary in function and importance. The less important documents are of a predominantly procedural nature, for example those containing information about the seizure of the suspect's personal possessions, the confirmation of the defence by a counsel and the demand for a
judiciary pre-investigation. The trial formally tests the legitimacy of these procedural steps.

The police record—which contains a description of the crime, the statement of the suspect, testimonies and a medical report—is important for the reconstruction of the substance of the crime. If it can be proved that the defendant was the culprit, the factual information is evaluated against information from the suspect's criminal record and the social inquiry report. The summons constitutes the cross-section between substantial and procedural matters.

The law has also arranged rules and procedures for the use of these documents. A few days before the trial the judge receives the files. From that moment onwards the defendant is permitted to consult his/her files (Article 31 Dutch Code of Criminal Procedure), provided that the judiciary pre-investigations are concluded and that the summons has been duly sent and received (Article 344-2 Dutch Code of Criminal Procedure).

We will describe the functions of only four of the documents of which the criminal file is composed, namely the police record, the summons, the social inquiry report and the crime sheet. These are the documents which play a major role in the legal citation across oral and written discourse.

**Police Record**

Police records constitute the basic components of larger criminal files, and are primarily internal means of information. In the Dutch criminal procedure the police record coins a basis for the decisions by the "Openbaar Ministerie" or is the ground for further investigations. The relevance of the police record in court is that it can be compared with statements made in court, which allows for testing the credibility of defendant, plaintiff, police officer and witness (Banscherus 1977: 15). As with regard to the reconstruction of the crime, the contents of the record prepare and guide the judge in the interrogation.

It is expected that police records are realistic and objective reports of criminal facts and their aspects. Statements of fact or circumstances must be based upon observation or immediate experience of the police officer(s) (Article 344-1 1st Dutch Code of Criminal Procedure). The police may—unlike witnesses—rely on hearsay (de auditu statements). Police officers are mainly interested in the establishment of certainty with regard to what happened, in finding out
whether the event was a criminal event and whether the suspect(s) was involved in a relevant way (Ars Aequi Libri 1983: 29). The report of the interrogation therefore only concerns what is considered to be of criminal relevance.

The realistic, objective or truthful character of the police record is safeguarded by a rule which requires that the police record ("procès-verbal") ought to be made up as soon as possible after the crime was observed or reported by police officers (Article 152 Dutch Code of Criminal Procedure): such a rule ought to prevent loss of memory.

**Summons**

In the inquisitorial system, the summons is the 'nodal point' within every criminal procedure. The summons marks the shift from pre-examination to final examination of the case (Articles 258-1, 348 and 350 Dutch Code of Criminal Procedure; André de la Porte 1976: 13). The (Dutch) trial is formally initiated by the prosecutor's issuing of the summons. In the summons, the suspect is called to appear for a trial at a certain time. This is the so-called *procedural* aspect of the summons: the personal data of the suspect are mentioned, the summons to appear at a certain day and hour before the judge, information with regard to the suspect's rights and the observation of the minimal term between the day the summons has been served upon the suspect and the start of the trial (André de la Porte 1976: 13). The summons also contains the *charge* (Article 261 Dutch Code of Criminal Procedure), which is the consolidated final product of the detection examination and the judicial pre-examination, which is the basis for the entire trial (Article 261 Dutch Code of Criminal Procedure; André de la Porte 1976: 13).

The charge must be described in clear terms, which enables the suspect to recognise a distinction between different events in his/her past. The description should therefore be sufficiently concrete or individual (André de la Porte 1976: 5).

No suspect can be sentenced without the procedure of examination, proof and 'criminalisation' of the contents of the charge (id: 13). The public prosecutor is not required to mention the relevant legal statutes which s/he applies in the qualification of the facts, but s/he has to charge the suspect with a criminal fact which is referred to by the law. According to the Dutch criminal procedure, no fact is a

The summons thus embodies a factual and a normative part. On the one hand, it refers to the supposedly criminal event in the past of the defendant. On the other hand it refers to a legal norm (André de la Porte 1976: 13). It is illusory however to try and distinguish the factual and the normative, since both suspicion and punishability are based on legal-normative grounds (id: 13).

Social Inquiry Report

The Probation Service issues this report (also discussed in 1.4) which contains information with regard to the defendant's background, family, home-circumstances, relationships, attitudes, job-situation and prospects. The report is based on interviews with the defendant and family or close friends. The report usually concludes with the probation officer's opinion on the defendant's suitability or otherwise deserves consideration for a non-prison sentence. It may suggest, for instance, that "he would respond positively to probation or community service, or it may conclude that his attitude is unlikely to make these methods successful." (Berlins & Dyer 1989: 115). If the public prosecutor thinks that more facts ought to be clarified, s/he may (during the judiciary pre-investigation) request a social inquiry report via the "rechter-commissaris" (Article 227 Dutch Code of Criminal Procedure; Ars Aequi Libri 1983: 80). It is possible for instance that the prosecutor desires information about the possibility of a recommittal of (the) crime.

Crime Sheet

Information from the crime sheet is always used in relation to the determination of the sentence (Berlins & Dyer 1989: 115). The police registers personal data of the defendant in an information document ("informatiestaat") (Ars Aequi Libri 1983: 46) and sends it forward to the parish register where it is verified and corrected if necessary. This is done for administrative reasons (identification of the suspect, the delivery of documents and registration in the judicial register). Such registration enables the judicial authorities to check the criminal past of the defendant. It also enables them to check whether there are any undealt criminal offences and assists them in answering the question whether an arrest or custody is possible.
The crime sheet is not often explicitly and elaborately discussed in
the trial unless it is considered to be relevant to the circumstances.

Intertextuality relates to the subject of discursive transformations in
at least three important ways: documents are evaluated within an
argumentative context, they are made to fit a pre-existing
administrative corpus (administrative consistency) and they 'economise'
information which has already been mentioned elsewhere.\(^2\)

1.6 Institutional Frameworks of Interpretation

In the previous sections we have pointed out that within an
encompassing institutional machinery, roles and tasks of legal agents
are strictly defined and finely tuned in onto those of their colleagues. Another particularity is that the chores of all legal agents are
interpretive not only in relation to the written documents but also in
relation to speech acts, narratives and arguments in the oral
discourse. The issue which this section seeks to deepen concerns the
question whether legal agents perform interpretive activities
according to a certain "direction".

Starting from the assumption that institutions aim at the processing
of information in a maximally efficient way, the idea is that
institutions not only have a limit as to how much and which information
is to be "absorbed", but also have tacit guidelines with regard to the
characterisation of information and its connection with other
information. The construction of facts is generally governed by the
constraint to condensate (information has to be eliminated or has to be
summarised in order to establish an intelligible overview), the
constraint to detail the manifestation of the constitutive elements,
and the constraint to seclude information from other information. Applying this to the the legal practice, factual descriptions generally
contain relevant aspects related to the decision to be taken (goal-
rationality) and focus on the reconstruction of the major action
(Kallmeyer & Schütze 1977: 159-274).

Institutional interpretation is therefore selective and undertaken
from a certain perspective: it concentrates on certain information and
'picks out' what is considered to be relevant. Although the short story
"Jimmy crashed his car when he collided with a brandnew red-coloured
contains perfectly credible information, the colour and brand of the car are irrelevant to the legal institution when determining Jimmy's liability (but perhaps relevant to the insurance-company of the owner of the Porsche). Whether the girl in this story was attractive or not is also irrelevant to the legal institution: it suffices to know that Jimmy was not paying attention to the traffic. Institutional agents, who perform this selection, have developed modes to ignore some information and highlight other information. They simply cannot afford to seek answers to (sheer) indefinite chains of questions. The selection and "cutting out" of pieces of reality occurs according to what seem • at least to the outsider • implicit and latent criteria of legal relevance (i.e. Caesar-Wolf 1984). The institution, therefore, has a functionalist perspective on the story. The story is first of all a means of problem-solving (i.e. Nelken 1983: 132; Caesar-Wolf 1984: 19).

The police for example does not record all offences they encounter (i.e. Snel 1977: 13f). It must be established whether the offence is of a serious nature and whether it has led to an identifiable result (Steer 1980: 54). A second 'check' concerns the question whether the offence is indictable, or 'tractable' under the present law (id: 56). But the decisive criterion for the recording of crimes is that "where there is insufficient evidence [...] the crime should be regarded as undetected" (id: 64). The crux of each police record is that only the 'bridge pieces' of the interview are registered (Banscherus 1977: 75). The interview, which often lasts for hours, has to be reduced and squeezed through a selection from the criminally relevant statements, resulting in a minimalised image of the interview. The police officer thus performs omission, suppression and condensation (Herren 1976 & Bortz: 313; Banscherus 1977: 75). Omitted statements become a language of silence (Pollner 1987: 44; Carlen 1976), but these "(...) empty lines represent an infinitude of unmentioned details." (Pollner 1987: 44).

Yet another instance of institutional selection and focus on relevant details is the way in which the counsel forms an image of his/her client's account. The discrepancy of professional and lay perspective is very important in this context:
"The way that the lawyer "selects" from his client's statements, how he interprets what he hears, and what characterizations he commits himself to as "the facts" can often be relative to his perspective, not that of his client." (Probert 1968: 268)

The legal institutional perspective diverges from the everyday perspective (i.e. Caesar-Wolf & Breunung 1981: 43ff; Gunnarsson 1984: 71ff), because the criminal event is being considered as deviating from the norm (Hoffmann 1989: 171). Legal agents tackle the event with their knowledge of the norm, and not otherwise. Employment of this knowledge results in a legal institutional distinction between the relevant and the irrelevant (id: 171). The case is an enchainment of facts which pretends to represent a concrete reality, which is nevertheless subdued to the intervention of the legal knowledge-schemata. The case becomes an objectified or "most plausible" unit as a ground and means for legal decision-making (id: 171).

Reason for the divergence of perspectives is then that whilst the institution attempts to guarantee its process-economy - which constrains the elaboration of the event - the client (defendant) seeks an opportunity to unfold a personal 'Leidensgeschichte' (Rehbein 1980: 64; 67), which is a justification or explanation with the purpose to gain sympathy from the institutional agent.

Each party therefore has an image of what happened, how it happened, and how the event ought to be evaluated (Hoffmann 1989: 172). For example, the defendant may explain his/her crime on the grounds of a problematic situation at home, while the public prosecutor may simply hold that the crime is an immoral act - irrespective of personal reasons. Similarly, the defendant may insist that s/he has committed the crime because his/her mates forced him to do it, while the judge may insist that the committal of each crime is a matter of individual responsibility. Crucial is that the institutional agent presumes that his/her view is automatically shared by the client (i.e. Seibert 1981: 19).

The institutional perspective acquires a more definite shape through a series of questions raised by the institutional agent. The agent has a systematic image of the possible order of events, which s/he seeks to ladle out. Free storytelling is therefore enframed by questions, which enforce matter-of-fact-statements (Seibert 1981: 21). Intervention by
institutional agents eventually results in a fragmentation of storytelling (i.e. in courtroom; Hoffmann 1983: 99f; see also 3.7).

The information in the police record is structured on the basis of such a question-answer pattern (Banscherus 1977: 76). The recording police officer tends to unfold structure and content of the document with his/her own questions as a starting-point, which means that more spontaneous interruptions, questions or remarks of the suspect generally disappear (id: 83). The questions themselves are goal-oriented anticipations, in the sense that the information is bound to fit the expectation pattern of the interviewer. Although the "reconstruction of the event" may be the official purpose of the police-interview, it is more accurate to characterise the practice of the interview as a check or verification of presumptions.

Psychological research demonstrates that the memory of information or stories is based on 'perspective' or a pre-existing 'schema' too (e.g. Pichert & Anderson 1977; Bartlett 1932; Arbib & Hesse 1986: 43f). Schemas are units of representation of a person's world. The schema of an action is for example the structure of the "generalisable characteristics of this action" (allowing for repetition of the action or its interpretation or application in a new context) (Piaget 1977: 30; Arbib & Hesse 1986: 44). These schemas are social-pragmatic instead of individual in the sense that the correspondence between a cognitive schema and reality is relative to other knowledge and circumstances: "Schemas do not reflect the "full" meaning of external reality but are always (at least potentially) in a state of flux, subject to change through our "dialogue" with the world." (Arbib & Hesse 1986: 61). Schemas constitute a perspective with which interpretation takes place.

However, it is crucial to note that such occurs in the everyday, say non-institutional discourse, as well. The heritage of cultural symbolisations creates interpreters who take certain issues into account and others not. It is nevertheless a complicated matter whether we can abstract criteria of selection from the observation that some information is characterised as 'dumb', 'irrelevant', 'implausible', 'unlikely', 'beside the point', 'just gossip' and other as 'interesting', 'coherent', 'ideologically sound', 'intelligent' or 'true'.

It therefore seems to be the case that the availability of standardised interpretations is typical for institutions. Here one can
think of the application of labels, categories, types, cases, frames, classes, sections, kinds and sorts. Even while symptoms indicating states of health and illness, or symptoms interpreted as expressions of normal or deviant behaviour may be polysemous, ambiguous or multi-referential (Vance Staiano 1986: 16)\(^2\), (semi-) legal agents are trained to transform their observations into objectified signs. For example, police officers systematically establish drunkenness by taking recourse to three standardised symptoms, namely a smelly breath, a double tongue and an unsteady way of walking or driving (the famous triple sign-configuration). It is perhaps superfluous to say that the standardisation of diagnosing is more than constitutive for the production of meaning. It should be added that the institutional reliance on criminological theories (i.e. Box 1981: 170) is an important factor in the standardisation of interpretation.

Within the legal-institutional discourse, the selection of information, the attribution of relevance and the standardisation of interpretation are discursive patterns which serve the realisation of institutional goals. Institutional interpretation is therefore *teleological*. The determination of symptoms into uniform signs is not a neutral event, because the purchase of institutional goals allows for the manipulation and exploitation of signs throughout the interpretive process.

1.7 Transformations

It is thus clear that standardised frameworks of interpretation are very much responsible for the selection of information: the institution never recounts information in its full glory and detail. But more important is that institutions, in particular the forensic discourse, claim to accurately reproduce or depict the discourse which precedes its registration. This claim stands in contrast with our claim, namely that the *interpretation and registration of the discourse from which evidence is distracted is a matter of discursive production*. When talking of 'transformations', we normally think of actors who, in between different stages of a theatre play, change their outfit and return as a different character. Or we think of birds who change their feather colour over the seasons. Or we think of Stephanie of Monaco as having transformed from a boyish character into a charming young woman.
What connects these three illustrative examples is that not the carriers of the role, feathers or boyish character have changed, shifted or been replaced, but their 'complexion'. More important however, our interpretation of that carrier has changed because of the transformation of its complexion. This implies that we call a discursively modelled text or speech act a transformation when it and its original relate to the same referent.

However, our rejection of the positivist idea that language is semantic in the sense that it truly reflects an external reality (see chapter 2), implies abolitionment of this definition of transformation. It needs to be made explicit that the meaning of language, text or discourse may transform even if there is no apparent, observable or visible shift. Words or text-sequences may be left intact, and still a transformation may be performed. But let us assume for the moment that we can only 'observe' the occurrence of transformations when they are prompted by the change of complexion. With help of the speech act theory (2.5) it can be shown that transformations can leave the 'referential core' of the utterance as it is, while the discursive context of that utterance can give direction to its sense. On the one hand, transformations are the product of a 'strategic steering' of meaning, whereas on the other hand it is interpretation which is largely responsible for the 'uptake' of these transformations. The standardisation of the legal-institutional framework of interpretation however fixes the margins within which transformations between 'everyday' and 'legal' discourse can vary freely, thereby restricting the creative imposition of new meaning.

Constitutive for institutional reality is not only the linguistic transformation of meaning, but also the sociological transformation of people. Being locked up 'behind prison-bars implies a transition to another status with special rights and duties: the individual is stripped off of his/her identity and individuality (Goffman 1987: 29; i.e. Carlen 1976: 23). However, questions concerning sociological transformations belong in another camp. The transformations we want to discuss are of a predominantly discursive character, although they may owe their origin to the specific socio-legal organisation of the forensic discourse.

Literature on legal transformations in the process of factfinding focuses on how 'meaning' is shifted across the different stages of the forensic discourse. Banscherus (1977) has paid major attention to the
text-processing aspects of the police interview (such an analysis will not be part of this thesis, because we have no empirical material at our disposal). Although some may insist that the police "only" collects information, we regard the police-interview as one of the crucial moments for the modelling of the criminal fact.

Police officers who are responsible for the record are under constraint not to edit or paraphrase the words of the person being interviewed. Records must therefore be a faithful reproduction of all that has been said during the interview. This is the norm, but not the practice. Mistakes are made because the infiltration of the interviewer's judgement may lead to an omission of information, but also because the recording police officer imposes his/her own formulations onto the statements of the suspect (which causes 'translation'-mistakes). Legal definitions - derived from the code - are provisionally attributed to the events which are recorded, which is a preliminary legal qualification of the crime. In this event, suspects or witnesses who are (not always) verbally weaker than the interrogating police officer are easy victims of having words put into their mouth. The transformation of their own statements into a fixed legal terminology often remains unnoticed. In one of the police records which we have analysed, the police writes that the plaintiff alias witness has reported "attempted manslaughter casu quo severe ill-treatment." This is only an example of the way in which police officers may anticipate the formal definition attributed to the crime by the Public Prosecutor.

A police officer is in problems when s/he has to recall a statement which contains more than 14 words. In the course of any text-processing event, elements of the text to be remembered are deleted, suppressed or emphasised. Other information may be added due to inference-making.

One obvious reason for the making of recording-mistakes is the loss of memory caused by the time-lapse between observing or listening and recording. Police officers often write their report a while after the crime, often at "odd moments when there is little else to do":

"Even with the best will of the world, when you're arresting somebody you can't be taking notes at the same time. So, you've got to do your notebooks retrospectively, and sometimes that means the next day." (police officer, in Graef 1989: 278).
"The record that results is, therefore, a recollection of incidents or conversations, not their instant transcription on paper." (McCabe & Sutcliffe 1978: 26).

Such leads to the loss of keys of information, and as a result, to the insertion of new information (perhaps with the purpose to make the account coherent and plausible). However, equipment has been devised to minimalise the making of mistakes, such as the recent introduction of tape-recorders during the police interrogation in some areas of Great Britain.

Another source of transformations is the complexity of summarising intricate textual entities. Banscherus (1977: 67) says that generally, whether it concerns a police record in court or a medical record or a student's record, the aim is to retain a one-off situation in a written form to be used in a later stage. Since the often specific situation cannot be retained scripturally in all its completeness and complexity, each recording person is confronted with the question what should and what should not be integrated in the record. Summaries in family doctors' practices for instance shows "significant error rates", such as wrong codation and omittal of important medical information. However, the summary is just an example of the complicated textual labour recording police officers must perform. They are in charge also of the creation of a coherent account, which requires them to transform the fragmentary character of the question-answer-pattern into a textual sequence. The succession of statements in the interview is therefore re-organised and embedded in a new chronological pattern (Banscherus 1977: 83).

The style of writing is also responsible for the occurrence of transformations. Police officers maintain their individual style (i.e. Herren & Bortz 1976: 314; Banscherus 1977: 76), because they believe such increases the legibility of the report for those not present during the interview. This also works to the accomplishment of a fairly "rounded off" record which is easy to skim through when the case gets a "follow-up" (Banscherus 1977: 71).

Since the police are the main information provider of the court, they are in charge of collecting, selecting and naming the information. Current provisions in the law of criminal procedure cannot prevent that police deliberately transform information. The police therefore possess a factual rather than a formal definition power (Feest 1973: 161). Defining, redefining or not defining is not just a matter of lexical or
semantic labour. In other words, events do not become crimes by the attribution of a label which is derived from the code. Knowing what will be relevant to a charge and possibly a conviction, police officers interweave interpretive clues in their account in order to 'direct' the reader's interpretation in matters of criminal intention or culpability. But it still requires a sophisticated police officer to refine, remove or dissolve discrepancies in witness-testimonies. In the case of Oscar Slater, two divergent witness-testimonies with respect to the appearance of the perpetrator were deliberately transformed into one coherent account. In identifying the perpetrator, the two decisive witness testimonies collapsed into one: "(...) the dark cloth cap became a tweed Donegal hat, and the light-grey overcoat a fawn-coloured waterproof - which made it much simpler for all concerned." (Mortimer 1988: 84f).

In such an early stage of the inquiries, the crime may undergo a corrective redefinition (i.e. McCabe & Sutcliffe 1978: 75). This is sometimes based on the finding that an offence was actually not committed, such as stolen property which was later found (Steer 1980: 60; Coleman & Bottomley 1976: 347). In other occasions, the offence thought to be of a different nature, such as a complaint which was of a civil instead of a criminal nature (Steer 1980: 62). Finally, there are the cases in which the evidence is simply insufficient, such as a lacking motive (Coleman & Bottomley 1976: 350), which may mean that the original suspicion will be altered (id: 353).

A frequently mentioned reason for not defining crimes at all is the ambiguity of the situation (Finckenauer 1976; Coleman & Bottomley 1976). This ambiguity may be of a legal-moral nature, in the sense that the police officer feels loyal to two different value-systems, the one being legal and the other one being social. In this context, Finckenauer (1976) mentions examples of crimes such as gambling, drunkenness, welfare fraud, prostitution and juvenile offences. In his conclusion, Finckenauer notes that it is mainly the street-experience of the police officer, which makes him/her torn between the public image of the police and the expectations of the community (id: 45).

Ambiguity may also be of a classificatory nature. The crimes which are defined by the law may indeed provide legal agents with a "conceptual equipment", but application of a conceptual apparatus requires the addition of experience and knowledge (Coleman & Bottomley 1976: 355). Finally, "non-definition" of crime may also be due to the
circumstance that crimes are regarded as hard facts, not as probabilities.

Evidence is sometimes 'planted' where it lacks (Graef 1989: 151; 277). One sergeant in Graef's "Talking Blues" mentions the fitting in of an extra page in a statement, because of "personal advancement" or the compensation for the lack of arrests that week (id: 279f):

"'Minimum amount of evidence.' Bull shit. Absolutely no evidence whatsoever!"
(sergeant, in Graef 1989: 280).

Banscherus (1977) provides us of a well-illustrated analysis of transformations which take place when interviews with suspects and witnesses are recorded. He established the following categories of "recording mistakes" (id: 223):

1. Suppression of statements in connection with questions regarding the person:

   **Interrogation**
   O: Is your friend a student as well?
   W: No.
   O: Then what is his profession?
   W: He does practice in hospital XY. His profession is massagist and ...

   **Police Record**
   It concerns trainee (...) in hospital XY.

2. Suppression of statements in connection with questions regarding the event;

3. Suppression of statements in connection with questions regarding the history before and after the participation of the interrogated person;

4. Suppression of statements in connection with questions regarding descriptions of persons or affairs;

5. Suppression of statements with regard to the motivation or legitimation of the suspect's participation in the event:

   **Interrogation**
   O: Did he notice by himself, that somebody had taken his suitcase away, or did you or other passers-by draw his attention to it?
   W: Yes. Other passers-by have drawn his attention to it as well, but he also noticed it by himself...

   **Police Record**
   The gentleman, to whom the suitcase belonged, (...) ran immediately after the young man. After about 5 minutes the gentleman came...
O: Mhm. Did you also yell or say anything at all?
W: No.
O: You didn't? Presumably because everything went so fast.
W: Everything went amazingly fast.
O: Ehm, ehm.

Banscherus (1977: 224) distinguishes the following modifications which take place between the interview and its recording:

1. Change of modus
   a) a statement which was made in conjunctive appears in the record as indicative;
   b) a statement which was made in the indicative, appears in the record as a conjunctive;

2. Change of temporal succession;

3. Wrong paraphrase:

   Interrogation
   O: Did you try to get a job?
   S: Yes, I did try.
   O: How then did you manage during the last few months?

   Police Record
   Despite of many attempts to get employment, I did not succeed.

4. Change of semantic characteristics;

5. Addition:

   Interrogation
   O: Weren't you afraid that he would recognise you?
   S: No, not in itself.
   O: He himself however did not notice you, when you approached him?
   S: No, in itself no.

   Police Record
   I wanted to snatch the bag from behind him. I wasn't afraid, that the person in question would recognise me, because personally I hadn't met him yet. I had seen him only from a far distance.

Although Banscherus is not entirely clear about his parameters, much of what he found for the recording of answers given in police-interviews is confirmed by our analysis of the oralisation of written documents during the trial (see chapters 7, 9 and 10). What already appears from Banscherus's examples is that the kind of transformations which occur are of a divergent nature, which will also be upheld by our findings. Some of the transformations, such as the suppressions, are of an
evaluative nature, in the sense that elements judged to be of smaller importance are left out. The occurrence of addition (see 5 above), which is the counter-part of suppression, confirms the idea that police officers impose their own theories or expectations onto the account. In a later stage however we will see that the occurrence of addition is relatively rare in the courtroom, at least when it concerns the reconstruction of the event or crime. Additions in courtroom are often of a moralistic nature, instead of a factual nature. In other words: omissions are far more frequent than additions, which is a natural consequence of the process-economy of the trial.

Unlike Banscherus, we will try to avoid value-judgements about the "right-" or "wrong"-ness of the text-processing-labour of legal agents. The "wrong" paraphrase mentioned above indicates that the researcher pretends to know better than the recording police officer what exactly a paraphrase should look like. We will see in sections 5.2.2 and 7.3 that it is hard to define objective criteria for the paraphrase and other intertextual references. In fact, it will turn out that the analysis of a courtroom-session on the basis of the categories "quotation", "paraphrase" and "summary" is virtually unworkable, because discursive transposition entails a coincidence of different strategies.

On a 'macro'-level, i.e. a level where one abstracts from detailed transpositions, interesting analyses of the transformative capacity of the legal discourse have further been undertaken by Felstiner, Abel and Sarat (1980-81) and Mather and Yngvesson (1980-81). The authors analysed how disputes are transformed in manageable units. Felstiner, Abel and Sarat (1980-81) claim that the institutional *reification of disputes* is a social construct (id: 631), which leads to new forms of existence (id: 632). One important aspect which they noticed is that the "creators of opportunities for law" make their own law, "but they do not make it just as they please" (id: 633). The authors mention three different forms of transformation: the first one is called *naming*, which is the act of labelling or calling (id: 635); the second one is the act of *blaming*, which is the act which transforms the injurious perspective into a grievance, and which holds X responsible for Y (id: 635); and the third one is called *claiming*, which unfolds the request for a remedy (id: 635). Less explicitly, the authors notice three other forms of transformation, namely that of extension,
normativity and individualisation. Extension may occur for instance when the discussion about the original incident is removed to the inquiry into the mens rea of the actor (id: 641). Felstiner et al. (1980-81: 647) state that:

"Courts, which fall at one extreme along most of the dimensions useful for describing dispute institutions, may transform the content of disputes because the substantive norms they apply differ from rules of custom or ordinary reality, and their unique procedural norms may narrow issues and circumscribe evidence."

The transformation or individualisation of remedies (id: 648f) does not only occur in law, but also in therapy and medicine for example. However, in law, the individualisation of remedies serves a special purpose, namely the attribution of responsibility to the individual who did 'wrong' (chapter 10).

Mather and Yngvesson (1980-81) want to show how law and normative frameworks can be "articulated, imposed, circumvented, and created as people negotiate social order" (id: 775). The authors claim that transformations occur because "participants in the disputing process have different interests and perspectives in the very process of defining and shaping the object of the dispute." (id: 776; see also 1.6). The legal transformation of a dispute therefore takes the shape of a compromise. On a linguistic level, the authors regard legal transformations as a change of the content, rather than of the structure of a dispute (id: 777). On a more fundamental level, transforming is equal to rephrasing: "some kind of reformulation into a public discourse." (id: 777). Mather and Yngvesson—who prefer to speak in terms of 'categories' and 'classifications'—distinguish between two kinds of transformations, namely narrowing and expanding. Narrowing (id: 778) is the process "(...) through which established categories for classifying events and relationships are imposed on an event or series of events, defining the subject matter of a dispute in ways which make it amenable to conventional management procedures. Expanding on the other hand refers to (id: 779):
"(...) a rephrasing in terms of a framework not previously accepted by the third party. Expansion challenges established categories for classifying events and relationships by linking subjects or issues that are typically separated, thus "stretching" or changing accepted frameworks of organizing reality."

Bourcier (1978), who, like Bennett and Feldman (1981), has examined legal-discursive transformations in light of the narrative (see chapter 3), claims that the process of narrations develops itself along two axes, namely that of accumulation and that of transformation (id: 135). Her method is to compare the versions of the "original discourse" with the "reported discourse" (id: 142), to analyse the "dépiscements", and to establish or show the attitude of the author in relation to reported discourses (....) (id: 137). Following the analysis of a case of infanticide, she established the occurrence of syntactic, semantic and argumentative-rhetoric transformations in the narrative which makes up the case. Bourcier claims that the profound (deep-) structure between the original and the reported discourse differs (id: 142).

Her view is thus compatible with the idea which we unfolded at the beginning of this chapter, namely that the occurrence of a transformation is not necessarily 'noticeable' at the surface. Whilst endorsing this view, it will be explained in chapter 5 that the analysis of "deep-structure-transformations" escapes the attention of an empirical analysis. But to avoid being wrapped up in an account which neglects the deeper rationale of discursive transformations, we will by means of hypothesis formulate the idea of an "invisible" projected point of reference which gives a direction to the transformations taking place in the reconstruction of crime (chapter 4).

Meaning which has been transformed by the institution may be re-transformed without a lot of work (Goffman 1986: 159). Criminal evidence goes from hand to hand. It also often takes a long time before the evidence is being evaluated and judged upon in court. An example is the succession of transformations that is performed on the basis of a police record. The text of the original police record serves as a basis for further institutional textual fabrication. The public prosecutor for instance borrows semantic brickstones from the record when describing the factual part of the crime in the summons. The chain
of the legal whispers is thus one of the major causes of the occurrence of re-transformations.

However, a distinction between transformations and re-transformations demands a firm and reliable criterion. It is complicated to pinpoint the performance of an "initial" transformation. One of the factors which should be taken into account is that the defendant him/herself may transform his/her account under the constraint of self-justification (rhetorical aspects, the selection of information and its ordering). The distinction between transformations and re-transformations is therefore rather arbitrary, so that we will further abstain from it.

1.8 Conclusions

In line with our pragma-linguistic approach, we have highlighted legal-discursive issues such as the role of protocols and procedures, the transfer of interpretations between legal agents, the dynamic exchange between the written organisation of the legal discourse and its interpreters, and the discursive transformations of the reported everyday reality.

Legal-institutional protocols and procedures are decisive for the expropriation of the reality of the individual: because of their predetermined structure, the individuality of experience is "translated" into an instance of a general institutional class. Furthermore, protocols and procedures preserve the stability of the legal institution by immunising it from original, "irrelevant" or uncodifiable information. Finally, protocols and procedures facilitate a routinised transfer of information between the legal agents.

Despite of the legal-institutional objectification of its information-processing, the different stages of the criminal procedure and the different role-descriptions of the legal agents function as discursive filters which bring about the screening and channelling of reported facts. Legal agents are those who infuse life into the heavily emphasised legal archive by interpreting legislative texts and police records, and by translating reported facts and decisions into the language of morality. In other words, they are the living medium of the law which widens or tightens the perspectival gap between laypersons and professionals.
The active interpretive character of a variety of mediating legal tasks supports our assumption that information is either mistakenly or deliberately transformed when it passes through a series of "serving-hatches". These transformations do not change the reality as such, but the discourse which is supposed to refer to that reality. In the next chapter we will therefore remove the debate concerning the nature of transformations from a presupposedly unmediated contact between law and reality to a presupposedly mediated contact between discourses and discursive stages. Furthermore, we will reconsider the question whether legal-discursive transformations are to be considered as interpretive "mistakes" or as interpretive "strategies".
NOTES CHAPTER 1

1. The asymmetry of knowledge and influence or control among suspects/defendants varies mainly according to their experience with the court and its procedure. See Bottoms and McClean (1976: 55-77) and Brogden (1982: 49-73).

2. Not dealt with here is the distinction Bernstein made between elaborated and restricted codes; elaborated codes being formal and context-independent, restricted codes being informal, intimate and context-dependent (i.e. Peter Trudgill (1984 (1974)): Sociolinguistics. London, Penguin Books: 51). On the basis of the distinction between elaborated and restricted codes, Carlen (1976: 103) argues that magistrates have the ability to simultaneously switch codes and reinforce consensualised meanings. The distinction between the codes is however controversial; critics note that the analysis is concentrated on syntactical aspects of the language (no attention for semantics); it abstracts from particular social contexts; and its conclusions with regard to cognitive capacities are based on normative prejudices (i.e. Jan Lenders, Harrie Hazeland & Michel van Nieuwstadt (1978): Taal, arbeidersklasse en ongelijkheid. Amsterdam, Van Gennep: 41f).

3. Code: A 1.08; the original Dutch transcript is as follows:

   21 R nou, 't is |
   22 R ruim twee keer zoveel hè? als mag 0.5 is het |
   V (3.9) |
   23 R maximum. |
   ____________________________________________________________ |
   38 R ja: (1.0) hh maar eh, ja u weet toch dat u ehm.. niet |
   39 R meer mag drinken dan eh: da/dat u dan een/een em |
   40 R hoeveelheid eh. alcohol in uw bloed heeft van nul komma |
   41 R vijf. en dat gaat heel erg snel. |
   V dat weet ik niet. |
   ____________________________________________________________ |
   80 R maar ja.u had ook |
   V /hij begint te/ |
   81 R te (.) veel (.) (1.2) want/ want nul komma vijf/dan eh |
   V is te veel. |
   82 R mag je niet meer dan twee glazen bier hebben. |

4. (Dutch) Road Traffic Act = Wegenverkeerswet (WVV)

5. The maximum amount of alcohol in Great Britain is fixed at 0.8 milligram. There are current discussions to fix this rate at 0.5 in the near future.

6. Within this particular trial, the defendant is supported by an interpreter, but his Dutch is well-advanced enough to answer the judge's questions. The interpreter therefore remains on the background in case problems arise. It is common that if the defendant does not master the Dutch language at all, the interrogation does not take place without the interpreter (Article 306 Dutch Code of Criminal Procedure). The interpreter is under oath (Article 307 Dutch Code of Criminal Procedure).
7. In some criminal trials, the factual discourse is of less importance than the moralistic discourse. Examples are the English Magistrate's court and the Dutch "politierechter" (see Appendix No. I); factfinding in these lower courts is less complex, because they deal predominantly with petty crime. These trials carry an admonitital function, which is realised in the confrontation of the defendant with the inaccepatability of his behaviour. The aim is to address the defendant in his/her aspirations to become a "normal" citizen again (Sauer and Pander Maat 1989: 131). Admonitions may take the form of morality plays, degradation ceremonies and ritual or symbolic punishment (Garfinkel 1956; Danet & Bogogh 1980: 59).

8. For example, if one continues to speak of the idea that "(...) all procedurality will filter all materially relevant factors (...)" (Csaba Varga 1989a: 3), one apparently adheres "he view that procedurality merely subserves the efficiency of th\institutional qualification of the everyday facts. This view do however not necessarily tolerate the idea that institutions create reality by means of the imposition of procedures and protocols.

9. "Social events are apparently as incomprehensible as natural events. They seem to have the same order of importance or unimportance. They seem merely to have occurred, and their importance seems to be indistinguishable from the fact that they were recorded. In fact, it seems that their importance consists of nothing other than the fact that they were recorded." (White 1981: 8). Garfinkel holds that "(T)he reproduction of institutional settings and the accounting practices through which they are constituted is an elementary and fundamental fact of institutional life." (in: Heritage 1984: 229); "Any setting organizes its activities to make its properties as an organized environment of practical activities detectable, countable, recordable, reportable, tell-a-story-aboutable, analyzable -in short, accountable." (Garfinkel 1984: 33).


12. The term "legal whispers" -also the title of this dissertation- is explained in the general introduction.

13. This is not to say that the forensic discourse is composed of linear decision-making processes. Besides, a central authority which from above regulates the actions of all those agents involved lacks as well. It is therefore also wrong to characterise the forensic discourse as a hierarchically organised discourse. Rather, as O'Leary and Newman (1970: 100, quoted in Bottomley 1973: 219) state, the criminal justice system "is literally composed of many sub-processes for dealing with different types of offences and different types of offenders."

14. Statistical surveys show that the immediate detection of crimes by the police is attributable to a myth. The police play a relatively marginal role in the actual discovery or detection of crime on the basis of suspicion (Bottomley 1973: 8; McCabe & Sutcliffe 1978: 4;
It is predominantly the public (i.e. the victim) who reports the crime to the police (Chatterton 1978: 47). Similarly, the "non-discovery" of crime mainly depends on the public as well. An influential factor is that the public is reluctant to or does not report the offences it witnesses to the police (i.e. Bottomley 1973: 14; Box 1981: 62). This is often due to a lack of belief or confidence in the police: "The police won't do anything about it anyway." In other occasions, the witness belongs to a sub-culture in which some crimes are tolerated and others not (Bottomley 1973: 14). Crimes such as drug abuse, child molesting, wife battering or tax evasion are often not reported out of sympathy with the culprit or because of fear of revenge. The public itself is therefore a far from negligible pre-selection filter (Snel 1977: 13).

15. A vast amount of time of the police officer's job is actually spent to administrative tasks; see Graef 1989: 150; Herren & Bortz 1976: 313.

16. A position in between the police and the public prosecutor in the Dutch criminal justice system is that of the rechter-commissaris, which resembles the French "juge d'instruction" (examining magistrate) who examines the evidence resulting from police inquiry (especially when the case is serious) and discloses the facts in issue.

17. "W.v.Sv." is an abbreviation of "Wetboek van Strafvordering", which is the Dutch Code of Criminal Procedure.

18. The Dutch counsel is called "advocaat", which resembles the position of the advocate in the Scottish, and that of the barrister in the English and Welsh legal system. "Lawyer" and "solicitor" are considered to be less accurate translations.


20. Reijntjes (1980) notes that the Dutch principle of immediacy is resembles the Anglo-American rule of best evidence, or the principle arranged under the West-German 249 St.P.O. (one is obliged to read out the documents during trial) and 250 St.P.O. (that what has not been read out, announced or observed during trial may not be used as evidence). According to the West-German 253 StPO (StPO: "StrafProzeßOrdnung", the law on Criminal Procedure in West-Germany) the chairperson can read out the relevant parts of the police record from testimonies, when the witness or defendant declares an inability recall an event, or when a contradiction with a previous statement emerges during the trial which cannot be solved without interruption (Banscherus 1977: 15f).

21. Displayed information is being evaluated, which is the "homiletic function of court" (the addition of commentary) (Nelken 1983: 159).
22. Carrión-Wara (1989: 68) describes the dossier as being determined by an interdiscursive model, which forms the cross-section between a pragmatic dimension (judging actions of subjects according to the code) and a cognitive dimension (judgements on the "being" according to the procedural theory).

23. The summons has to be distinguished from the so-called 'warrant', which is an authorisation to arrest the suspect.

24. In England and Wales, i.e. in the adversary system, the issue of the summons belongs to one of the tasks of the justices' clerk (Baker & Dodge 1981: 46).


26. The summons in England and Wales contains the complaint or the information, which is similar to the charge in the Dutch summons (Baker & Dodge 1981: 69).

27. "The transformed content of the record lends itself more readily than the original to various kinds of social scientific analyses on the assumption, of course, that there exists a defensible correspondence between the transformed account and the way the information was meant in its original form." (Garfinkel 1984: 190f).

28. Foucault characterises this movement as "(...) the passage from the totality of the visible to the over-all structure of the expressible (structure d'ensemble de l'énonçable)." (1973: 114); the "(...) implicit labour of language in description (...), authorizes the transformation of symptom into sign and the passage from patient to disease and from the individual to the conceptual." (id: 114).

29. In this context, Herren & Bortz (1976: 315) quote a famous record fragment: "I admit that I have taken and worn the clothes that belong to the farmer's wife and which were found on me. Therefore I committed a furtum usus." The source of this statement is supposed to be a 15 year old herdswoman.

30. The interrogation and the recording of the obtained information often run parallel. This may happen in different ways (Fischer 1975: 178f): either the interrogating officer formulates a statement and types simultaneously, or otherwise the interrogating officer asks a new question and writes it down simultaneously. Yet another possibility is that the officer starts with the writing down of the statement before the interrogated person has finished it or the interrogated person starts a new statement while the officer is still writing (Banscherus 1977: 85). The fact that interrogation and information are simultaneously performed is a source of potential disturbance. The noise of the typewriter may lead to problems of hearing (id: 85), which results in recording-
mistakes.


32. The original German text sounds (Banscherus 1977: 225):

Vernehmungsgespräch

B: Ist ihr Freund auch Student?
A: Nein.
B: Was macht er denn von Beruf?
A: Der ist Praktikant im Krankenhaus XY.
Von Beruf Masseur und ...++

Vernehmungsprotokoll

Es handelt sich um den Praktikanten (...) im Krankenhaus XY.

33. The original German text sounds (from: Banscherus 1977: 230):

Vernehmungsgespräch

B: Hat er das selbst bemerkt, daß da jemand den Koffer genommen hat oder hat, oder haben Sie ihn oder andere Passanten darauf aufmerksam gemacht?
A: Ja. Andere Passanten haben ihn auch darauf aufmerksam gemacht, aber er hat es auch selbst gemerkt...
B: Mhm. Haben Sie auch irgendwie was gerufen oder gesagt?
A: Nein.
B: Nicht?! Weil das alles so schnell ging warsscheinlich.
A: Das alles ging blitzschnell.
B: Ehm, ehm.
+++ 

Vernehmungsprotokoll

Der Herr, dem der Koffer gehörte, (...) rannte nun sofort hinter dem jungen Mann her. Nach ca. 5 Minuten kam der Herr zurück und sagte, daß er den jungen Mann nicht mehr habe einholen können.

34. The original German text sounds (Banscherus 1977: 234):

Vernehmungsgespräch

B: Haben Sie denn versucht, 'ne Arbeit zu kriegen?
A: Ja, hab' ich schon versucht.
B: Wie sind sie denn da in den letzten vier Monaten über die Runden gekommen?

Vernehmungsprotokoll

Trotz vielfacher Versuche, eine Arbeit zu bekommen, ist mir dies nicht gelungen.
Vernehmungsgespräch

B: Hatten Sie dann keine Angst, daß er Sie erkennen würde?
A: Nein, an sich nicht.
B: Der hat Sie selbst aber nicht bemerkt, als Sie da ankamen?
A: Nein, an sich nein.

Vernehmungsprotokoll

Ich wollte ihm die Tasche/Tüte von hinten entreißen. Ich hatte keine Angst, daß der Betreffende mich erkennen würde, denn persönlich war ich ihm noch nicht begegnet. Ich hatte ihn bisher immer nur aus der Ferne gesehen.
CHAPTER 2: THE MAKING OF THE LEGAL FACT

2.1 Introduction

The legal discourse is a discourse which has to establish the truth of certain facts. In our case -since we discuss the forensic discourse- we are interested in the true establishment of the occurrence of crimes. In making that choice, we find ourselves especially situated in a domain of problems thrown up by the so-called "context of discovery". Often, this "context of discovery" is equated with "finding the facts", a term which, as it will turn out throughout this chapter, is not only unfortunate but also misleading (i.e. Nerhot 1990: 56).

The epistemological problem -which focuses on the conditions which guarantee the truth of our knowledge and beliefs about the world- forces us to be critical about this "factfinding process" which takes place within the legal discourse. As we have stated in the previous chapter, the legal discourse gets access to reality or "the world" by observation, but much more frequently through witnesses who assert their observations. Such implies that the legal discourse avoids reliance on other methods than observation. "Reality" can only be truly "reconstructed" when the reconstruction -itself a matter of communication- is based on a registration of crime via the senses. We could, in that sense, find a strong resemblance between the logical positivist paradigm and the doctrine of legal factfinding. However, a strong discrepancy between the paradigm and the doctrine rests in the opposition between theory and practice: the logical positivist paradigm excludes certain (e.g. metaphysical) statements from its verification procedure, an exclusion untenable in the realm of a normative discourse. Section 2.4 will discuss a few examples in relation to the logical positivist tradition (section 2.3) which demonstrate that observations and confessions, entailing registrations by the senses, are not always as reliable as we are often made to believe.

"Facts" are the subjects of exchange in processes of communication. They are therefore -if they are 'real' and not conjured up altogether- defenceless. "Facts", like "texts" do not have an independent will. First of all, facts are the correlates of the direction of our interpretation. They result from the questions we ask about reality.
These questions are embedded in contexts of relevancy. Therefore, facts are left unnoticed if they are not relevant to us, unless someone brings them to our attention. The "nature" of facts may be pretermined by the nature of our question, theory or hypothesis. In other words, the contents of the fact may be manipulated due to a desire for a certain outcome (2.6; 4.6). Such a view shatters the unity between fact and world (2.7). Statements about the world do not correspond with states of affairs, but cohere with our anticipations and interpretations (i.e. Frank 1949a: 100). This idea is the red line culminating in our hypothesis of narrative coherence as progressive justification (chapter 4).

Another important point concerns the linguisticality of factual assertions. Let us remind that Frege defined true propositions as facts and that Russell, in his introduction to Wittgenstein's *Tractatus Logico-Philosophicus*, claimed that a proposition is true if it *corresponds with* a fact: asserting or denying facts is the essential business of language. "Facts" thus need to be transmitted by means of propositions. However, the legal discourse transmits facts by means of a *natural language*, and not—as many still imply when discussing the process of legal qualification—by means of a semantically closed, well-defined, logical and a-temporal system of propositions. Even if this were the case, then the question which must be raised is whether the (discursive) transmission of established legal facts implies the desired neutrality, objectivity and truth.

So far, we have tacitly assumed that facts are not necessarily 'true' or 'sound' linguistic reproductions of reality. What should follow immediately after this assumption, is the dubious question whether the legal "factfinding" discourse has a reproductive nature or not. "Dubious", because although we may claim that facts are the products of our interpretation, should we therefore rigourously reject the term "reproduction"? When a film is a reproduction of a novel, do we then imply that the film is a copy of the contents and structure of the novel? We don't. We assume that the film is a reproduction of the novel, in the sense that the message of the novel is maintained. But we also assume that episodes of the novel are omitted because the medium of the film allows for less discursive space. At the same time, we assume that the film adds to the novel, especially where it concerns the evocation of visual imagination. Strictly spoken, the term
"reproduction" does therefore not exclude elements of "productive imagination".

The thesis which underlies this chapter is that paradoxically, although the legal discourse seeks protection against a distortion of the truth, it is particularly vulnerable to it. The arguments for this thesis have been stated previously: the legal discourse is a natural language discourse; the language of the legal discourse is supposedly descriptive, but fails to rule out elements of creativity (i.e. Legault 1979: 21; 23); established 'facts' are passed from the one to the other legal agent to the effect that reported facts are subjected to human error, misunderstanding, goal-oriented selection, translation and interpretation. Furthermore, the vulnerability of legal 'facts' may be linked to attempts of manipulation in view of a desired increase of the rate of successful convictions, or in view of a desired coherence between what we will tentatively call the "factual" and the "normative" legal discourse. The latter remark relates to the "squeezing of the facts" in the process of fitting them into an interpretive pattern. Another vulnerability is directly related to this process of squeezing and modifying: "facts" -i.e. observed or communicated states of affairs in the world- are being evaluated against the background of a normative and goal-oriented discourse. The qualification of the fact is therefore not simply a matter of attribution or addition of a legal meaning to the former meaning of the fact. Rather, as we pointed out in chapter 1, the fact is being transformed by virtue of its transposition of the one to the other discourse.

As we have said above, this chapter intends to focus on the establishment of legal facts in relation to criminal evidence. When "evidence" is being discussed, we are not primarily interested in rules of evidence (although occasionally there may be talk of it), but in the communication of evidence (i.e. Lachmayer 1988: 275).

2.2 Dichotomies

The relation between fact and law has traditionally been conceived as a dichotomy between respectively "the concrete" or "the given" and "the abstract" or "the constructed" (Nerhot 1988: 322). The world of the facts has been equated with reality, while the law has been conceived as the organisation of that reality (id: 317). Hence, making the law
means reflecting reality; it means the "picking out from the raw materials of social relations the normative principle which, once crystallized, has in future to govern those relations" (id: 317). Law is thus conceived as "a general, abstract construction, emerging from a natural order, from a 'given', that is immediately perceptible, (...)" (id: 318).

The idea that law and social reality are two separate entities nourishes the perception of law as a merely descriptive body. A rather worrying question is whether that legal description ('representation', 'depiction') reflects that social reality objectively or accurately. An opposing view is that if law describes reality more than anything else, then it has the power to create and to modify that reality (Nerhot 1988: 327).

However, a view which holds that law changes reality still incorporates a hierarchical dichotomy between a dominant law and a subordinated reality. In order to circumvent this traditional opposition it is necessary to pursue an alternative view which radically rejects the existence of a priori frontiers between law and reality, and to substitute the dichotomy with the claim that the two—if they are still two—are an 'organic' unity (Nerhot 1988: 327).

It takes one step to claim that the definition of the dichotomy between law and fact is a problematic one (Nerhot 1990a: 51). However, in our view a second step is necessary. The rejection of this dichotomy is not radical enough if we maintain to say that facts are being determined by the (legal) rules (i.e. Nerhot 1990a: 58), even if we regard the rules as the result of the interpreter's activity (Nerhot 1990: 197). Although there is nothing wrong with saying that legal rules provide in the possibility of a prior interpretation (in the sense that facts are being chosen on the basis of the rules, and that these facts are being read according to the (meaning of) these rules (Nerhot 1990a: 58, 65)^2, a certain level of dissatisfaction must remain.

The idea that legal-dogmatic rules determine the selection and the meaning of facts fails to take account of the possibility that facts may be selected, interpreted or qualified according to other than legal-normative interpretation schemata. The attribution of an exclusive position to legal rules as the determinators of the meaning of facts implicitly seems to suggest that the legal discourse is detached from other forms of discourse, i.e. that it does not bring
into the practice scientific, moralistic, or everyday-like interpretations. Varga seems to put forward a similar suggestion, when he says: "For in law, any 'establishment of fact' gets a normative quality by being constituted in the normative process" (1987: 4). This again entails the assumption that the legal discourse is sealed and secluded from -strictly spoken- non-legal interpretations, and furthermore, that the legal discourse has a circular character. In contrast, John Jackson (1988: 63) claims that an engagement in legal discourse is not insulated from an engagement in factual and moral discourse.

A counter-question against the idea that the legal discourse is "open" rather than "closed" as far as the qualification process of facts is concerned, is whether it is possible to perform that qualification without help of legal rules at all. Wróblewski has claimed that it is possible both ways (1989: 7): facts may be determined "descriptively, positively and simply (e.g. driving a car on a road with the speed over 100 kmh (...), or "evaluatively, negatively and in a relational way (e.g. a morally harmful omission contrary to the imposed legal duty)." When the existence of facts is determined "simply", "there is no need for any assessment of the relation of this fact to a legal rule". (id: 7), whereas the relational determination of a fact requires the fixation of a consistent relation with a legal rule (id: 7).

Thus, in claiming that facts may be established without necessary assessment of the rule, Wróblewski has introduced yet another dichotomy, namely between "descriptive" and "evaluative" (Beck 1989: 17-28). Beck regards Wróblewski's distinction as misleading, and for the right reason: although a concept may not be loaded with legal connotations, it is still only relevant from what is "understood to be the purpose" of a legal rule (id: 25). Although very much in agreement with Beck, it must be said that the "understanding the purpose of the legal rule" is in itself a far from negligible interpretive process. The concretisation of the "purpose" of the rule can only come about when they are being interwoven with the facts. In other words, although the facts may be interpreted in the light of the rules, the rules only gain their meaning and application width when being entangled with a concrete case. We would argue, indeed much more in line with the interpretive strategy outlined in philosophical hermeneutics, that between the text of the fact and the text of the law there exists a
dynamic, perhaps dialectic, relation, undertaken by agents within a living legal discourse.

From this position, another threshold in the idea that "rules determine" the facts can be identified, namely that there is a play with the assumption that rules are there prior to the facts, or, the rules are the antecedents of the facts. This view tends to coincide with the position that the legal rules form a static body while legal facts are infinitely alterable under the many combinational operations of the law. It also tends to characterise the qualification of the legal fact as the result of a dominant legal nomenclature, in which a normative-legal descript is simply added or attributed to the 'naked' fact. Regarded from an alternative perspective, facts are being understood and explained other than just 'named'. Although we are aware that this is perhaps a too glamorous and positive approach of the rigour with which the criminal justice system may frame reality within its own parameters, it should be borne in mind that interpretation underlies even the simplest qualification-process. Hence the idea that facts are determined by rules does not sufficiently compensate for the poverty of a semantic account either.

The position which favours the view that facts are determined by rules leaves three major positivist tenets intact: 1) on a syntagmatic level of interpretation, the interpretation of the legal rule X always precedes that of the fact Y (asymmetric chronological order); 2) again on a syntagmatic level of interpretation, the formulation of the legal rule X determines the formulation of the fact Y; this leads to the (wrong) idea that facts Y are simply labelled, stamped or classified according to normative rules X; 3) assumptions 1 and 2 feed the 'subsumption-machine': the legal rule X (static, prior to the fact, meaning is more or less fixed) as the major premise determines the fact Y (undetermined) from which a normative conclusion Z must follow.

This syllogistic operation as it is even by more radical authors attributed to the process of qualification entails also an ideological function. It is assumed that subsumption is self-evident and that, if the rules are indeed found to correspond with the facts, the qualification needs no further motivation, explanation, justification or argument. This seems unrealistic however: the process of rule application involves continuous justification of the way the facts have been established, namely by anticipatory taking recourse to underpinning reasons (4.6).
But a ticklish question remains: are facts subsumed? Is their legal or evaluative status a simple derivation from normative descriptions? Is the syllogistic formulation of a legal decision a true and accurate representation of the reasoning-process which has taken place? (i.e. Probert 1961: 236).

It can hardly be denied that indeed - when we read a judicial decision - the formulation of a normative legal conclusion follows neatly from the many considerations taken into account. But legal decisions are the product of discursive labour, in which the 'loose ends' have been suppressed, the remaining sound arguments ordered according to their weight and priority, the considerations translated in the archaic expressions of the law; all that in itself contributes to the legitimation of the legal decision. But meanwhile however, it conceals the complicated 'black-box nature' of the subsumption. It mystifies the influence of discursive filters (id: 243) and it suggests that judges were ever in touch with the bare facts rather than with statements prepared by others. We will return to the question of subsumption in section 2.8. Most important at this stage is to note that the statement "law and fact are an organic unity" shows a flaw as long as a dichotomy between the two entities is maintained, and as long as no objective discrimination can be made between rules as the starting-points (premises) of the interpretation of facts and the rules as the desired consequences (conclusion) of a legal decision.

In the realm of the traditional fact-value distinction, we can either speak of facts and qualified facts, or of "Tatsache" (the so-called naked fact) and "Sachverhalt" (the so-called fact of the case), or we speak of "brute facts" and "institutional facts" (Anscombe 1981; Searle 1977: 63-66). The latter distinction bears relevance for the subject of the institutionalisation of facts. Anscombe takes recourse to an economic example. The event of "going to the grocer and buying something" implies that a bill will be handed over to the client. She says: "A set of events is the ordering and supplying of potatoes, and something is a bill, only in the context of our institutions." (Anscombe 1981: 23) It follows that when I am not in the official, institutional position of selling a good to someone, I am not entitled to write a bill, or at least, the bill I write is worthless. Anscombe seems to suggest that a grocery-event can be described without
reference to the economic event at all. Such would be equal to describing the grocery-event as a "brute fact".

However, Weinberger (in: MacCormick and Weinberger 1985: 28), whose remarks on law are an elaboration of Anscombe's theme, notes that normative and regulative patterns are inherent to social reality. Institutionalisation has 'as it were' 'penetrated' social reality, which makes it untenable to perceive social reality by means of immediate observation, and furthermore, which makes an objective distinction between everyday and institutional reality far from conceivable. Instead of maintaining the dichotomy between "brute" and "institutional" fact, Weinberger proclaims that brute facts are constituted by institutions: "brute" facts are established according to institutional co-ordinates, and on the basis of institutional rules and definitions. "Brute" facts are therefore entailed by and relative to "institutional facts" (1985: 30; for a discussion see Peczenick 1984: 294ff).

But this position still sticks to the underlying assumption that we are capable of drawing an objective distinction between "brute" and "institutional" facts. It also presupposes the dominance of institutional fact over brute fact. If this hierarchical relation were valid, then where does the hierarchy find its origin? How do we know whether some parts of reality are ruled by conventions and other parts not? What propels the institutionalisation of the brute fact? Does the institutionalisation of a "brute fact" mean that some "surplus meaning is added, or that it is put into another context? (f.e. Varga 1989: 17). Are institutional facts outcomes of conventional classificatory systems determined by constitutive rules "that say x counts as Y in context S" (Varga 1989: 15)? Is the transformation of "brute" fact into "institutional" fact merely a matter of "anticipating normative consequences and sanctions (id: 15)? Is the difference between brute and institutional facts continuous in the sense of 'more or less'(id: 15)?

Such questions beg a far more fundamental question, namely: has the newly introduced and widely accepted distinction between brute and institutional facts sufficiently elbowed out the positivist dichotomy between fact and norm, or that between descriptive and evaluative statements? Has it superseded the hierarchical position of norm over fact? Has the introduction of the distinction not simply provided the subsumption model with a more acceptable overcoat?
2.3 Excursion 1: Logical Positivism

"We learn facts by the senses; (...)"
Jeremy Bentham (1825: 10)

The legal rationale on evidence and proof embodies a curious epistemological bifurcation. On the one hand, the rationale relies on the epistemological assumption that facts may happen and exist without necessarily being established and verified through human observation (i.e. Twining 1985: 13), whereas on the other hand, the rationale relies on the assumption that facts are true only when asserted and iterated in the form of a statement performed by the person who claims to have observed ('witnessed') the fact ('event') through the senses. From the point of view of the law, we speak of "fact" in the first instance, and of "evidence" in the second. The legal "factfinding" procedure can only prove facts to be true if suspects or witnesses verify their claim to have observed something (Frank 1949: 44), although it may hold a belief that other facts - facts which were not witnessed - may exist as well. However, the existence of a fact does not imply that it is also true. Lachmayer (1988: 278) subsequently states:

"Cependant, la déposition de témoin est perdue si elle n'est pas enregistrée au procès-verbal. Ce n'est que par la transformation du parlé en écrit que la déposition du témoin devient partie constitante du dossier (quod non est in actis, non est in mundo)."

'Facts', observed by suspects and witnesses, therefore need to be transformed into assertions ("I am guilty"), and it is only by virtue of their written registration that they are taken to be true (confirmed by a signature at the end of each statement). A linguistic mediation is thus needed for stating the facts. It is presupposed in law that it is possible to substitute facts for statements (Varga 1989a: 2). The assertions of the parties and their concordance with the facts of the evidence are regarded as more important than the question whether facts are effectively true or not (Lachmayer 1988: 276). Departing from the common sense idea that facts are being grasped immediately (self-evident proof), the law only takes account of those facts which are convenient and meaningful in its own eyes (Landowski 1989: 35).
Bentham (1825: 10) made a distinction between *experience* and *observation*: "Facts, of which I have the perception within myself, are the subjects of *experience*, in the strict sense of the term; facts, of which I have a perception as passing without myself, are the subject of what is properly called *observation*." He seems to suggest that "experience" is a more subjective, personal or individual matter than "observation." However, the distinction tends to collapse under the weight of definitional ambiguity, which will become clear from this brief excursion into the thoughts of logical positivists. Although one of their crucial epistemological categories was that of "experience", their ideas referred back to Comte, who relied on the category of "observation".

The main purpose of this theoretical excursion is to contrast the ideas of the logical positivists with the central building-blocks of the legal "factfinding" procedure. Apart from the discovery of some striking similarities, such as the strong reliance on statements of subjective experience (i.e. Reijntjes 1980: 157), the excursion will clarify that there are various theoretical squabbles when discussing notions of perception, observation, experience and the assertions thereof.

The word "positivism" in *Logical Positivism* essentially refers to Auguste Comte's definition of positivism: all knowledge is (and should be) derived from observable phenomena. Comte hails 'real observation' as the only base of real accessible knowledge (1974: 18). Every proposition which is not in itself reducible to the simple expression of a fact cannot offer any real or comprehensible sense (id: 19). Hence all imagination should be subordinated to observation. It was claimed to be the "failure of the kantian programme" (a priori knowledge and analytical statements) which inspired the logical positivists to take recourse to Comte's positivist principles.

In his first book "*Language, Truth and Logic*" (1976 (1936)), Sir Ayer explains that the school of Logical Positivism is "phenomenalistic". A phenomenon is a thing that appears and which is perceived or observed. Individual facts are perceived by any of the senses or by the mind. The sense or the mind take note, not of facts, but of immediate objects of perception (as distinguished from substance, or a thing in itself). Consequently, an important tenet of the logical positivists is that we never directly perceive material objects, but always "sense data". In this hides a major difference between correspondence theories of truth
and the logical positivist school, for that the correspondence theory entails the assumption that statements are immediate reflections of observations. However, this distinction wavers when we take into account the common criticism at the logical positivist idea, namely that the perception of sense data by definition presupposes the existence of objects, events or states of affairs in the world. Furthermore, the correspondence theory of truth and the logical positivist school are linked by the hypothesis that the objectivity of experience is regarded to be equivalent with the truth of its assertion. We will briefly return to this equivalence at the end of this section.

Let us for the time being take the perception of sense data as a special position which makes the School of Logical Positivism -also referred to as "The Vienna Circle" or as "Logical Empiricism"- a distinctive doctrine of sense perception. The base theorem of Logical Positivism is the epistemological principle that knowledge can only be gained by experience (Hegselmann 1987: xi). Experience is constructed through perception. Hence all the ideas about the world are based on data of direct immediate experience. This corresponds to doctrinal rules of evidence, which tolerate testimonies which are based on individual experience, but which exclude hearsay evidence (that which has not been personally perceived, but what has been communicated to him/her by someone else).

Data of immediate experience can be described in so-called protocoll sentences (basic sentences), which can be logically analysed. A central problem of logical positivism was the characterisation of the relation between these basic sentences and expressions about reality ("Wirklichkeitsaussagen").

In his "Sense and Sensibilities" (1962: 47), John Austin criticises the logical positivists for not properly defining what "perception" is. He agrees with Ayer that perceptions refer to 'a reality'. But Austin wonders whether a distinction between real and not-real can possibly be defined (Austin 1962: 73). He also raises the question why reference to a material world is by logical positivists said to be less reliable than to a world which is perceived through the senses (id: 131).

The introduction of "Logical Positivism" (1978) and a chapter on perception in "The Problem of Knowledge" (1984), are attempts of Ayer to make up for this structural negligence. The only hard data we have, says Ayer (1984: 84), result from the evidence of our senses. Not the
facts, but the sense data are directly perceived (id: 87). Ayer explains that our perception of sense data is a fully individual enterprise. Other people cannot sense my sense data ("(...) objects appear differently to different observers (...)"; 1984: 87), neither can they share my thoughts or feelings, nor verify the statements that I make about them. We inhabit entirely different worlds. But, says Ayer, "(W)hat can be verified, however, is that these worlds have a similar structure." (Ayer 1978: 18f).

Opponents have called these ideas altogether an expression of "multiple solipsism*. But Ayer holds in defence that the "classification of objects (...) coincides with mine" (1978: 19), which means, more concretely, even though sense perceptions are individual, that we share a language with which we refer to objects "sufficiently alike" (id: 19): "(...) we have, as it were, the same canvas which each of us paints in his own private fashion." (id: 19). These are the propositions of intersubjective meaning, which describe the structure of the material world. If we were to transpose this discussion to the legal "factfinding" procedure, where different witnesses claim to have perceived or experienced different aspects of the same event, we could be satisfied too quickly by borrowing the logical positivist explanation: perception is in all cases individualistic, but these individual perceptions are tuned in onto each other ("coincide") by means of sharing intersubjective propositions about the world. But how would a logical positivist account for contradictions between testimonies if they are yet all bound to be true because they are based on individual experience? For, in the eye of the logical positivist, a statement is true if it is based on sense perception.

Austin's skepticism, which we mentioned above, bears relevance for the verification of empirical statements, which has its antecedent in the writings of Schlick and Carnap.® The verification of empirical facts should, according to Ayer, be a verification of a linguistic assertion about our sense-contents. The verification of a linguistic assertion which directly refers to empirical reality is therefore inadequate. Strictly speaking this would mean that saying "I saw that Smith kills Jones" can be verified, while saying "Smith killed Jones" cannot. With Austin we will see that the distinction between explicitly and implicitly asserted sense perceptions does not necessarily bear implications for the meaning of propositions, or, more importantly, for their truth-claim (section 2.4).
The verification principle, which ought to be distinguished from the criterion of verifiability, says that the sense of the proposition is the method of its verification (Hanfling 1981: 24). It is thus designed to answer the question what the meaning of an expression is. Derived from this is the idea that we can understand the sense of a proposition only if we understand the procedure of establishing its truth. If one does not know this procedure, one cannot understand the proposition either. The verification principle says further that "unless a sentence can, at least in principle, be verified (i.e. for its truth or falsity), it is strictly speaking meaningless." (Levinson 1987: 227). Most of our daily expressions are consequently at least according to this criterion "meaningless".

Metaphysical expressions or value-statements do not pass the verification test for that they cannot be verified; metaphysical statements express the feeling of the other, and experience which is not personal cannot be verified. Nor can statements which are expressed in a mathematical or formal language be verified for that they lack factual content: they can only be true by means of conventions. However, a comparison of these ideas with (Dutch) rules of evidence easily demonstrates that within the criminal procedure, one must take recourse to legal fictions (for example presumptions), causality relations, psychological circumstances (the mens rea), non-factual inferences from observations or professional interpretations of and opinions on the facts (expert-witnesses) in order to prove a fact (or the facts). Proof therefore goes beyond the facts which are immediately perceptible sense data (chapter 10).

Hence, although for the law the meaning of an empirical statement is the equivalent of "true experience" -in which propositions of perception (and thus of experience) are the ultimate points in the verification process- the reasoning about the facts is unavoidable for the construction of a more complete picture which reveals the intentional and causal links between those facts.

Hanfling describes the logical positivist solution for the verification of statements as "the leap out of language", because the method relies either on ostensive definitions or on our available pre-knowledge of the meaning (Hanfling 1981: 18). In other words, there is no meta-language with which we can check the actual correspondence between sense-perception and the assertion about it. Wittgenstein argued at some point that one cannot be certain of the complete
verification of a proposition, for that "words oscillate between different meanings". Ayer speaks accordingly of strong and weak verification. The later Wittgenstein has shown that knowing the meaning of a sentence primarily involves the ability to understand linguistic rules.

An important criticism of the verification principle is that the truth or falsity of a proposition can never be decided on the basis of its meaning alone, but that the meaning of a proposition —and consequently its truth— always depends on the context in which we produce the proposition (Austin 1962: 111). Furthermore, the concern with the verification has been relativised. Austin wonders whether we actually want our propositions to be verified: where does the desire come from (id: 118)? But that is a question raised by someone who did not have the specific truth-constraint of the legal discourse in mind.

Habermas has made a distinction between the objectivity of experience and the truth of assertions. Having in mind the double function of the speech act (see section 2.5), Habermas speaks on the one hand about an a priori framework of experience, in which experience can be gained, shared and identified (correspondent with the propositional content of the speech act; objectifying attitude) and on the other hand about the assertion (containing a validity claim, correspondent with the performative part of the speech act; performative attitude) by means of which this proposition of experience is expressed. Habermas also explains that the main weakness of the correspondence theory of truth is its assumption that facts are equal to experiences. On the contrary, he regards 'facts' as the correlates of theoretical discussions, or stronger, of the consensus achieved about a certain claim on a state of affairs. Assertions are hence not about the relation between reality and assertion, but about the coherent relation between assertions within a certain system (Korthals & Kunneman 1979: 125ff). Aspects of the linkage between coherence and consensus will be further discussed in chapter 4.6.
2.4 Evidence as True Assertion

"The question of fact is decided by evidence. All depends on facts."
Jeremy Bentham (1825: 9)

This statement of 18th century legal philosopher Bentham reveals at least three issues. First of all, it makes clear that a fact or facts are not equal to evidence. Evidence is the *gist*, the *sediment* of the fact or the facts. Such entails isolation of the question of fact and subsequent selection on the basis of its relevance. Secondly, the term "evidence" has a double meaning. Not only is it "factual" in terms of its *content*, it is also a means, an *instrument* in order to prove that a crime has indeed been committed in some or the other way. Its double meaning thus suggests that evidence is not only "factually true", but also "factually most true". The factually "less true" is therefore suppressed or abandoned, whereas that what is considered to be "factually most true" will serve as a rhetoric means to defend interpretations of what really happened. Thirdly, Bentham's statement implies that there exists a *circular relation* between "fact" and "evidence". This may be reduced to the tautology that without a fact there is no evidence, and without evidence there is no fact. The two components determine each other: "evidence", which is a legal category, may be viewed as the qualitative and constitutive filter for the eligibility of facts; "fact", which is a non-legal category, may be regarded as the basis of the contents and direction of evidence.

Most handbooks on evidence discuss the rules of evidence, which determine which evidence and other what conditions evidence may be presented. "Evidence in ordinary speech is the means by which something is proved or disproved." (Andrews & Hirst 1987: 1); it is "something which tends to prove or disprove any fact or conclusion (May 1986: 3). More concretely, evidence is the information which "is put before the court in order to prove the facts in issue." (id: 4). Only the communicated contents of the charge, not the facts, as such have to be proved (Reijntjes 1980: 9; Carzo 1989: 81f).

In the continent, the main means of evidence used to be the confession of the accused. Nowadays the most important means of evidence is the evidence given by witnesses and experts. In this case, the statement of the accused counts in fact as a witness testimony (with the difference that the accused is not under oath and is not
obliged to testify) (Van Bemmelen 1984: 222). The evidence that the accused has committed the crime may therefore never rely on the statements of the accused alone (Article 341-4 Dutch Code of Criminal Procedure; id: 223), neither may evidence be admitted on the basis of just one witness testimony (id: 224). The accused is allowed only to make a statement about the facts and the circumstances as s/he knows them (Article 341-1 Crim. Proc.; id: 222); witnesses testify about the facts or circumstances which they themselves observed (id: 224). Similar to the hearsay-rule in the common law, evidence which is based on what the witness learnt from somebody else is not admissible ("testimonium de auditu") (id: 225). Police records from detectives and information reports from experts may count as evidence as well (Van Bemmelen 1984: 228; Article 344-1 Crim. Proc.). In the Dutch criminal law, there are generally five means of evidence -that is: sources from which something may be deduced with regard to the truth of the charge-, namely the personal observation of the judge (during trial), statements and testimonies of the suspect, witnesses and experts and documentary evidence (Article 339 Crim. Proc; Reijntjes 1980: 127).

Unlike the Dutch situation, confessions of the accused may, in England and Wales, count as the sole basis for conviction. Confessions are different from guilty pleas at the trial or formal admissions (Andrews & Hirst 1987: 455): a confession is "a statement by the accused that he committed the offence, or from which an inference can be drawn that he committed the offence", while an admission "is an agreement by the accused with some fact or facts which weigh against his innocence but does not amount to a complete confession." (Baker & Dodge 1981: 56). The Common Law presupposes that the contents of the confession are true, because the confession is a form of hearsay, and "a statement can only be hearsay if relied upon as evidence of the truth of the matters asserted." (Andrews & Hirst 1987: 457). The burden of proving the admissibility of confessions is on the prosecution (May 1986: 52).

In the past, but also more recently, we have witnessed various miscarriages of English justice in relation to the obtainment of confessions. One of the cases widely known is that of the then twenty-five year old Timothy Evans, who, in November 1949, walked into the police station at Merthyr Tydil in Wales and stated to the police to have put his wife's body down a drain (Woffinden 1989: 22). In a second statement, Evans said that his wife had died due to an attempted
abortion executed by his down neigbour Mr Christie. Not knowing quite what do with these statements, the police questioned Christie. However, this did not reveal anything. After that, the house was searched and the bodies of Beryl and her baby daughter were discovered. Evans was then charged with two murders, after which he confessed. In January 1950 the jury deliberated for 35 minutes and found Evans guilty of murdering his daughter Geraldine. Two months later, Evans was hanged (id: 23). The turning point in this whole episode happened when the new tenant of Christie's (Evans's neighbour) flat discovered three bodies behind the wall (March 1953). A fourth body, the remains of Mrs. Christie, was found under the floor boards. Two more bodies were buried in the backyard near the washhouse. All women had been strangled. Christie plead guilty and confessed to the murder of seven women, including Evans's wife, but never admitted having killed Evans's baby daughter (Sterling 1965). Christie was charged only with the murder of his wife. The case finally resulted in a posthumous executive pardon for Evans in 1966.

A far more recent and politically loaded case concerns the IRA-bombings of two pubs in Guildford (killing five) and one in Woolwich (killing two) in 1974. The "Guildford Four", as Gerard Conlon (the alleged ringleader), Paul Hill, Paddy Armstrong and Carole Richardson have become known to the public, were released in the autumn of 1989, after evidence known for fifteen years, but always suppressed by the police and the authorities, established reasonable doubt concerning the way in which the confessions were made. The influence of drugs and intimidating, uninterrupted questioning (perjuriously denied during the trial by the involved police) are claimed to be the reasons why the four confessed to the bombings. These confessions contained incriminating statements against the doubtlessly innocent "Maguire Seven", who, in the meantime have served sentences for illegal handling of or possession of explosives (the conviction was never quashed, although an inquiry started on March 13 1990). After conviction of the Four it was demonstrated -mainly by campaigners- that their confessions were not only obtained in 'mysterious circumstances', but also that although they were tuned in onto each other by the police, the contents of the confessions showed contradictions and discrepancies (which was then believed to be a deliberate and misleading IRA-trick; Woffinden 1989: 320; Kee 1989: 143f). But more importantly,
involvement in the Guildford and Woolwich bombs was later admitted by the "Balcombe Street Four", while making explicit that four innocent people "are serving massive sentences." (Woffinden 1989: 340). These admissions were suppressed however, and the four were never charged with the two bombings with the argument that the Guildford Four were guilty too. The integrity of the officers from Surrey police came into serious doubt when it was revealed that "three sets of documents had been found which suggested that interviews were fabricated or that the Surrey police did not tell the truth about when certain interviews took place."22 Besides, certain notes which were claimed to have been written down simultaneously, were in fact not. Important alibi evidence from a witness (Frank Johnson) upholding the account of Richardson was suppressed in court by the prosecutor. Evidence has thus been fabricated and four innocent people 'framed' or 'fitted up' by the police. The case has propelled an examination for a change in the law "on the use of uncorroborated confessions" (the May inquiry).23

In 1988, Hassan Khan was sentenced to fifteen years of imprisonment for armed robbery in Birmingham city centre. Yet after two and a half years he was released. The conviction, mainly based on Khan's "confession", was quashed by the Court of Appeal on the grounds that evidence presented by detectives of the West Midlands Serious Crimes Squad was not reliable enough. Khan's alleged confession was given in the police car just after his arrest. No solicitor was present, although Khan had asked for one. The notes were written "by a detective sergeant by torchlight in a moving car", but showed "no signs of the pen being jolted".24 Khan was not given the opportunity to read or sign the record of the last interview. However, he signed "the caution on the first page of the second statement - but on no other pages." According to Khan, "false sheets were written and inserted later in place of the originals, which denied the charges." 25 The West Midlands Serious Crime Squad is currently under investigation for complaints from 66 individuals, 12 of whom were involved in cases before 1986 (like the Birmingham Six).

In section 76 of the Police and Criminal Evidence Act or 1984 (Great Britain), which treats the issue of evidence in criminal proceedings and the conviction and proof thereof, the rule on confessions has been modified, although not radically. Previously, confessions were only
admissible if they were made 'voluntarily' (this maxim was obviously violated in the cases of the Guildford Four and the Birmingham Six). Now, it has been decided by Criminal Law Revision Committee that when a confession is obtained contrary to the European Convention of Human Rights, it ought to be excluded from admissible evidence. Such implies that when the confession is obtained by means of "inhuman or degrading treatment" (Zander 1985: 112) or in consequence of anything said or done which was likely in the circumstances existing at the time (id: 112), the confession should be ruled unreliable. In the Act of 1984, it is ruled that "(T)here must be some likely causal link between the pressure and an unreliable confession." (id: 113).

However, many interrogation techniques, which are less loaded with the use of coercion, may still be allowable under the present rulings. The employment of psychological techniques does not necessarily violate the European Convention, and may therefore still be widely and legitimately used. Psychological tactics embody sophisticated forms of control over human behaviour. Zimbardo (1967: 25) mentions the technique of perceptual and judgemental distortion which aims at minimalisation of the seriousness of the offence ("by allowing the suspect a face-saving "out") or at misrepresentation or exaggeration of the seriousness of the crime. Misrepresentation can take "several forms", such as 'knowledge-bluff' (the interviewer pretends to know more about the crime in question than s/he does), the 'fixed line-up' (setting up a trap with the help of alleged witnesses) and the 'reverse line-up' (false accusation of a more serious crime) (id: 26). The technique of social-psychological distortion is characteristic for situations in which the interrogator "role-plays" the position of the subject (id: 26), in which flattery, compliment, understanding and sympathy create a pseudo-informal rapport (id: 26; i.e. Sterling 1965: 39), which reduces the suspect's guilt feelings.

It is therefore no wonder that controversy exists as to the degree of the coercion of these interrogation techniques (i.e. Irving & Hilgendorf 1980). Lowen for example argues that the suspect "may have a real compulsion to confess", and therefore, these techniques "might be viewed as merely testing a suspect's actual will to resist confession." (Lowen 1974: 806). The law prohibits involuntary confessions. However, confessions are "irrational" (id: 809); hence, legal safeguards against involuntariness of confessions do not at the same time guarantee a true outcome of the interrogation.
The question remains how a court or jury is able to decide on the reliability of a confession without having been present at the time of the interview by the police, a problem which naturally can only be solved if a sound or video tape of the interview is made available. The fact that "(I)t is for the prosecution to prove beyond reasonable doubt that the confession was not obtained in consequence of something likely to make the confession unreliable even though it may be true" (Zander 1985: 113) does not contribute to a more neutral or detached position of the prosecutor towards the police either. Finally, the Criminal Law Revision Committee has refrained from an attempt to formulate criteria with which to test the logic of confessions as compared to witness testimonies or other means of evidence (consistency).

More could therefore be done to increase the reliability of the confession, because even the mildest conditions and the existence of willingness and voluntarism from the side of the suspect may produce false confessions. Except for the fact that suspects are suggestible to adoption of the theory of the police, memory and perception are inaccurate and imperfect, which questions the status and the utility of confessions irrelevant of whichever condition surrounded the interview (Stone 1984).

But also in the case of witness testimonies observation and memory are fallible and suggestions from the police are too easily accepted. Judge Jerome Frank (Frank & Frank 1957: 200), known as the "fact skeptic", claims that all three stages which are involved in the establishment of a witness testimony have their own weaknesses. The initial observation of the event implies the registration of the crime via the senses: the witness must be able to accurately see or hear some past event. Frank & Frank (1957: 200) hold that when witnesses state that they heard or saw something, they are actually stating a belief about that observation. Although skeptic about facts, Frank & Frank endorse the view that a belief does not necessarily coincide with the "actual facts" (id: 200) and illustrated that with the following example:

"Behind you, you hear tires screech and a sound like crashing automobiles. Then you look around and see two wrecked cars. You didn't see the collision. But if later you are questioned, you are not unlikely to say (and believe) that you did see just how it happened."
In other words, the mirror of the witness is "imperfect" (id: 201), because lacunae in the memory of the witness are gradually complemented with patterns of expectation. When I observe that the tyre of my bike is flat, I presume or expect that a sharp object must have caused it. Moreover, say Frank & Frank, "observations are supplemented with wishes" (id: 201). Witnesses have an opinion on the state of affairs they claim to have observed. Stronger even: the opinion or prejudice of the witness may have preceded his/her observation. My curious inspection of my neighbour's whereabouts, may cause me to observe that my neighbour -of whom I know that he is unemployed and receives social benefit- is not at home, which intensifies my pre-existing suspicion that my neighbour commits social fraud. Hence, observations are by no means simple passive registrations. Furthermore, say Frank & Frank (1957: 202), observation includes "interpretative imagination":

"We select, organize, and add to any experience; and so in part, we make it. We mingle the objective facts with our subjective needs on which we base our impressions, our preconceptions."

Witnesses make their testimonies "look smoother": doubts and gaps are eliminated, so that there is "a tendency for evidence to become coherent, consistent and integrated over a period." (Stone 1984: 77). In addition to that, observation mistakes are made because of confusing and disturbing circumstances at the time of the event (id: 48ff). Witness testimonies thus cannot guarantee objectivity or neutrality, which can be derived from the fact that those who have witnessed the same event give different accounts of what has happened (Frank & Frank 1957: 205f; see also chapter 9).

The memory of an observation involves the actual remembering of the seeing and hearing in the courtroom. The accuracy of that initial observation and the memory thereof is supposed to be secured when the witness asserts his/her testimony under oath. Bartlett (1932: 204) stated that we should get rid of the idea that "memory is primarily or literally reduplicative or reproductive." Considering the evidence resulting from his experiments with people's recall of stories, he suggested that remembering the past is "an affair of construction rather than one of mere reproduction." (id: 205). In remembering the past, we condensate, elaborate and invent; these features "very often
involve the mingling of materials belonging originally to different schemata." (id: 205). Crucial in Bartlett's theory of remembering is that people have an attitude towards the past and that remembering involves the justification of this attitude (id: 208). We remember the past through the work of association by means of images or language forms (id: 213).

The assertion (not only in courtroom, but also in the police office) implies communication (which involves accurately reporting that memory). It is often said that those who are able to formulate well-built sentences decorated with an attractive vocabulary and a high degree of politeness sound more convincing than those who are not. Quite striking is an episode of the Guildford Four trial in 1975, in which police officers being present as witnesses were being questioned about allegations from the accused that they had been physically assaulted when interviewed. With a sense of deep bitterness, Kee (1989: 181) writes:

"(...), judgment on the quality of a person's evidence, and of his or her stand under cross-examination, is not easy to separate from judgment of their quality as a class of person. Armstrong's "I never done no bombs at all" inevitably contrasted unfavourably with the "Certainly not, my Lord" of police officers responding to the allegations made against them."

Consequently, the police officers' answers were believed to be true at the time, but have been declared to be perjury only recently.

2.5 Excursion 2: Speech Act Theory

The British logician and professor of moral philosophy John Langshaw Austin (1911-1960) was convinced that ordinary language counted as the most important factor in the construction of facts and the practise of a (linguistic) phenomenology. This idea can be traced back to the late Wittgenstein and Moore, who both proclaimed a philosophy of ordinary language.

Austin wanted to realise an exhaustive stock-taking of all existing "real" linguistic situations; he disagreed with the late Wittgenstein about the infinity of language-uses. Austin's stock-taking of many rich
examples and analyses of ordinary language use has resulted in a vivid interest for language as a form of action.

Austin's starting point is a critique of the traditional philosophical presupposition that linguistic assertions merely serve to describe reality or facts (Austin 1989: 1). Instead, Austin claimed that (some) declarative expressions may well be expressed without the intention to make it either true or false, i.e. correspondent with reality (Levinson 1987: 228). Dismissing the traditional presupposition, Austin claimed that many everyday utterances do something, rather than representing or describing a state of affairs. In an essay on truth ("Philosophical Papers", 1970), Austin raises a few questions on 'trivialities' of truth and falsity. He wonders what 'truth' is and how it can be measured, for example, how exactly does a statement fit the facts? Secondly, to what does the truth-question actually refer, to the fact itself or to the statement about the fact (see section 2.3)? Despite these most interesting questions, Austin shows less interest in the weaknesses of truth-questions than in the possibility to raise truth-questions at all. To Austin, truth is a matter of degree and dimension, intents and purposes (1970: 130).

It was Austin's aim to develop a thesis on the irreducibility to matters of truth and falsity. The argumentative pillar of this thesis was that utterances not only serve to express propositions, but also perform actions (Levinson 1987: 243). Austin's preoccupation became the question how to distinguish between statements which claim truth and statements which "do" something. For this purpose, Austin first distinguished between constative and performative utterances. Characteristic of performative utterances is that they are not statements of fact (i.e. they do not describe or report), and therefore they cannot be true or false - at least not in the traditional sense. The "truth" of performative or illocutionary utterances is to be dealt with in a pragmatic way; the illocutionary force indicates how the utterance is to be interpreted and acted upon (id: 246). This has important consequences for the way in which confessions and testimonies - or legal encunciations in general - are to be valued: not their alleged reference to a reality, but the way in which they are performed and interpreted is decisive for the attribution of a truth-value. In line with the speech act theory, we will regard linguistic performances within the legal discourse as pragmatic expressions, and not as semantic propositions.
Austin, who maintains a distinction between referential propositions and their pragmatic embedding, offers the following criteria for the distinction between constative and performative utterances:

1) "the performative should be doing something as opposed to just saying something";
2) "the performative is happy or unhappy as opposed to true or false." (Austin 1989: 133);

In other words, "in constative utterances, we abstract from the illocutionary and perlocutionary aspects, and we concentrate on the locutionary", which is the notion of the "correspondence with the facts", and "in performative utterances, we abstract from factual correspondence" (id: 145f). The constative utterance is therefore 'swallowed' or embedded by the performative (Searle 1973: 141).

The act of "saying" and "doing" at the same time has a force. Sometimes we make this force explicit in terms of a verb. It is on this basis that Austin distinguishes between implicit and explicit performative utterances. He gives the following example:

1) I will arrive tomorrow (implicit promise)
2) I promise that I will arrive tomorrow (explicit promise) (Austin 1989: 71).

The "force" of an utterance can also be expressed by means of intonation, the use of adverbs, and the relation with the context of meaningful circumstances. Hence, performatives are not necessarily characterised by the use of certain verbs (id: 73).

But most important in this context is that the performative both refers to reality as that it shapes reality. This has constituted a major source of inspiration for legal philosophers who are concerned with the relation between law and fact. It is argued that when confronted with a body of actions, norms, values, goals or teleological relations - as is the case in law - reliance on descriptive expressions is insufficient (i.e. Weinberger, in MacCormick and Weinberger 1985: 122). What is decisive in law is not the terminological fixation of fact, but the texture of structural relations and normatively determined action (Weinberger 1985: 25). Law is a construct of legal institutions - the treaty, the legal person, duty compensation for damage, the testament and marriage - and these are all institutionalised by performative legal actions (MacCormick, in MacCormick and

The latter claims that the dual structure of the performative act itself underlies the dual structure of law (id: 26). On the one hand, the performative act embodies a referential activity (because it incorporates the locution or the constative speech act) and on the other hand it constitutes a reality ("Darstellung") (Broekman 1984: 27). Broekman claims that the performance does not describe what exists as the outside: performative speech acts produce and/or transform a situation with implication of its effects (id: 26).

John Searle, interested in language as 'langue' (in De Saussure's terms), starts with the analytical statement that everything which is intended can also be said (1977: 27): this is called the "principle of expressibility". Furthermore, speaking a language is the performance of speech acts, made possible by and performed according to rules which determine the application of verbal elements (1977: 26). Searle's theory is one of illocutionary acts. He rejects Austin's original taxonomony as being based on "verbs" instead of "acts" (Searle 1981: 9). Searle regards Austin's distinction between locutionary and illocutionary acts as "very unhelpful": Austin's "locution" is replaced by "propositional content" and and "illocution" by the illocutionary force of a speech act. Searle therefore holds a distinction between propositional utterances and illocutionary utterances.\(^{33}\) It is crucial to note that Searle regards it as an impossibility to perform propositional acts in isolation. They are always tied up with the illocutionary act (1973: 156; 1977: 40-45). The illocutionary "force" reigns over the proposition: \(F(p)\); "(...) no sentence is completely force-neutral" (Searle 1973: 148). Accordingly, the same referents may play a very different role by virtue of different speech acts (Searle 1977: 77). Theoretically therefore, the proposition and the illocution may vary independently of each other.

The forensic discourse centralises the illocutionary claim that a proposition \(P\) is true. It would therefore be a little odd to imagine the following free variation between proposition and illocution within the forensic discourse. Imagine a witness performs the following illocutions (I) generating the meaning of proposition (P: suspect X committed the crime):

1. I [I warn you that P [X committed C]]
2. I [I ask you whether P [X committed C]]
3. I [I promise you that P [X committed C]]
4. I [I assert to you that P [X committed C]]

It is only the last illocution (4: assert) which is valid within the context of discovery. If, in the process of interrogation, performed illocutions deviate from the illocution "asserting", they preferably ought to be transformed into either positive or negative assertions. In Habermas's terms, a regulative speech act "I bet Jansen attempted to kill Bertinus" can be transformed into a constative speech act "Jansen attempted to kill Bertinus" (Korthals & Kunneman 1979: 119). This of course contains important suggestions for a sequential analysis of speech acts performed during the courtroom interrogation and their subsequent integration in the written trial record. In view of the varying function of the phases of the trial, or alternatively, in view of varying role-descriptions, the illocutionary force may change while the proposition remains constant. In other words, the performatively vis-à-vis the shifts in factual definitions, for example:

1. P [I accuse the suspect of [an attempt to deprive X of his life]]
2. C [I doubt whether suspect [attempted to deprive X of his life]]

Since the propositions of the police record are equal to the contents on which the argumentative exchange in the courtroom is based, the prosecutor (in 1, and 1') may perform a different illocutionary force over the proposition than the illocutionary force dominating the same proposition in the counsel's plead (2, 2'). However, because these illocutions are performed subsequently (that is, in different phases of the trial), the second interlocutor may embed the illocution at t2 performed by the first interlocutor at t1 in the newly performed illocution:

2'. [F2 [F1 [p]]], or:
C [I have doubts concerning [the accusation [that suspect attempted to deprive X of his life]]]
Such an embedding of illocutionary forces may generate further embeddings in the course of the trial sequence. The judge may perform illocutionary force F3 at t3 over \([F2 [F1]]\), for example:

3. J [I dismiss [the doubts expressed with regard to [the accusation [that suspect attempted to deprive X of his life]]]]

3'. \([F3 [F2 [F1 [p]]]]\)

Yet it is possible to imagine that the proposition which was the original subject of the performance 'disappears' in the course of the trial. Previously performed illocutions may thus become the new propositions in the argumentative exchange. Therefore:

4. J [I dismiss [the doubts expressed with regard to [the accusation]]]

4'. \([F3 [F2 [p (F1)]]]\)

The speech act theory therefore provides a way in which discursive shifts occurring at time-axis t1-tn may be performed due to the intervention of discursive-interpretative filters (performed by different legal agents) and the fixed goal-setting of each discursive phase within the trial.

Although replacing most of Austin's taxonomy, Searle has maintained his perlocutionary act (Austin 1989: 102), which is the "achieving of certain effects" by saying something (id: 121). The main criterion for the distinction, Austin said, is that illocutionary acts ought to guarantee an "uptake", an understanding or comprehension of the speech act (which is the 'hermeneutic dimension' of the speech act) because they are conventional, whereas perlocutionary acts cannot guarantee this comprehension because it is not conventional (id: 121). Hence the illocution occupies a crucial position in the speech act theory: the "uptake" of a speech act is always a precondition for its potential effect. Not all illocutionary acts can be defined in terms of the intended perlocutionary effect (Searle 1977: 89), such as promising.

As Austin himself admitted, his distinction between illocutionary and perlocutionary acts has evoked complications. Austin's criterion for a perlocutionary act is merely the appearance of an effect. However, the objection which has frequently been put forward is that it becomes a
problem to speak of an action which is realised by a speaker: sometimes effects are produced by a speech act without being intended (Austin 1989: 106). A speech act may thus achieve various effects, which makes it perhaps preferable to speak of perlocutionary acts only if they relate to effects which were intended by the speaker. A perlocutionary act has therefore only taken place if the speaker has indeed achieved the effects which he intended. It follows that this criterion makes the perlocution a correlation of intention.  

2.6 Evidence as Subject of Strategic Performance

Austin's distinction between illocutionary and perlocutionary acts has proved to be particularly useful to Habermas, who made it fertile for his own distinction between communicative action (action which is oriented at comprehension) and strategic action (action which is directed at the realisation of goals) (Habermas 1981, Vol. 1: 377).

According to Habermas, communicative action cannot be reduced to teleological action for which intention is constitutive (id: 388). The reason for this is Habermas' theoretical departure from a critique of Weber's typology of action and rationality. This typology only allows social action to be judged under the aspect of purposive rationality ("Zweckrationalität"; id: 387). In the theory of communicative action, a speech act is successful only if the other is prepared to accept its content and takes position toward a profoundly criticisable validity claim (id: 387). While for illocutionary acts the meaning of what is said is constitutive, for teleological action the intention is constitutive (Habermas 1981: 389). Underneath all this is Habermas's attempt to design a theory of comprehension (Verständigung).

"Communicative action" discriminates itself from "strategic action" in the following modes:

1. In strategic action, subjectivity is intransparent and therefore not recognisable or criticisable ("My" World of the Internal Nature is not expressed; the speaker's subjectivity is not disclosed);
2. the validity claim on truthfulness is therefore suspended;
3. the communication is therefore not symmetric (no equal distribution of chances, assertions, clarifications and justifications);
4. strategic action deviates from the ideal speech situation;
5. strategic action does not aim at the achievement of a real consensus (as opposed to sheer or 'pseudo' consensus).
In view of our analysis of courtroom strategies, we will mainly pay attention to Habermas' statement that "what Austin calls perlocutionary effects, can only exist through the fact that illocutionary acts adopt a role in a teleological action-context." (id: 389f). It should be noted that there is a slight shift of concepts here: Habermas applies the term "perlocutionary goal", while Austin employs the terms "perlocutions", "perlocutionary acts" or "perlocutionary effects" (id: 391). Another major modification concerns the implication of a defined action context.

In an ideal speech situation (communication), privately defined, goal-directed orientation ought to be absent. We will maintain Habermas's notion of the ideal speech situation for the moment, while making explicit that it is our view that non-institutional discourse contains teleological aspects—and correspondingly, perlocutionary goals—too.

<table>
<thead>
<tr>
<th>Illocution</th>
<th>Perlocution</th>
</tr>
</thead>
<tbody>
<tr>
<td>internal coherence is conventionally arranged</td>
<td>perlocutionary effects remain &quot;outside&quot;; they are not part of a convention which determines their expected application and interpretation but the result of an &quot;intransparent&quot; intention; they are therefore not recognisable or criticisable</td>
</tr>
<tr>
<td>illocutionary goals have to be made explicit;</td>
<td>speaker is not allowed to admit or to make perlocutionary goals explicit</td>
</tr>
<tr>
<td>in communicative action, illocutionary goals are tuned in onto each other, without reserve: symmetrical communicative conditions</td>
<td>there is no &quot;tuning in&quot;: asymmetry</td>
</tr>
</tbody>
</table>

Habermas thus seems to suggest that the employment of perlocutionary acts or imperatives amounts to misleading the hearer or interpreter of the utterance. His conclusion is that the incorporation of the use of perlocutionary acts in communicative action is improper. But a crucial question at this point is whether the use of perlocution necessarily fails to be a means of intersubjective, comprehension-oriented communication.
Before attempting to answer that question, it should be noted that something mysterious occurs with the "intentionality" of perlocutionary actions. Austin said that perlocutions are not necessarily intentional (Davis 1979: 37); an (perlocutionary) effect may appear, even when it is not intended by the speaker. Austin even suggests that effects or perlocutions ought to be integrated in the terminology of the action itself (Austin 1981: 51). This means on the one hand that there ought to be a formal detachment between perlocution and the speaker's intention, and on the other hand that the perlocution may be as conventional as the illocutionary act. Austin made clear that the illocutionary act "promising" can still be understood, even if the illocution itself is not explicitly expressed in the verb "promising". At the same time, the performance of an illocution (explicitly or implicitly) entails the speaker's intention (Searle). It seems therefore arbitrary to claim that all latent illocutions are perfectly understandable (because they are backed by an intersubjective convention), whereas all latent perlocutions are not. Habermas has to prove therefore that perlocutionary goals, perlocutionary acts and perlocutionary effects are unconventional. Stronger, he seems to claim that the lack of convention is the recipe for the success of the (intended) perlocutionary effect. However, an imaginable question of the judge "You did consume quite a lot of alcohol that night didn't you?", which is the illocutionary act "to question" performed by a judge entailing the perlocutionary act "to admonish", generates an intended, but also a conventional understanding if the defendant shows remorse. The expression "I see there's only one beer left in the fridge" is indeed not explicitly recognisable as a complaint or an admonishment, but it depends on the context in which it is uttered whether the hearer understands the underlying intention of the speaker. It further depends on the recipient's background knowledge whether the perlocutionary goal of a speech act will be uncovered or not. 'Perlocutions parasatise illocutions' (Mertens 1986: 91). We would therefore hold that the implicitness of the perlocution is not necessarily damaging if it is backed up by the share of interpersonal, social or even conventional knowledge (f.e. Cohen 1981: 183). Furthermore one could argue that the use of perlocutions does not generate a situation of asymmetry when the participants in the interaction know that certain utterances X are to propel a certain emotion Y or attitude Z.
Habermas however admits that the success of a perlocutionary act depends on *basic cooperation*. Perlocutionary effects depend on a prior trust based on communicative expectations: "A warning of impending danger for example, can have the intended effect of frightening the hearer into a course of action only if the warning is taken seriously" (Ingram 1987: 37). A solution to the asymmetric character of the use of perlocutions, would perhaps be to make perlocutions part of a process of coordinated action subdued to conventions (Cohen 1981: 186) (which incorporates both the production and the reception/interpretation of speech acts) with mutual orientation on a shared goal.

The perlocutionary action has reached its momentum in the establishment of the notion of *strategic action*. In the remainder of this section, we will discuss the courtroom interaction as a possible form of strategic action (Schütze 1978; Frank & Frank 1957: 223-242). We mentioned in chapter 1 that interaction as it occurs within the forensic discourse has frequently been characterised as a form of asymmetric action (Bal 1988; Kallmeyer 1983: 142; Ullmer-Ehrich 1981: 201f; Hoffmann 1980: 40), due to an unequal distribution of power, control and professional knowledge and language. It may thus be expected that this is the kind of teleological context Habermas has in mind when unfolding his views on coercive communication ("Zwangskommunikation"). Especially when comparing the special set of circumstances in and around the courtroom with Habermas's counter-factual notion of the four validity claims (correctness, comprehensibility, truth and truthfulness), it may be quickly concluded that in the courtroom the conditions of the ideal speech situation are far from satisfied (see also section 2.5). However, ideally, the *fair trial* meets all conditions formulated by Habermas. Only by discovering discrepancies between the 'ideal' and the 'real' can we criticise the courtroom interaction for its lack of symmetry (Bal 1988). It is not our purpose here to investigate the extent to which the real courtroom situation deviates from the ideal speech situation, but to see how—in the context of this particular argumentative discourse—certain definitions of the same event (the crime)—are manipulated, forced upon, or coercively accepted (i.e. Kunneman 1983: 68). This interest is however again related to the four validity-claims. According to Habermas, one may employ criticisable validity claims in order to
manipulate others, which is yet another definition of perlocutionary effects. The strategic use of validity claims is a derivative form, not aimed at the accomplishment of comprehension (which is regarded by Habermas as the primary function of validity claims), but at the accomplishment of a 'pseudo' consensus, based on privately defined goals (id: 68f). Not entirely convinced of the appropriateness with which Habermas applies the notion of perlocution, the latter approach to strategic action promises to be more helpful for the description of the specific character of the courtroom interaction. Hence the focus will be on the reaching of a (pseudo) agreement between the parties about the definition of a certain event. Different definitions and evaluations of the event will come into play when the details of the crime and its forensic follow-up are worked out argumentatively.

Bal (1988) claims that coercive communication, like that in courtroom, has a paradoxical character. Strategic action is a hidden pattern beneath the surface of the trial. The latter may be characterised as cooperativity and a shared goal. The idea is that the judge cannot break the rules of a fair trial unless he wants to provoke a legitimacy crisis, and therefore establishes cooperativity with the defendant. Meanwhile however, the judge coerces the defendant to perform or to refrain from certain speech acts (Bal 1988: 99). The establishment of cooperation with the defendant is meant to function as a precondition for the subsequent establishment of an agreement with the defendant about the definition of the crime in the summons, and an acceptance and recognition of the verdict (id: 100). The judge's goal to convince the defendant of the institutional description of the crime (i.e. definition of the situation) is particularly relevant here. Bal (id: 133) concludes on the basis of empirical material (consisting of Dutch 'politierechter'-cases as well; see Appendix I) that the judge does so by launching so-called 'closed questions'. These questions include information which the judge derives from the police record and which seek corroboration of that information by the defendant. The natural consequence of such questions is that the defendant is limited to either a confirmation or denial of that information. Hence, the judge (or other legal agent) wants the defendant or witness to agree with his/her fact-definition (see also 1.6 and 3.7).
2.7 Excursion 3: Philosophical Hermeneutics

In contrast with the traditional positivist school, which describes the legal practice as a logical subsumption in which the determination of the facts and the explanation of the norm are two separate processes, the hermeneutic thesis is that language and world are one, and similarly that language and being are one. The old distinction between reality (i.e. what happened in the world?) and language (i.e. which meaning should be given to the norm?) is abandoned. From a hermeneutic perspective facts are not self-evident. They are determined by the direction of our questions (see also 4.5).

Life is not exactly like we assume (Gadamer 1975: 337). Both our knowledge as well as the object which we want to know better change over time because we continuously raise questions. The negativity of our experience (id: 317ff) is radical, because we know what we do not know ("dem Wissen des Nichtwissens"; id: 344). Knowledge-gaps direct and propel a patchwork of questions. Therefore, in all our experience the structure of the question is presupposed: "Man macht keine Erfahrung ohne die Aktivität des Fragen" (id: 344).

In the legal interpretative practice, these questions are determined by the applicable norm (Gizbert-Studnicki 1987: 362). We have previously noted (in 2.2) that this representation again stipulates a dichotomy, because the function of the law is to act as a meta-language or interpretation-filter by which the facts are constituted. Instead, we have argued in favour of a mutual and dynamic integration of the meaning of factual and normative definitions, which also allows for a reverse move, namely that the description of the fact (which may contain non-legal elements) may influence the way in which the law is to be applied.

Gadamer claims that a (normative) text gains its actual meaning by applying it to a (concrete and factual) case. Interpretation is always also application (Nerhot 1990: 213). Application is a techné which we learn in our daily life; it is a product of experience (Gadamer 1975: 283).

Consequently, the meaning of law is made concrete from the present case. The law can only be understood when it bears actual relevancy for the present:
"A law is not there to be understood historically, but to be made concretely valid through being interpreted." "(...) the text [...] must be understood at every moment, in every particular situation, in a new and different way." (Gadamer 1975: 275)

"The judge applies his understanding to the law - that is, tries to understand the law according to his best lights with reference to the case at hand; but he also applies the law to his understanding, for he wants to understand the case at hand with reference to the law and not to his understanding alone." (Weinsheimer 1985: 186)

The meaning of the law is disclosed only in relation with its application to a certain case. The heart of the matter is that the law is dialectically confronted with the case by means of a question (Gizbert-Studnicki 1987: 357). Such a conception raises quite a few questions however, some of which we have already put forward in section 2.2.

One of the most important questions concerns the choice of the law or statute to be applied to the case. In order to apply the law to a case, one must make a selection out of the massive body of statutes, which undeniably requires a pre-understanding of the potential application-width of these statutes. To what extent does the case influence the selection of the norm to be applied?

Another question concerns the opposition between the law as 'text' and the fact as 'case'. It tends to suggest that the law is textually and linguistically organised, whereas the case is a matter of undefined experience. We choose to disagree with this representation. The 'fact' or 'case' comes to the law as discursively organised material, although it may be of a heterogeneous nature. Witness testimonies to the police contain various matters which are perhaps irrelevant from a legal perspective, they are perhaps ambiguous and discrepant, but their sequential account of the event shows the features of text.

Gadamer thus holds a Popperian-like view in claiming that the direction of our question determines the nature of the facts (see 4.5). John Jackson (1988: 74) says with Popper (1972a: 342) that a theory or hypothesis (the question we ask) precedes every observation, every qualification of the fact:
"On this view it is impossible to know the whole truth about anything. Instead fact-finding should be viewed in the context of some matter to be investigated, or some hypothesis to be tested, or some problem to be solved. Knowledge is produced in particular chosen contexts and the significance and scope of knowledge can never be generalised to the extent that no account is taken of these contexts. Facts are never found in a vacuum. Before we can answer the question 'what are the facts', we need to know either from the context, or by being told explicitly, with respect to what matter, hypothesis or problem the question is being asked."

Totality can only be relatively understood, and it therefore remains incomplete. We continue to return to our understanding of the parts, and vice versa, to the whole (Weinsheimer 1985: 40; see 4.3). "Truth" keeps expanding itself, "(T)hat is, the whole truth never is but always to be conceived." (id: 248). We, who try to understand, are always in a process without a beginning or an end. We are always in medias res, because experience is anticipating and open, which transforms our initial positions (Warnke 1987: 100f). Understanding is therefore a circular activity (hermeneutic circle). The answer which the lawyer formulates in response to the text of the law can itself generate a new interpretation of the fact (Gizbert-Studnicki 1987: 357).

The understanding of the meaning of a text has the structure of a dialogue. When a text is understood, its meaning is neither a property of the author nor of the reader (Warnke 1987: 48), rather it is the dynamic product of a fusion of horizons, a shared view of what the text possibly means. Horizons are constituted by our prejudice. They are "continually formed" (Gadamer 1975: 272f), for that prejudices are tested in a process of trial and error (id: 273). Our interpretive claims are validated by an argumentative process within a dialogical framework, which makes successful hermeneutic understanding equal to dialogical consensus (id: 103). "Facts then may be seen as nothing more than the truths that are accepted within the context of a particular enquiry, [....]" (John Jackson 1988: 74). These ideas will be together constitute the guiding principle for the founding of narrative coherence as anticipated consensual judgement (4.6).

Gadamer's model of mutual understanding (Arbib & Hesse 1986: 180) implies a rejection of the Cartesian paradigm. Descartes claimed that it is possible to discharge historical inheritance by means of
purification: not everything should be taken for granted (Weinsheimer 1985: 10). The Cartesian claim thus culminates in an attempt to eliminate prejudice (id: 10). But Gadamer (1976: 9) claims in contrast that "(P)rejudices are biases of our openness to the world. They are simply conditions whereby we experience something -whereby what we encounter says something to us."

A hermeneutic philosophy conceives of facts as interpretive correlations of ourselves, our language, our history and our prejudice. Contrary to the Cartesian paradigm, it does matter who conducts the act of interpretation, for that the act of interpretation is a prejudiced enterprise.

Gadamer questions evidence as the only access to truth (Weinsheimer 1985: 164). He holds that reality does not contain a truth-claim in itself for that it can only be reasoned upon by the process of interpretation. Neither is it possible to objectify interpretation through the application of methodological rigorousness. The objectivity of legal interpretation is therefore a myth (Gizbert-Studnicki 1987: 366). This discovery, namely that reality is not self-understandable ("selbstverständlich"), stimulated the sciences to compensate for this "loss" by designing and applying method (Weinsheimer 1985: 5).

Gadamer calls method an alienated response to the alienation ("Fremdheit") from reality and history (Gadamer 1975: 5). The fact that method nowadays determines the truth, renders history unnecessary (Weinsheimer 1985: 7). Yet, the very rejection of method does not imply the abandonment of truth (Giddens 1977: 137): instead, truth is attained through argumentation (Bernstein 1983: 168). Method is a failed attempt to attain total knowledge, nor does it guarantee the objectivity of the sciences, because "being is prior to our consciousness" (Heidegger).

2.8 Evidence as Past Experience

The legal-hermeneutic concern with the past plays within two domains, namely the reconstruction of past experience (i.e. the crime (Beck 1989: 18ff); precedent) and the reconstruction of the legislator's will (Frank 1949: 303). In both occasions, the desired objectivity and seizure of the totality of meaning are bound to be a failure, because
the prejudiced and limited framework of the questions constitutes selectivity.

"Since the actual facts of a case do not walk into court, but happened outside the court-room, and always in the past, the task of the trial court is to reconstruct the past from what are at best second-hand reports of the facts. Thus the trial court acts as an historian, its job being much the same as the historian's. ( ) The historian, too, tries to reconstruct the past, but usually he relies on second-hand or third-or-fourth-hand reports of dead witnesses. Indeed, the historian has been called a judge of the dead." (Frank 1949: 37)

There are thus intersections between the task of the historian and the task of the legal agent. Although they both have to capture the past, their access to past reality is mediated (i.e. Nerhot 1990: 221) by documents, tapes or pictures. Of particular interest in light of this attributed similarity is the debate between hermeneuticians Betti and Gadamer, which focuses mainly on the tasks of respectively judge and legal historian (id: 213ff). Betti claims that one ought to make a distinction between the interpretive task of the judge (dogmatic) and the historian. Gadamer rejects this distinction between dogmatic-legal and historical interpretation and disagrees with Betti about the distinction the latter draws between legal and theological interpretation on the one hand, and literary and historical interpretation on the other hand.

As with regard to interpretation in law and theology, Betti is convinced that interpretation should be processed from a dogmatic point of view. This requires the application of an objective meaning-context (Bleicher 1986: 86). Betti proposes to proceed this on the basis of a so-called duplex interpretation ("duplex interpretatio"; Betti 1971: 798), which means that we are confronted with two criteria of interpretation. The first criterion is historical-subjective, which is regarded as fixed and durable, and which reveals the "real meaning" of the text (the will of the legislator; subjective meaning) (id: 799). The second is the historical-evolutive criterion, or the objective criterion, in which the interpretation becomes variably dependent on social demands (id: 799). As a consequence of the last criterion every interpretive norm applies itself in the light of foreseen consequences ("( ... ), la norma interpretativa si applica alle conseguenze antecedenti ( ... )" (id: 207). There are no rigid schemes which are adaptable to social reality (id: 815); we have to find a harmony
between the legal norm and the multiple facts of social life; we have to bring the meaning of the law in accordance with the present time. Legal interpretation is not mere theoretical representation, but calling upon the social unity which determines the interest as it is implied in the norm (Betti 1971: 818).

According to Betti, linguists and historians do not have to cope with "norms" (i.e. their domain is not prescriptively dogmatic), neither with the solution of practical problems. As we shall see shortly, Gadamer and Betti fundamentally disagree about dogmatic interpretation.

Gadamer holds the view that the distinction between legal-dogmatic and historical-exegetical interpretation is impossible. He explains his point of view by drawing a comparison between the historian of law and the judge. Both of them, says Gadamer, take the legal text from the point of view of the present legal situation. Both mediate between past and present: the legal historian cannot exclude the contemporary consequences of a legal text, while the lawyer has to determine the original intention of the legislator in order to draw conclusions about the present (Bleicher 1986: 86). So both legal and historical interpretation are incomplete without application on a concrete case. Says Gadamer:

"Mediating the universality of the law with the concrete material of the case before the court is an integral moment of all legal art and science." (Gadamer 1981: 95)

The historian of law and the judge or lawyer both learn to understand the text in front of them by questioning it (id: 95); only through application of the text to a concrete case the text becomes clear and meaningful.

But Gadamer also criticises Betti's idea of dogmatic interpretation as the objective representation of the legislator's will or intention (or God's will in case of the bible). Betti equates understanding with the reproduction of the author's intention, while Gadamer regards understanding as a fusion of horizons which creates new meaning in the course of time. However, neither judges nor historians are simply free to read whatever they want into their perceptions of the present or the past." (Couzens Hoy 1985: 141; i.e. Gizbert-Studnicki 1987: 358): their interpretation is not a completely arbitrary enterprise for that
the context in which the text can be found gives a direction of how to interpret the text.

Intentionalists would object however that the relevance of a context of interpretation depends on the interpreter's will or choice (i.e. Fish 1983). But Gadamer does not eschew the rhetorical pervasiveness of the interpreter's choice. Instead, he argues that the *temporal distance* between the moment of textual creation and the moment of the act of interpretation should be regarded as positive (Japp 1977: 49). The meeting between historical horizon and actual ("Gegenwart") horizon is bound to produce new meaning.

However, at this stage one feels the urge to pursue the comparison between judge and historian somewhat further. A judge, or a legal agent in general, usually works within an institutional framework. Unlike historians, legal agents are not scientists, but practitioners (i.e. Frank 1949: 38). Working within an institutional framework means having to deal with clients awaiting their trial. Time is limited, costs are being spared. Therefore, even while understanding is an ongoing activity (Gadamer 1981: 105), the legal agent faces a deadline of his/her interpretative activities. A historian only experiences this when writing a book or article. Hence our claim is that although legal agents and historians are both mediators between past and future, the legal agent is relatively more constrained by the pressure of *institutional process-economy*. The need for speed is also caused by a protection and granting of the suspect's rights. A failure to meet this institutional responsibility may result in legitimacy problems. It is exactly the latter responsibility which reveals the normative character and effect of legal interpretation and legal decision making. Each action undertaken by the criminal justice system has direct moral consequences for the suspect (i.e. even if the charge were dismissed, the suspect would still experience the effects of a degradation ceremony; Garfinkel 1956). The writing of history, in contrast, turns judgement onto anonymous entities (Zaccaria 1990: 257).

2.9 Conclusions

Within the legal institutional framework, one seeks to guarantee and protect the objectivity of the legal factfinding-procedure by the
substitution of a method with the implementation of legal rules and procedures on evidence and proof. These very rules constitute the criteria for the adoption of eligible information, thereby creating a selection filter. On the other hand, this information also determines the direction in which a legal norm is to be applied. The complexity and multi-dimensionality of legal fact-construction enforces the abolishment of the propositional model which fuels the subsumption-ideology. The propositional model should be replaced by a textual model which deconstructs the mechanistic and vertical relation between 'facts' and 'norms': in chapter 3 we will argue in favour of a view which regards legal evidence as a synthetic narrative text. However, this (narrative-) textual model ought to receive a position within the semiotic triangle, which connects the three dimensions of author (speaker), text (speech utterance) and reader (hearer, interpreter). The adoption of this semiotic-discursive dimension makes it possible to conceive 'legal facts' as pragmatic utterances which may be transformed due to the attribution of a rhetorical force or due to prejudiced interpretations. The formulation of legal evidence may be conditioned and manipulated by the employment of strategies which steer the adaptation of that formulation toward an anticipated and acceptable definition. There is no longer a need to regard the notion of 'fact' either as a context-independent extension of human observation or as a true assertion corresponding with that observation. The pragmatic performances of legal agents within the context of the legal "factfinding"-procedure determine the selection and normative evaluation of discursive material which will culminate in the construction of a crime.
NOTES CHAPTER 2


2. This is similar to Frank's (1949a: 276) claim, who states that rules can be "mental devices for assembling, (....), information (....)."

3. Cf. Paychère 1988: 284: "Pour un tribunal suprême, l'ensemble des faire d'un sujet n'est pas directement pertinent. Ces faire doivent passer au travers d'un filtre, la preuve, qui permet au destinataire-judicateur de statuer sur des contenus qui ne sont signifiants pour lui que dans la mesure où ils seront passés à travers ce filtre."

4. Wittgenstein defines Sachverhalte as facts which are not compounded of other facts (atomic facts), and Tatsachen as facts which may consist of two or more facts (from Russell's introduction to Tractatus Logico-Philosophicus).
   In law, one normally distinguishes between Tatbestand and Tatsache. The Tatbestand is the actual state of affairs, or the elements of a punishable fact which ought to be integrated in a record (the correlate of the facts which are inserted in the law). The Tatsache is the 'fait accompli' or the integral juridical transformation.

5. This definition implies a second meaning of institutions, which bears upon crystallised patterns of interaction, behaviour or exchange.

6. "Phenomenalist" ought to be distinguished from "phenomenological". The Logical Positivists criticise phenomenology for not making the logical connection between "the way physical objects appear to us and the way they really are." (Ayer 1984: 130). The phenomenalistic label which Ayer attributed to Logical Positivism is misleading because interest in material reality itself is absent. The interest of the school is in the perception of reality.

7. The base theorem of the Logical Positivist School was mainly prompted by the "failure" of Kant's transcendental philosophy (i.e. the 'absurdity of judgements a priori') (Hegselmann 1987: x).

8. Only logical truths or empirical statements are accepted by the logical positivists. Logical truths are analytic statements: their "truth or falsity can be ascertained by merely reflecting on the relevant words." (Hanfling 1981: 9). Empirical statements are
verifiable by perception.

9. A causality relation may be seen as a rule of experience: When X observes that Y throws a conifer at a window, and observes that subsequently, the window breaks, X is justified in saying that s/he saw that Y broke the window (Reijntjes 1980: 134).

10. Reijntjes (1980: 134) claims that also psychological circumstances may be eligible for observation: when X sees that Y gives his neighbour Z a blow, than X may claim that Y acted intentionally (and that Z experienced pain). Such an observation is not self-evident however (see chapter 10).

11. If X carries a stolen good, it may be inferred that X is the thief of that good (Reijntjes 1980: 137).


14. For a critique of Ayer's ideas about verification, see Hanfling 1981: 37-44.

15. Elsewhere, Habermas draws a distinction between observation and understanding. The first notion correlates with: a direction to perceptible things and events (states); individualism; sensory experience (immediate relation with a sector of reality). The second notion correlates with: a direction to the meaning of utterances; communality and participation; mediatory relation via language with a symbolically prestructured reality (Habermas 1979: 9).


17. In the Dutch criminal procedure, the judge is not allowed to accept proof of the crime if only based on a statement by the accused (Article 341-4 Crim. Proc.). Similar to the regulations under Scottish law, confessions always need to be corroborated. Also the conviction of the accused cannot be reached on the basis of only one witness-stestimony (Article 342-2 Crim. Proc.): unus testis, nullus testis; één getuige, geen getuige; eines Mannes Rede, keines Mannes Rede (Reijntjes 1980: 174). However, there are exceptions: a report made up by a single police officer may result in conviction (id: 174).

18. The murder charges were reduced to one (Woffinden 1989: 32).

19. According to Woffinden (1989: 33), this was to avoid "political embarrassment" and to backshadow admission of judicial mistakes to the public.

20. These were similar to the circumstances surrounding the confessions by the Birmingham Six: the defendants claimed they were physically assaulted, their spirits were broken and they were left without food for large periods of time (Woffinden 1989: 393-395;
see also: Chris Mullin (1990), *Error of Judgement: The Truth about the Birmingham Six.* Dublin, Poolbeg Press). On March 21st 1990 Mr. David Waddington, the current Home Secretary, has reopened the police inquiry into this case following new evidence provided by the defence solicitors of the Six (i.e. *The Guardian*, 22-3-1990).


25. As under 24.

26. Compare Article 29.1 Dutch Code of Criminal Procedure: "In alle gevallen waarin iemand als verdachte wordt gehoord, onthoudt de verhoorende rechter of ambtenaar zich van alles wat de strekking heeft eene verklaring te verkrijgen, waarvan niet gezegd kan worden dat zij in vrijheid is afgelegd. De verdachte is niet tot antwoorden verplicht."

27. Misrepresentation may be used to intensify fear. It is suggested that in statutory rape cases the suspect might be told that the victim "has testified to being forcibly raped." In theft and embezzlement, the reported loss - and thus the consequences - can be increased." (Zimbardo 1967: 26).

28. In the case of knowledge-bluff "(T)he interrogator reveals a few known items and pretends to know more; he may lie, saying that a suspect's fingerprints or blood were found at the scene of the crime. A suspect may even be shown falsified samples and records. Sometimes in a murder case, interrogators are instructed by police manuals to say that the victim is still alive." (Zimbardo 1967: 26).

29. "In the fixed line-up, the interrogation is interrupted so that alleged witnesses, who are really 'ringers', can point out the suspect as the guilty man. The interrogator then resumes questioning with an air of increased confidence." (Zimbardo 1967: 26).

30. "In the reverse line-up, the suspect is falsely accused (by fake witnesses) of a real or fictitious crime more serious than the one for which he is held." (Zimbardo 1967: 26).

31. See also: Reijntjes 1980: 159.

32. Habermas disagrees: he thinks it is not right to contrast the propositional part of speech acts with their illocutionary part, because it suggests that the propositional part of the speech act is the only access to an objective judgement about the reference of speech act to reality. Habermas thus rejects the ontological assumptions of the truth-semantics which underly the speech act theory (Kunneman 1983: 65). Habermas considers cognitive language use to be surrounding the propositional part of the speech act, referring to states of affairs in reality. Constative speech acts correlate with this cognitive level.
33. Searle (1977: 34) distinguishes between:
   - utterance: expressing words, a sentence;
   - propositional act: referring to something, attachment of properties;
   - illocutionary act: announcing, promising, etc.;
   - perlocutionary act: the consequence or effect (id: 35).

34. For the distinction between constative and regulative speech acts, see Habermas 1981. Vol. 1: 414f; 429; 432f; 435.

35. Marie Agnes Van Rees (1982: 71), *Illocutionaire strekking: Betekenis en regels voor gesprekken*, doctoral dissertation. The opinion of the author is that one can almost always regard illocutionary acts as attempts to attain a certain perlocutionary effect; author claims that Austin and Searle would disagree with her (id: 77).

36. In designing the ideal speech situation, Habermas has relied on Grice's model of conversational maxims, which is based on the principle of cooperativity (Grice 1989: 26). Grice's model has been criticised for that it applies to processes of information-exchange only, and not to distinct types of speech act (Springorum 1981: 83). The model is applicable to truth-claiming assertions, such as constatives or propositions. It is not applicable to the use of rhetorical speech, such as the use of perlocutions. Finally, Grice's principle is not universalisable, in the sense that it does not apply in asymmetric situations, in which the interactional goal is unilaterally defined (see also Den Boer 1990a).

37. From: Seminar "Hermeneutique Juridique", by Prof. Dr. Patrick Nerhot, autumn 1987, European University Institute.
CHAPTER 3: THE NARRATIVITY OF LEGAL DISCOURSE

3.1 Introduction

"The sciences do not develop in complete isolation. On the contrary, there is interaction between the disciplines. By way of simply analogizing, the borrowing of jargon analytic tools or, in some cases by a mere transfer of metaphor."
(Thoben 1982: 292)

The tasks of the judge and historian do not fundamentally differ, provided that the presence of institutional constraints and the specific normative consequences are left out of consideration. The analogy between the historical-interpretative task and the legal-interpretative task is anchored in the lack of immediate access to past events one seeks to reconstruct (i.e. Nerhot 1990: 214; 221). Consequently, a feature which law and historiography share is that the respective interpreters rely on the formulation of an hypothesis before the collected information can be given a coherent sense. The hypothesis which is put forward takes the form of a stipulated coherent textual-discursive unity: the narrative (id: 220).

On intuitive grounds one could argue that the attribution of narrativity to the writing of history rests on more plausible grounds than the attribution of narrativity to the legal practice (Burton & Carlen 1979: 73). The claim that the legal discourse is a narrative practice -to be defended in this chapter- almost comes as a professional embarrassment to the legal practitioner, because traditionally the narrative has always been associated with a literary exercise or with the writing of fiction. This associative persistency is grounded in the belief that scientific, political and normative-legal discursive practices raise a truth-claim, while others, such as the literary exercise, do not.

Veyne and Ricoeur have shattered this traditional asymmetry by arguing that the non-fictional character of history can only be a scientific myth, which is to be discussed in section 3.2. However, the frequently hailed detour via the analogy between history and fiction becomes patently superfluous when it can be defensibly argued that narrativity is ontologically rooted in a universal human capacity to mediate experience by means of narratives. The latter argument
undermines the exceptionality of law as a narrative discourse: in fact it resembles all its neighbouring discourses.

If the legal practice can be characterised as a narrative discourse, the possible implications of the application of theories of the narrative - most of them of a poetic origin - must be analysed as well. Since most of the theories of literature maintain to distinguish between fictive and realistic narratives on the basis of a referential criterion - a distinction which we have rejected in chapter 2 (Nerhot 1990a: 56f; see also chapter 4) -, they turn out to be unfit for application to empirical legal narratives. Instead, the rejection of the opposition between real and fictional narratives as it is endorsed in this thesis, removes the emphasis from the effect of the real to the effect of the text (Adam 1985: 10), entailing a shift from the study of the characteristics of form and structure of the narrative text to its production and reception. Formalist, structuralist and psychological theories of narrative - which by and large refrain from envisaging the narrative in the context of a living interaction - will therefore have to give way to more pragmatically oriented theories of narrative.

Therefore, after discussing the various theories of narrative (3.3, 3.4 and 3.5) in the light of a future analysis of the discursive relation between criminal files and courtroom interaction, we will discuss the relation and distinction between the story and the narrative or the discursive level (3.5), thereby forging a link with the speech act theory which has been discussed in section 2.5. There is therefore no restriction to questions relating to the textual structure and content of narratives. An expansion of the questions to a pragmatic-discursive level means concretely that we will lay emphasis on the exchange of the narrative text between communicative agents, and the meaning they attribute to the narrative text.

3.2 The Symmetry between History and Fiction

It has been frequently argued over the past thirty years or so that one can find many interweaving references between history and narrative fiction (i.e. Ricoeur 1984). Stronger, the writing of history has been christened a narrative practice. The attribution of narrativity to the writing of history and the implicit attribution of a fictional character to it has not remained without complications however. A view
which is still widely held is that unlike historians, novel writers or poets do not try to improve on the material which they write, because their works of fiction are not constrained by truth- or objectivity-claims, that is: they are not necessarily presupposed to correspond with reality. What opposes the historical text to the fictional narrative "(...) does not have to do with the structuring activity invested in their narrative structures as such, rather it has to do with the truth-claim (...) "that defines the act of reading and application (Ricoeur 1985: 3). The term fiction is thus generally reserved for literary creations that "do not have historical narrative's ambition to constitute a true narrative." (Ricoeur 1985: 3). Hence, the traditional asymmetry between the two narratives does not concern their structure or construction, but their truth-claim and application: we are apt to apply historical narratives in a different way than fictional narratives. Historical narratives are supposed to be realistic reproductions of the past, whereas we accept from fictional narratives that they present an imaginary world to us. Furthermore, it is claimed that recipients judge historical and fictional writings on the basis of divergent criteria, for that the historian would have different ('more serious') motives for his work (Gallie 1964: 63). Consequently, not the narrative text, but the interpreter raises divergent expectations when the text is read.

Advocates of the narrative model of historical explanation (Danto 1985; Gallie 1964; Mink 1978; Ricoeur 1984, 1985, 1988; Veyne 1984) share the presumption that the writing of history is a literary artefact, for that it simultaneously imitates and imagines its subject of explanation (Ricoeur 1983: 229)3. The (historical) interpretation and explanation of reality are ways of "rewriting". We rewrite "the real" as well as "fiction". In doing that, we use our imagination (Ricoeur 1986: 221). This brings Ricoeur to the conclusion that we "redescribe" (mimesis) and "fictionalise" (mythos). As a consequence, Ricoeur challenges the neo-positivist rupture between the so-called empirical narratives and the so-called fictional narratives. He refuses to draw a sharp distinction between the referential character of history and the non-referential character of fiction (Ricoeur 1983: 120)4. Instead, he seeks to "shatter the appearance of asymmetry between true narrative and fictional at the level of reference." (Ricoeur 1981: 289).
It is crucial to note that the historian seems to be forced to make a
more or less arbitrary decision with regard to the position of the
dause in a sequence of events. Thus, the historian may indicate
heterogeneous factors as causes, s/he may indicate a large sequence of
dauses without suggesting that the accumulation is exhaustive, and
historical dauses are characterised by their dependence not on general,
but on specific circumstances (one often hears the claim that history
is "unique" and that historical dacts "never repeat themselves")
(Lorentz 1987: 116). Then it seems impossible to decide on a neutral
basis-which cause is more important or relevant than the other and how
much "time" is allowed between the cause and the consequence
distinction between direct and indirect). Finally, historians make no
distinction between descriptive language and causal explanatory
terminology (id: 117).

History needs narratives, says Danto, because the connection between
events has to be explained in the form of a "narrative sentence"; "(T)his connection is not a causal connection: rather, the events in
question are connected as end-points of a temporally extended change-
as the beginning and end of a temporal whole--and it is the change
thus indicated for which a cause is sought." (Danto 1985: 235).
Narratives are the result of a reasoning-process which succeeds the
imposition of a certain explanation-sketch (Hempel 1965: 231-245). This
explanation sketch is what Ricoeur calls the "intrigue", the plot (see
4.5).

The identity between fictional and historical or empirical
narratives thus lies, so it is claimed by Ricoeur (1985: 3) and Veyne
(1984: 169), in the plot which precedes their creation and which is
subsequently interwoven with the contents of the text. The historian is
said to approach the substance of past events with a working-hypothesis
or a question (Ricoeur 1955: 25; Gardiner 1961: 79; Gadamer 1975 in
section 2.7). The historical perspective is thus regarded as the
antecedent of the recording and explanation of historical facts. The
choice of the plot is even prior to and determinative for what will be
causally relevant (Veyne 1984: 169; Nerhot 1990: 222), or: causes
'exist' through the eye of the plot.

But the historian risks "regression to infinity" (Veyne 1984: 160).6
Gaps in the explanation require the presentation of more explanations.
Veyne calls this the work of "retrodiction": the working back of a
certain historical plot to "a presumed cause, to an explanatory

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hypothesis". (Veyne 1984: 145). In other words, the historian gradually "fills in" the gaps in his/her knowledge. This matches with Gadamer's hermeneutic thesis which we discussed in 2.7, namely that the historian knows what s/he does not know ("dem Wissen des Nichtwissens"). New knowledge results from the questions which are posed in light of a certain hypothesis (anticipation) and tested against existing knowledge.

Hence, the writing of the historical narrative involves reflective judgements of the historian about knowledge to be integrated or neglected: "To narrate and to follow a story is already to 'reflect upon' events with the aim of encompassing them in successive entities (Ricoeur 1981: 279). This counts also for the readers of narratives, who are not bound to the perspective of the text (id: 279), but invited to exceed its semantic borders. The notion of reflective judgement discriminates itself from the Gadamerian position which holds that "being" is equal to "language". Thus according to this position, the interpreter or producer of text cannot take a critical stance vis-à-vis the text (see also 4.5).

In this context, Ricoeur brings forward the poetic notion of 'point of view', being the point of view of the narrator or the point of view of the character(s) in the narrative. The historian is empowered to integrate not only causes, but also rational motives and intentions of the agent(s) s/he describes. What occurs therefore is the transposition of the historian's understanding and judgement onto the actor whose actions are explained. As soon as kings, knights, emperors, philosophers and revolutionists, or alternatively suspects become the subject of the historian's narrative, their autonomy becomes disenfranchised.

As a necessary extension of the agent's point of view which is sketched within the text, the reader has a point of view as well, because (the application of) emplotment is ultimately a task of the interpreter. Ricoeur either relates 'point of view' to the narrative composition (domain of the narrative configuration) or to an "invitation addressed to readers to direct their gaze in the same direction as the author or the characters." (Ricoeur 1985: 99). The historian thus imposes a persuasive effect on the reader.

This means that Ricoeur does not want 'point of view' to be the equal to the critical moment which is contained in rethinking the past. However, in following Collingwood, Ricoeur attributes an a-priori
judgement to the historian; the historian is the judge of his sources and not vice versa (Ricoeur 1988: 145). Therefore, it is difficult - if not impossible - to trace the border between argument and plot (Ricoeur 1983: 233)\(^8\), but it becomes equally difficult to discriminate the substance of the narrative from the argument. Veyne explains this idea by saying that an historian will never explicitly claim that king A did the legitimate and king B did the illegitimate (Veyne 1984: 171). Value judgements, points of view, justifications and critical perspectives are thus interwoven with the historical narrative texture.

The main question in this chapter does not bear upon the philosophy of historical narrative, but upon that of the legal narrative. But if the narrativity of the legal practice can philosophically be established only by means of a detour via a narrative model for the writing of history, it should be demonstrated that the analogy between history and law is a valid one.\(^9\)

It should first of all be made explicit however, that only a fragment of law or the legal practice is taken into account here. What we want to know, is whether the analogy between the writing of history and the reconstruction of crime is a valid one. The most apparent similarity between historiography and crime-reconstruction is that they share the constraint to 'seize the past' most accurately. The question is whether the historian and the lawyer can do so without having to take recourse to the narrative.

In both practices, one speaks of the issue of 'reports' rather than of narratives. However, the distinction between narrative (or story) and report seems to be based on functional considerations which strongly resembles the drawing of the afore-mentioned asymmetry between fiction and non-fiction (i.e. Ludwig 1984: 38; Hoffmann 1984: 57f; Rehbein 1984: 71). In line with the distinction, one tends to associate the 'report' with a true, neutral, decision-relevant and goal-oriented transmission of information and the 'narrative' or 'story' with evaluative entertainment. Our rejection of such a distinction is based on three distinct arguments, namely that a) the distinction is invalid on hermeneutic grounds, because every reproduction of a 'fact' requires an act of interpretation; this results in a cancellation between 'neutral' (report) and 'evaluative' (narrative) (Den Boer 1990: 347); b) the distinction may be ruled out on the basis of ontological status of narrative activity (to be further explored in section 3.3) and c)
the distinction becomes superfluous if it can be shown that the
'functionalisation' of the (legal) narrative in an institutional
case context equals the free variation of the discursive function over the
story (to be further explored in section 3.6).

A further similarity between the writing of history and the
reconstruction of crime as far as narrativity is concerned is the
insertion of an hypothesis, causing selection and the employment of
criteria of relevance. Neither history nor law concern themselves with
the totality of events (for law: i.e. Broekman 1982: 174; Nelken 1983:
132). To prevent regression to infinity (see above) a decision needs to
be made as to which elements are constitutive for the narrative. This
decision is guided by the available pre-knowledge, opinion or argument
of the historian or by the applicable semantic range of a legal
statute. In line with our remarks in section 2.2 the narrative which is
the result of the application of a certain hypothesis may lead to a
revision of the hypothesis itself. In the case of law, this may mean
that the original qualification of the legal fact - when tested against
precedent or the anticipated success of a conviction - requires
modification of the application of a norm or statute, causing a
transformation in the normative basis of the narrative.

The historical and the legal narrative have furthermore in common
that precisely because they are expected to be accurate
representations of past events they will be placed in an argumentative
context in which their truth-claims are debated and contested. The
professional narrators - be they historians or lawyers - know this and
anticipate this argumentative discussion by integrating explanatory or
justificationary elements in their accounts. The causal relations
within the narrative act as explanations of which the author expects
they will be accepted by the audience which s/he addresses (4.6). The
evaluative judgement of the actor is not displayed explicitly, but
implicitly by means of underpinning reasons which justify the causal
relations imposed on the narrative elements.

Historians and lawyers create narratives which cannot have been
experienced in exactly the same way as the narratives suggest by the
actors who lived through the narrated experience (Danto 1985: 294). Law
and history are mediatory practices, since they narrate events which
were neither experienced by the actor, nor by the narrator. Their
narratives are therefore projections, or intersections of horizons of
plausible understanding and explanation.
3.3 The Ontological Status of Narrative Activity

After having taken an indirect course for the establishment of the narrativity of the legal discourse, one may wonder whether it is not altogether much easier to establish a short-circuit. The 'short-circuit thesis' is that the analogy between law and history (section 3.2) can be made redundant with the argument that all discourse - be it political, legal, historical or moral - has a narrative base ('t Hart 1983: 415). The thesis thus embodies the idea that narrativity is universal instead of being limited to a couple of discourses.

Narrativity constitutes one of the basic modes of human communication. The necessity of the production of narratives is rooted in our basic need to make events and human agency intelligible (i.e. Gumbrecht 1982: 206). The structure of the narrative allows for the organisation of experience, enabling communicative actors to store knowledge and to reflect upon experience (Ehlich 1983). Furthermore, the narrative as a mode of organising action and knowledge is transportable through discourse (Ehlich 1980: 20). Narratives are thus intelligible structures which are transferable to other human agents (Quasthoff 1980: 11). Therefore, narratives generally have a purpose. It is a misconception to think that narratives are merely produced and listened to because it is 'fun': one does not produce a narrative without a reason. It is more conceivable to regard narrating as a constitutive basis for intersubjectivity (Gumbrecht 1982: 207).

In light of such a wide interpretation of the act of narrating, Fisher (1984: 1) introduced a "mastermetaphor" of the human being as a homo narrans. This mastermetaphor "sets the plot of human experience", which subsumes other metaphors in that it incorporates "various ways of recounting or accounting for human choice and action." (id: 6). Furthermore, the master-metaphor incorporates all symbol composition: "it holds that symbols are created and communicated ultimately as stories to give order to human experience." (id: 6).

Fisher also proposes to define narrative activity as a paradigm of human communication rather than just a mode. Moreover, the author does not maintain that the narrative paradigm is the only legitimate or useful way to appreciate human communication (id: 2), but he regards it as an alternative view.

The narrative paradigm is a marriage between two themes within the theory of rhetorics, namely the argumentative, persuasive theme and the
literary, aesthetic theme (section 3.7 will take up this issue). In using the term "narration", Fisher refers to "a theory of symbolic actions—words and/or deeds— that have sequence and meaning for those who live, create, or interpret them." As a consequence, the narrative perspective has relevance to real as well as fictive worlds, "to stories of living and to stories of the imagination." (Fisher 1984: 2).

Hence Fisher sees no incompatibility between the theory of narrative and that of rhetorics ("the argumentative paradigm"), nor between the theory of narrative and the theory of speech acts ("the language action paradigm") (id: 7). He even claims that "language action is meaningful only in terms of narrative form." (id: 7; elaboration in section 3.6).

Narrativity is not limited to specific cultures or societies. Whether written or oral, the narrative is a "feature of human nature" which "crosses time and culture" (id: 8; see also Barthes 1984: 79). Greimas (1971: 793) says that narrative structures are intralinguistic. They are common "to cultures with different natural languages." Neither are narratives restricted to the linguistic medium. Also dreams and films, which operate mainly on the basis of images, are narratives (i.e. Greimas 1971: 793; Bremond 1964: 4). Narrativity thus also defines a group of texts which are not literary products (Van Dijk 1973: 191).

Apart from directly organising our experience, the narrative also enables us to understand actions of others (Fisher 1984: 8). A narrative is an action-discourse (Van Dijk 1976; 1979: 62; GÜlich 1976: 225; Ricoeur 1981: 15f). Moreover, we think in terms of stories. They imply for example mental schemes of perception which unfold the direction of our interpretation (1.6). Legal agents, psychotherapists, doctors and insurance-agents listen frequently to the stories of their clients. On the basis of collected professional experience, they build up an expectation-scheme, and interpret their client's story as a specific instance of a larger (perhaps arbitrary) category. Quasthoff (1980: 72f, 81) adds that the repression and refabrication of the narrative are conditioned by the speaker's estimations of what the hearer expects and by his/her anticipations to the values of the hearer. The interpretation of the story to be institutionalised, and after that the formulation of a solution, develop themselves under the constraint of 'standardisation' which is validated by the institutional norm (i.e. Caesar Wolf 1984: 19).
These reasons form for some authors a sufficient ground to claim that narrativity is ontological (Fisher 1984: 8). Lewis (1987: 288) says that the 'function' of narrative is to shape ontology "by making meaningfulness a product of constituent relationships between situations, subjects and events and by making truth a property that refers primarily to narratives and only secondarily to propositions; (...)"

Narrative activity is an expression not only of everyday language use, but also of 'common sense' rationality. Apart from premeditated and perhaps instrumentalised procedures of information-processing, the nature of legal-institutional organisation of experience does not necessarily diverge from the nature of the ordinary organisation of experience. We would therefore at least raise careful doubts with regard to what seems very much a 'myth', viewing legal narratives as expressions of an 'uplifted' form of rationality which would be uncommon to the everyday practice. Perhaps somewhat bluntly ignoring the myth, we will instead hold the claim that narrative activity is not specific to the everyday practice, but rather that it deeply pervades the institutional practice.

Linguistic research has shown that the distinctions between what we have called 'everyday discourse' and 'legal discourse' cannot be sharply drawn (i.e. O'Barr 1981: 396; Sauer 1989: 101; section 1.2). Except for the use of ordinary language, the legal discourse employs everyday forms of communication, like that of the narrative (Bennett and Feldman 1981: 20). Schütze (1978: 34) claims that the narrativity of the legal discourse roots in the fundaments of everyday discourse. The shift from everyday narrative to legal narrative is a gradual one, and thus obscures and conceals the transformation which is required to close the gap between the two discourses. Narrative organisation as it underlies both discourses conditions the continuous character of the legal qualification process (i.e. Schütze 1978: 21).

The narrativity of the legal discourse is a rational fundament instead of a functional instrument. We therefore disagree with Bennett and Feldman (1981: 20) who claim that the incorporation of everyday means of communication (i.e. narratives) in formal procedures of justice enables "members of society to look through the fairness of law." In contrast, we believe that the narrative organisation of the legal discourse creates an illusion for the "members of society", because it makes them believe that the initial narrative remains
unchanged in the hands of legal agents. The intervention of legal evaluation and argumentation requires that the narrative be mediated by the law. The expropriation of the suspect’s narrative is accomplished through a substitution of the narrator, which causes a cleavage between the narrator of a statement and the statement itself (sections 6.1 and 6.2). The transformation of the narrating medium is a major operation in the institutional framing of everyday experience.

Legal narratives are very alike everyday narratives (i.e. Greimas & Landowski 1976: 95). Not only do legal narratives leave out small and unimportant intermediate steps (Hoffmann 1983: 109), they are also differentiations of everyday narratives toward a more formalised process of institutional and explicit fixations (Kallmeyer 1983: 141). The story which is told by the client, suspect or witness undergoes a screening-process, with means such as the adaptation of the vocabulary to the institutional jargon and the exclusion or irrelevant entities. The institutional narrative is thus the sediment of selective story-processing. The employment of relevancy- and selection- criteria is not merely an institutional affair. Every narrator who is not 'to the point' runs the risk of losing the hearer's attention and of creating confusion (Kallmeyer & Schütze 1977). White (1981: 10) maintains mainly on epistemological grounds that every narrative is a selection:

"For in fact every narrative, however seemingly 'full', is constructed on the basis of a set of events which might have been included but were left out; and this is as true of imaginary as it is of realistic narratives. This consideration permits us to ask that kind of notion of reality authorizes construction of a narrative account of reality in which continuity rather than discontinuity governs the articulation of the discourse." (White 1981: 10).

Although we will argue in section 3.6 that the legal-institutional narrative is governed by the rules of institutional relevancy and becomes the vulnerable subject of argumentative interaction, the legal narrative may simultaneously be considered as the innocent result of the creation of order out of chaos.

Thus in narratives, quite a few axes of meaning and communicative functioning join each other. The very complex character of the narrative springs from the mere intricacy of all these axes. Narratives are very much synthetic compositions, to say it with Kant (in: Brodsky 1987: 36). The fact that the narrative text reaches both beyond the
syntactic and the semantic level complicates its very decomposition in separate propositions or reflections of perceptions or experiences. When watching the cross-examination scene in the film "A Cry in the Dark" for example, it discontents to observe the resurrection of legal professional power out of mere destruction of the narrative cohesion of the defendant's account. When decomposing the narrative, we change and possibly manipulate it (i.e. Schiffrin 1987: 17). The narrative is a flow, the context of a text in which every element relates to all the other elements. It is therefore almost unfair to cut the narrative in separate and independent pieces, to scrutinise the pieces and then to glue them together again. Experiences are a totality, unlike a film-script which neatly reproduces and describes the details of that experience in separate shots.

Narratives are such complex textual entities that they cannot logically be decomposed in propositional constituents. Judging this from the angle of a correspondence theory of truth, a narrative fails to be 'true': its texture obscures all analytical distinction between the representation of 'facts' and the attribution of value-judgements to them (see 4.2).

The latter remarks also bear relevance for the meta-narrative level, namely the method of analysing narratives. At least, when examining the narrative, one should always take its pragmatic context into account, namely factors which influence and constrain the narrative production and interpretation (i.e. Seibert 1989: 51ff). We believe that the inquiry in the pragmatic context of the legal narrative may have a circular character: it is impossible to distract rational patterns of a general or repetitive nature without reading and interpreting the narrative(s) several times, but it is also impossible to avoid the imposition of a theoretical expectation when interpreting the narrative(s). If talk of a 'hermeneutic method' is not a contradiction in terms (see 2.7), it could be said that the reading of the narrative and the formulation of a theoretical expectation are involved in a dynamic contraposition, which causes continuous revision of interpretations and expectations.
3.4 Theories of Narrative (I)

After having established the narrativity of the forensic discourse along two ways, namely via the analogy with the writing of history and via the ontology of narrative practice, we have to reflect on the question which theories of narrative qualify for application when analysing the legal narrative. For heuristic reasons, we will deal with the theories of narratives as if they were divided in three groups. A first group of theories pays major attention to the form and structure of the narrative, encountering the internal relation between the various elements within the narrative text (formalism and structuralism; section 3.4). A second group of theories focuses on the psychological aspects of narrative interpretation and production (text-processing theories; section 3.5), whereas a third group analyses the interpretation and production of narratives from a discursive-pragmatic point of view (sociolinguistics, discourse-analysis; section 3.6).

**Formalism**

It is often claimed that the origins of narrative analysis stem from the Formalist School, which in the Western world is best known as the school founded by the Russians in 1915 or 1916 and mainly represented by Jakobson and Eichenbaum. The school has always had close relations with structural linguistics (Striedter 1981: IX). The main fields of Russian Formalism were and are the theory and analysis of poetic language and the structure of hymns, the theory of oral prose, of literary genres and of literary evolution (id: X). In short, the Russian Formalists have understood their contribution as a theory of literature (id: XII).

Striedter holds that the image of Formalism is too static (id: XI). But the school has been criticised for more than being 'static'. Critics have attributed a form of naive positivism to the Russian Formalists (id: XII). The German "Methodendiskussion" resulted in the labeling of Russian Formalism as a "nomological theory" (i.e. Popper) (id: XIII). Striedter (id: XIII) says that nomological statements can neither claim to be explanations of meaning nor to be definitions of the nature of their object of analysis. Rather, nomological statements are understood as working hypotheses which can be established on the basis of observations and which can be verified or "falsified" through
new observations. The method of the Russian Formalists is therefore empirical-nomological (id: XV).

The best known formalist analysis is Propp's who in his book "Morphology of the Folktale" (1968 (1928)) examined Russian folkloristic (fairy) tales by means of a structural analysis of functions. Propp described morphology as not just the study of forms, but as a "description of the tale according to its component parts and the relationship of these components to each other and to the whole." (id: 19; Bremond 1966: 5).

The term "function" ought to be understood as "(...) an act of a character, defined from the point of view of its significance for the course of the action." (Propp 1968: 24). Having this aim in mind, Propp came to develop a typology of functions with a moral value. In fact, he isolated unities which figured as the structural components of 'plotlines'. These functions of the dramatis personae were to Propp the basic components of the tale (id:21). Before he started to extract these functions, he first defined them (id: 21).

His four main hypotheses were:

1). "Functions of characters serve as stable, constant elements in a tale, independent of how and by whom they are fulfilled. They constitute the fundamental components of a tale." Propp claimed that tales contain 'constants' and 'variables'. In his analysis one often sees an identical attribution of constants to different personnages. After an initial situation in the fairy tale, functions occur. These functions are for example: one of the members of a family (the hero) absents himself from home (id: 26). The functions are transmitted between the dramatis personae in the tale.

2). "The number of functions known to the fairy tale is limited." Propp identified 31 of these functions. Although distinct in meaning, one function develops out of another "with logical and artistic necessity"; not a single function excludes another (they all belong to a single axis) (id: 64). The functions are mutually related by means of direct notifications (id:71f), trebling (id: 74f) and motivations (id: 75f).

3). "The sequence of functions is always identical" (id: 22). The succession of functions means that they can be placed sequences. A distortion of a sequences of events in a narrative renders the narrative meaningless: "The sequence of events has its own laws." (id: 22). Lévi-Strauss later called this the operation of a meta-narrative structure.

4). "All fairy tales are of one type in regard to their structure." (id: 23), which is the appreciation of each particular tale.
Propp admitted at the end of his pioneering work that there were classification problems with regard to the separation between fairy tales and other sorts of tales, and also with regard to the fairy tales themselves (id: 99). Because of the resemblance of the functions, there was risk of overlap (Lévi-Strauss 1978: 122). The problem of analysis and classification of the internal structure of one single tale was related to "residual material" to which no function corresponds (Lévi-Strauss 1978: 122).

Bremond has later elaborated, articulated and improved Propp's work (i.e. Van Dijk 1970: 145). According to Bremond, one cannot consider the narrative unity as a function, but rather as a sequence of functions with a certain internal logical coherence (the "narrative atom"; 1966: 60). Bremond's main concern is whether the enchainment of functions in the course of the narrative can vary freely or not (Bremond 1964: 7).

One of his conclusions is that one can never state a function without stating at the same time the possibility of a contradictory option (Bremond 1964: 15). Functions therefore always stand in a binary opposition to another function. Bremond also concludes that there are two types of linkages between functions, namely "de bout à bout" and "l'enclave". He added "l'accolement" which is the systematic conversion of points of view.

Although Bremond approves of Propp's claim that the one function necessarily succeeds the other in a sequence, the former says that 'other functions' are linked by means of relations of probable frequency (which are either explained by fact or by cultural routine) (1964: 17; 1966: 60f). This rather mild criticism is followed up by a proposal to re-articulate Propp's scheme and to introduce unities which are bigger than the function but smaller than the sequence (1964: 18). Propp's scheme is being reduced, which -after analysis- leads Bremond to the conclusion that there are really three elementary functions in the tale: 1) a situation which 'opens' the possibility of a conduct ("comportement") or of an event; 2) the passage to the act of this virtuality and 3) the result of this action, which concludes the process by means of success or failure (id: 21).

In the wake of Russian Formalism, Greimas later developed a syntax grammar for tales, after which he made a shift to the semantic groundrules of the tale (5.2.3).
Formalism versus Structuralism

More profound criticism onto Propp's work came from a somewhat unexpected angle. Lévi-Strauss, in an article called "Structure and Form: Reflections on a Work by Vladimir Propp" (1978: 115-146) rather upset Propp by explaining that from a structuralist point of view, the analysis of Russian tales could not pass muster.

Lévi-Strauss notes first of all that structuralism differs from formalism in that it does not distinguish the abstract and the concrete, nor does structuralism recognise a privileged value in the latter."; "Form is defined by opposition to material other than itself. But structure has no distinct content; it is content itself, apprehended in a logical organization conceived as property of the real." (Lévi-Strauss 1978: 115).

Propp is therefore claimed to be the victim of 'subjective illusion' which imposes the making of 'accidental choices'; besides, Propp 'lacks context' (Lévi-Strauss 1978: 131). According to structuralism, the distinction between form and content is absolutely arbitrary:

"There is not something abstract on one side and something concrete on the other. Form and content are of the same nature, susceptible to the same analysis. Content draws its reality from its structure and what is called form is the "structural formation" of the local structure forming the content." (id: 131)

Lévi-Strauss thus reproaches Propp with a one-sided syntagmatic view. The syntagmatic analysis (see below) pursues to analyse the narrative in linearly ordered sequences, which results in a chronological analysis of succeeding sequences (the manifest level, or the surface of narrative structure). The paradigmatic analysis on the other hand pursues the description of the pattern which coins the basis of the folkloristic text: the elements are taken out of their fixed order and regrouped in an analytic scheme (the latent or paradigmatic level, or the deep-narrative structure).

"Formalism destroys its object. With Propp, it results in the discovery that there exists in reality but one tale. Henceforth, the problem of explanation is only displaced. We know what the tale is, but as experience puts before us not an archetypal tale but a greater number of concrete tales, we do not know how to classify them anymore. Before formalism, we were certainly unaware of what these tales had in common. Since formalism, we have been deprived of any means of
understanding how they differ. One has passed from concrete to abstract, but can no longer come down from the abstract to the concrete." (Lévi-Strauss 1978: 132-133).

The "error of formalism" is threefold. First of all, it has generalised the established characteristics of its object, namely the Russian folkloristic tale, to all other forms of narrativity in the world. We fully endorse this criticism: the analytical apparatus which Propp provides fails application to empirical narratives which are embedded in a living and dynamic discursive environment. If one does want to apply Propp's model, one needs on the one hand to abstract from the particularity of this discursive context, while on the other hand one needs to 'squeeze' the narrative sequence into a pre-fixed sequence of functions before one can even begin to analyse the material. It is in our view preferable to envisage the narrative as it presents itself, thereby taking into account that the theoretical position of the researcher may cause a selection of fragments which best illustrate his or her hypothesis.

A second error of the formalist school is the restriction to the "rules which govern the grouping of propositions" which has caused it to lose sight of the fact "that no language exists in which the vocabulary can be deduced from the syntax." (id: 141). Narrative grammar can therefore never predict the substance or the contents of the narrative.

And thirdly, formalism has misunderstood "the complementarity of signifier and signified, (...)." (id: 141). It lacks, in other words, attention for the variations in the immediate context of the signified.

Structuralism
In order to understand the grounds of the structuralist critique outlined above, the major theses of the structuralist school need closer attention. The fundamental theorem is that the human being is subdued to unchangeable structures, causing the human being's impotency and inability to influence that what essentially predetermines the texture of his/her social acting. This theorem reverberates in structuralist ideas about language.

Individual elements of each particular language, be it English, Dutch or Chinese, are arranged in relations of mutual dependence. This varies from language to language from which it follows that the separate components of a system can only be understood in the light of
a system as a whole (see also Schleiermacher in 4.3). The primary object of linguistic study must therefore be the structure of the system itself rather than the individual linguistic fact (Robey 1976). Perhaps ironically though, codes and elementary utterances can only be analysed on the basis of real utterances. So, the object of structuralism is the linguistic system, but it can only analyse that system when generalising the actual linguistic performances in 'reality'.

The majority of the fundamental structuralist theses are headed under Saussurean Structuralism (Lyons 1976). The consequences on the methodological level are clear. Units cannot be determined or identified without taking their interrelations within the system into account first. The existence and meaning of linguistic units (for example phonemes) is unthinkable without their relations to other elements. This state of mutual interdependence is what is usually called the doctrine of linguistic relativity.

The first Saussurean distinction is that between "langue" and "parole". Langue is in Chomsky's sense the linguistic competence (see also 5.2); others regard it as the language-system. Parole is the linguistic performance in Chomsky's sense, while others define it as language-behaviour. The regularities which underlie utterances indicate the system-character of the langue. One often claims that langue exists before parole. Consequently, an individual cannot create or change the system of language. A structuralist position presupposes a-subjectivity (see section 5.3.2) in the formation of meaning. The linguistic laws which determine linguistic structures do not belong to the conscience of linguistic actors (De Ruijter 1979: 15), but to a subconscience which is an activity obeying the same laws in all linguistic actors (id: 24). Hence, langue is in this view 'autonomous'.

But a slight ambiguity modifies that view, because on the other hand, structuralists claim that the parole brings langue to live. Parole is individual (this does not directly correspond with the sociolinguistic notion of 'idiolect') and selective and actualises langue. Langue and parole therefore stand in a dialectic relation. Barthes (1982) says that in that sense parole is always incomplete or insufficient when compared with the langue; on the other hand, langue is in evolution due to parole and one learns to master parole in a context of langue. The structuralist tradition therefore does not take teleological actions (i.e. strategies) of individual communicative
agents into account, and is thus largely incommensurable with the theoretical views of the speech act theory (Austin, Searle, Habermas; see section 2.5 and 2.6) which we adhere.

Another level of structuralist analysis concerns the triangle between sign, signified and signifier. The sign is thus a two-legged term, consisting of a 'concept' (meaning) and a 'sound' (De Ruijter 1979: 15). Relations between the signs exist both at a syntagmatic and at a paradigmatic level (the two-dimensionality of language). "The set of paradigmatically related, or interchangeable, elements that can occur in one context is typically distinct from the set of elements that can occur in another context." (Lyons 1976: 12-13). The interchangeability at the paradigmatic level depends on the application of complementary principles of selection and combination.

Finally, Saussure defined a dichotomy between synchrony and diachrony. They both analyse language: synchrony analyses the ordering of elements within the system at a certain moment (parallel states of the system) and diachrony studies the transformations of the successive states within the system (i.e. De Ruijter 1979: 15).

The latter ideas have found their way into discourse analysis in an adapted form, especially where subject-matters such as intertextuality (section 1.5 and chapters 7 & 8) and interdiscursivity are concerned. Discourse analysis for example regards courtroom interaction as a specific instance of a much larger and encompassing legal discourse. The normative principles and relevancy-criteria of this larger legal discourse (what one could call the paradigmatic level or the deep level of signification of the legal discourse) constitute a latent basis for the performance of sequences of speech acts in the courtroom (the latter could be called the syntagmatic level or the surface-level at which meaning becomes manifest). Instead of claiming that legal discourse is a two-dimensional phenomenon, some prefer to regard the legal discourse (or any other discourse) as a multi-dimensional phenomenon (Sauer 1989: 72). Nevertheless, a structuralist idea which has infiltrated our theoretical account of legal-narrative transformations (chapter 5) is that these transformations are performed along a vertical (the chronology of the criminal procedure; syntagmatic) and a horizontal axis (the continuous penetration of legal statutes and principles in the structure and contents of the criminal procedure; paradigmatic). Such a cross-section of 'horizontal' and 'vertical' discursive elements forms the fundament for the emergence of
alternative combinations (i.e. transformations) between these elements. However, departing from the structuralist position, we disregard the tension between syntagmatic and paradigmatic level as the autonomous origin of these transformations. Instead, we prefer -in line with the discourse-analytic position- to regard this very tension as the creative, conscious and teleological outcome of an interpretative and rhetorical process performed by legal agents in a dynamic interaction.

Semiotics

Structuralism has strongly influenced the work of semioticians like Barthes and Greimas, which is noticeable from the semiotic vocabulary. Again, according to the semiotic position, the organisation along deep- and surface-levels of signification is essential in every system of meaning. Semiotics itself is the study of the relations among signs (f.e. icons, symbols). Furthermore, semioticians have conducted narrative analyses in correspondence with Lévi-Strauss's analysis of myths.

A crucial semiotic starting-point is the definition of narrative as a discourse, which is different from the sum of sentences which compose it (Barthes 1984: 84; see also sections 3.3 and 4.2). This synthetic conception of the narrative has two separate implications. On the one hand the semiotician seeks to reconstruct the formation of meaning detached from the referential function of language (the truth of significations is therefore abandoned), while on the other hand the semiotician exceeds the traditional linguistic object-restriction (the sentence) (Barthes 1984: 82f).

Barthes proposes a structural analysis of narratives along three levels, namely the level of functions (Propp), the level of actions (Greimas) and the level of narration (or discourse, Todorov). The relation between the narrative levels is that of progressive integration: "(...) a function only has meaning insofar as it occupies a place in the general action of an actant, and this actions in turn receives its final meaning from the fact that it is narrated, entrusted to a discourse which possesses its own code." (id: 88). Barthes also proposes to emphasise the logical aspect of the narrative, mainly because narratives are ambiguous due to their atemporal logic which lies beneath the visible temporality of the narrative surface. It is possible to describe the narrative by examining its various levels (phonetic, phonological, grammatical and contextual). These levels are
hierarchically related (Barthes 1984: 85f., 87), which means that elements belonging to a certain level obtain a meaning when integrated into a higher level. The latter idea establishes one of the main pillars for the narrative school which concentrates on the processing of narrative information.

3.5 Theories of Narrative (II)

Despite of the rapid developments within semiotics and anthropology evolving around the narrative, one started to feel the need for a theory and a method on (the analysis of) narratives (Van Dijk 1970). The isolation and the categoricality of the unity which constituted the objects for narrative theories, like 'time', 'place', 'personnage', 'character', 'form' and so on, remained intuitive or definite in a non-functional way (Van Dijk 1970: 144; Van Dijk 1973: 177; 193). Propp's identification of narrative functions lacked for example a proper exposition of the criteria of a 'discovery procedure' (Van Dijk 1970: 145). Similarly, Van Dijk criticises Bremond and Greimas, for that in their narrative analysis the personnages analyse themselves essentially according to their actions. Van Dijk claims that there is no break-through regarding the employment of traditional categories in structural analysis. The character of the recurrence of rules which underly the composition of a narrative text remains yet to be examined.

Van Dijk prefers the narrative theory to be coherent and explicit: its hypothetical affirmations should not contradict each other, and its terms and propositions should not be vague and ambiguous (1973: 178). Besides, he seeks a way to correct the former neglect of the textuality of the narrative (Van Dijk 1970: 144).

The development of a generative theory (not a meta-theory; Van Dijk 1970: 148) of the narrative text should be similar to and as efficient as Chomsky's generative syntax (i.e. id: 148; see also section 5.2), with the important extension that the narrative grammar should transgress the boundaries of the sentence. This required first of all the introduction of semantics in the grammar (Van Dijk 1973: 180), which lead to the quite radical consequence that textual structure and textual transformations are not longer considered to be primarily arranged under syntactical rules (id: 180).
Yet another modification concerns the introduction of pragmatics (Van Dijk 1973: 181), i.e. psycholinguistics and sociolinguistics, which questions the relation between competence and performance and that between speaker and receiver (id: 181). The development toward a narrative or textual grammar (text linguistics) was paved by regarding texts as more than just long sentences or linear sequences of sentences. In fact, the narrative grammar is the rewriting of a deductive algorithm (Van Dijk 1970: 161). There is a limited probability, and it is even an impossibility, that the production and reception of textual utterances operate by means of an unregulated concatenation of isolated sentences. The very notion of textual coherence would even be inexplicable in such a conception (Van Dijk 1973: 184).

Instead, in text-linguistics the most global textual structure is a so-called macro-structure, which determines and predicts which sentences are forgotten or wiped out when recalling or summarising discourse (id: 184; 189; 204; Van Dijk 1979: 50). According to this theory, a text is thus linearly coherent, if it has an underlying, implicit or explicit, text-base (Van Dijk 1973: 207) which generates the meaning and the position of the propositions within the (narrative) text. The surface of the text is the result of a number of transformations which operate on a range of ground-rules (see also chapter 5 and 7). These ground-rules are text-processing strategies, which allow for the omission, generalisation and construction of textual propositions (Van Dijk 1979; see section 7.4). Formal derivations and categorical retranscriptions are responsible for their generalisation. The concatenation of functions and sentences is thus a surface-phenomenon of the text which constitutes its direct linear coherence.

The introduction of such a text-linguistics turned out to be the long expected breakthrough among psychologists and specialists in the field of Artificial Intelligence. Some explored and elaborated the theoretical model that Kintsch and Van Dijk finally issued in 1978 for the design of hierarchical or causal models of story-understanding as problem-solving processes (Schank & Abelson 1977; Clark 1978; Van Dijk 1979; Black & Bower 1980; Black & Bern 1981; Trabasso & Van den Broek 1985).

Others persisted in the importance of hierarchical textual structures for the storage of story-contents in our memory. The
'fathers' of the story-grammars (Rumelhart 1975; Thorndyke 1977; Mandler and Johnson 1978) claimed that their grammars would be applicable to real stories and also that these grammars were appropriate theories for the representation of stories in our memory.

Thorndyke (1977) gave the following abstract outline of a story-grammar: (1) the goal for the protagonist; (2) the obstacle or complication for the protagonist to attain that goal; (3) the actions to overcome obstacles and complications and (4) the outcome of these actions. Subsequently, the comprehensibility of the story depends on the distance between announced goal and the performance of an action. The application of story-grammars restricts itself to envisaging the story in terms of the goals, intentions and purposes of the actor (protagonist) within the story, which only allows for the (re-)construction of a teleological account of action.

In addition, story grammars turned out to be incapable of capturing stories which are interrupted, or which omit goals, motives and events (Black & Bower 1980: 230). Hence, the ideal that the story-grammar should generate or recognise all texts that are stories fails on both an empirical as well as on a formal level (id: 231). But story-grammars only apply to stories with one major character who attempts to attain one well-defined goal; it is more difficult to cope with stories with conflicting goals and more than one protagonist (id: 231; chapter 9). For the endorsement of this shortcoming it suffices to compare the often heterogeneous and undecisive character of the legal narrative.

The frequently argued 'reliability' of story-grammars is thus a consequence of the fact that they are "context-free" (i.e. they do not take into account the pragmatic-discursive dimension, such as the speech situation or the knowledge and attitude of the communicative actors). We regard the construction of a story-grammar or story-model (e.g. Den Boer 1990: 363) mainly as a heuristic device, allowing for deeper penetration in the interrelatedness between various story-dimensions. Story-grammars should therefore not be regarded as the ultimate goal of narrative analysis. Meanwhile we must be aware of the fact that story-grammars are interpretations and not 'objective' reconstructions of the story as it has presented itself to the researcher.
3.6 Theories of Narrative (III)

Usually one makes a distinction between the tale ("le raconté") and the narrative ("le récit"). The tale has significant properties and presumably a rather fixed structure. Its properties have been captured in a semiology of the fable (Bremond 1964: 5; see section 3.4). For a narrative it is sufficient that it tells a story, which contains information about an (past) event or an experience (id: 4). Its structure is independent of its techniques or the medium by which it is transmitted (the so-called transposability of the story via the medium of the narrative; Chatman 1978: 20).

The "narrative" is a more general category than the story. In fact, the narrative contains a story (Polanyi 1982: 511; Chatman 1978: 19). Narratives are the 'mediations' of the story. Therefore, all stories are narratives, but not all narratives are stories (Polanyi 1982: 511). For example, the category of narratives may include stories, but also information reports or written documents that tell about outcomes or results. The narrative as mediator brings the story to life. The narrative is the "énonciation" or the communication, the way in which the story is expressed or evaluated.

In line with the structuralist tradition, Todorov 'revived' the distinction between story and discourse. In his view, the story is the argument, comprising a logic of actions and a 'syntax' of characters. A story is mainly designated by its temporal structure: we tell a story mostly about a past event or experience (i.e. Labov, see below). This temporal character is intertwined with actions, undertaken by characters in the story who have goals and motives in a certain situation. The actions propel the occurrence of new events. This perception of the notion 'story' thus strongly resembles Propp's perception of the Russian folk-tale.

For Ricoeur, who lifted the notion of 'story' or 'narrative' out of the literary exercise to associate it with the practical sphere, narratives are about an action "which is already there" (1981: 223; i.e. Polanyi 1982: 513). This leads Ricoeur to the investigation of human action as a text. He unfolds his argument that action should be considered as text as follows:
"An action, like a text, is a meaningful entity which must be constructed as a whole; and a conflict of interpretations can be resolved only by a process of argumentation and debate, in which the intentions of the agent may be relevant but are not decisive." (Ricoeur 1981: 15f).

This argument allows the theory of interpretation and the theory of narrative to be extended to the domain of the social sciences. Ricoeur supports his claim by stating that "action itself is the referent of many texts." (id: 16), an idea which is derived from Aristotle's thesis about tragedy. This genre specifically seeks to "imitate action in a poetic way." (id: 16). Tragedy does not merely describe actions. It rather throws a favourable light on these actions (id: 16). Thus "the world of fiction leads us to the heart of the real world of action". (id: 296).

Ricoeur's next claim in "Time and Narrative" is that the truth claim of a narrative or its structural identity is determined and governed by the temporal character of human experience: the world which is unfolded by the narrative is always a temporal world (Ricoeur 1984: 3).\(^\text{14}\)

Two conclusions may be derived from this claim. First, in the story, action and time are entangled with each other. Narrative action is dynamic only in the light of a chronological time-axis, which connects the stages between past and future. Time remains invisible if not made explicit through the narrative succession of actions. Second, and we regard this as crucial, both time and action are extensions of the narrator or interpreter. Time is a construct, allowing for the imposition of causal relations between the actions and events, whereas action as it is reconstructed in the narrative is the correlate of a decision made by the interpreter or narrator (see chapter 6 for an analysis of temporal transformations). The respective notions 'construction' and 'decision' may be regarded as discursive functions which determine the contents and the structure of the narrative. The story is therefore a product of discursive organisation, and their combination is the narrative (Chatman 1978: 19): discourse is the "expression plane" of the narrative structure (id: 146).

The principal feature of the narrative is that it orders and selects. Chatman defines selection as "the capacity of any discourse to choose which events and objects actually to state and which ones only to imply." (id: 28). The discursive level of the narrative thus embarks
on the complex relation between sender, author or narrator and receiver, interpreter or narratee.

The distinction between 'story' and 'discourse' is entirely compatible with the ideas of the speech act theorists (as in 2.5). In analogy, the narrative may be viewed as a "macro" speech act which encloses the story or propositional utterance and the discourse or illocutionary act. The 'locutionary' character of the story is hence conditioned by the illocutionary force of the discourse. The narrative as speech act would then have the following formula: $N = D(s)$ (the narrative is equal to the discursive performance of the story). This formula must however remain abstract, for that discourse consists of the performance of a sequence of speech acts, which means that the narrative may incorporate various illocutionary forces (i.e. Gülich 1976: 231). Moreover, due to intertextual references and discursive transpositions (for example quotations), the narrative becomes fragmented by which it loses its "general illocutionary force." A further complication on this formula is the heterogeneous performance of speech acts, especially in the context of forensic discourse (see also 2.5). The 'chain' of clients and legal agents involved in constructing the narrative dismembers the discourse in different situations and perspectives, causing different speech acts to be performed on the same story. In the context of a forensic discourse, this may mean that the defendant intends his/her narrative to be an excuse and that the judge intends his/her narrative performed on the same narrative core to be an admonition. Discourse-analysis, which regards language as a form of action in relation to its surrounding discourse, attempts to reconstruct this sequential performance of speech acts against the background of an interactive situation. It can thus cope with the sequentialisation of linguistic performance as well as with the heterogeneity of linguistic performance.

The distinction between story and discourse has opened the door for the analysis of storytelling within the discursive setting in which it is performed. One of the most celebrated approaches of 'storytelling in a context' has been developed by Labov. First in cooperation with with Waletzky (1973; 1977: 363f), he developed a temporal order scheme for the unfolding of stories:
"Narrative, (...), is only one way of recapitulating (...) past experience; the clauses are characteristically ordered in temporal sequence: (...)" (Labov 1977: 360).

Unlike most previous analyses, Labov and Waletzky analysed tape-recorded oral accounts of personal experience (1973: 12). They distinguished between the referential (what we call 'story') and evaluative function of narratives (what we call 'discourse') (id: 13). Labov and Waletzky maintain that storytelling is generally sequenced in the following way:

1. Abstract: The initiation of a story contains a brief summary of what is yet to come; the summary has a pragmatic function in that it allows the recipient to 'open' his/her knowledge register (Labov 1977: 363f).

2. Orientation: Identification of time, place, persons, their activities and the situation, which enables the hearer to recognise or localise the actors and the theme of the narrated event (Labov & Waletzky 1973: 32; Labov 1977: 364-366).


4. Evaluation: Expression of how the narrator experienced this event ("At that point I got really scared") (Labov & Waletzky 1973: 33-36; Labov 1977: 366-370). This is typical for narratives about personal experience. Without the evaluation, the narrative "lacks significance: it has no point." (Labov & Waletzky 1973: 33).

5. Resolution or Result: The dénouement of the complicating event or action (Labov & Waletzky 1973: 39).


The core of the narrative (i.e. the story) may remain the same, but the sequences which relate the story to the narrating situation may vary according to the speaker's anticipation to the listener's participation (i.e. Schütze 1976: 11. 15; Stempel 1982: 14). Crucial about the model is also that it departs from the formalist position, which rigourously claimed that the sequences within the story (the syntagmatic level) have a fixed order. Labov tends to render primacy to the pragmatic function of storytelling, which dominates the story to such an extent that it becomes subject to modifications.

Narrative evaluation had been defined by Labov and Waletzky (1973: 37) as
"that part of the narrative which reveals the attitude of the narrator towards the narrative by emphasizing the relative importance of some narrative units as compared to others."

In this older model, the evaluation was perceived to be a "section" within the narrative. But at the same time, Labov and Waletzky realised that the narrative evaluation may "fuse" with the result: "that is, a single narrative clause both emphasizes the importance of the result and states it."

They also defined evaluation as being embedded in the narrative framework. In a later publication, Labov (1977) corrected the idea of evaluation as a 'block' in the temporal sequence. Rather, the evaluation of the speaker permeates the story in waves, which is for example visible in the use of discourse markers (i.e. Schiffrin 1987). This correction is essential, because if evaluation indeed permeates the narrative, the tracing of the borders between the core of the story and its evaluation becomes complicated.

Adam (1985: 13), in discussing Labov's contribution, notes that these evaluations are continually embedded by the speaker because s/he seeks a justification to tell the story. Our point of view departs slightly from this position. In chapter 4 we will argue that it is not the act of storytelling itself which requires justification, but the narrative representation of the facts (i.e. Caesar-Wolf 1984: 207).

3.7 The Narrative in a Legal-Argumentative Context

Within the legal discourse, evaluation may be expressed by the performance of value-judgements, legal comments or meta-narrative sentences (Gülich 1976: 234f). This institutional evaluation, which not only precedes the story-telling event in that it discloses the "raison d'être" of the narrative, but also continuously permeates it in the event of making it the subject of subsequent discursive situations, is guided by a superordinate norm-and action-constellation. The substance of this higher ranked action-context may be an institution, but may also be a political meeting or a discussion relating to moral questions. The idea is that the narrative supports a thesis (expressed by either the speaker or by an interaction partner) as a means of proof, illustration or evidence (Gülich 1980: 335, 349; Schütze 1976: 6; Stempel 1982: 4; Schiffrin 1987: 17). In other words, all the
elements of the narrative core can potentially serve as premises for legal conclusions. Hoffmann (1980: 41) subsequently calls the legal narrative an "enthymemtic argumentative narrative structure".

Our objection to these ideas is that they are too weak, because they contain the suggestion that the narrative is explicitly 'referred to' when one argues a case: in that sense narratives would become the factual premises of the normative conclusion. It is our contention however that the narrative is a normative argument rather than the illustrative support of one (i.e. Fisher 1984: 2; 8). Narratives are based on good reasons and rational, because they "satisfy the demands of narrative probability and narrative fidelity, (...)" (id: 2; 8): the act of narrating and the act of arguing do not exclude each other, but compensate each other and may be performed simultaneously. This is not to say that legal agents always argue by means of narratives, but that when a certain reconstruction of events is defended, and when this reconstruction is rendered validity within the legal-normative context, the narrative is 'penetrated' (to use Labov's term) with underpinning reasons which constitute coherence and rational anticipations which stipulate consensus (see chapter 4).

The pragmatic school thus regards the act of storytelling as part of a more embracing communicative discourse. This discursive environment is decisive for the content, structure and function of the narrative. In everyday discourse, the interaction within which the act of narrating takes place is directed at the compensation of knowledge-gaps. As Labov anticipated with his introduction of pragmatic aspects of narrating, every narrative is not only related to interaction, but is principally an interaction (Schütze 1976: 8). Interaction literally means that an exchange takes place. This requires theoretically that the hearer performs a much more active role than was previously admitted (Schiffrin 1987: 17). This is what Schütze (id: 8) called the 'double contingency of the interaction process'. The interaction process is based on the idea that the partners act cooperatively (Grice 1989: 26). This means that the hearer bears an interest in a communicative interaction with the speaker; that the hearer is interested in getting to know the envisaged theme and content of the story; that the hearer agrees with the way in which the story is told (Schütze 1976: 9) and finally, that the hearer agrees with the tacit preuppositions with regard to the actualised interaction- and relation-aspect. This
includes the agreement of the hearer with the speaker's evaluations of the narrated events (id: 10). Narrating in everyday discourse is thus by many regarded as an activity which is directed at the cooperative creation of understanding ("Verständigungsorientiert").

In the courtroom or the police office however, this cooperation may be quasi-real, suspended or imposed (i.e. Den Boer 1990a). Following Habermas's theory of strategic action (see 2.6), Bal (1988: 116) calls this the constitution of a pseudo-consensus (section 2.6). The strategic character of legal communication rests on the intended realisation of unilaterally defined institutional goals (i.e. not shared by defendants). More concretely, courts use 'irritation strategies' (Schütze 1978: 83), which are normally kept latent for the defendant (Kallmeyer 1983: 144). The employment of such strategies may lead to the defendant's loss of concentration on the ongoing interaction (for example to such a degree that the defendant loses perspective on the planning of his/her next contribution to the interaction). Despite of these strategic interventions the court expects the defendant to deliver an optimal contribution to the courtroom proceedings ("Kooperationszwang"; Hoffmann 1983: 61).

Legal discourse is strategic and asymmetric for more than one reason. It shares with the everyday discourse that it is full of situations in which the speaker has a surplus of knowledge about a certain event. The difference is however, that in everyday discourse one seeks to remove this asymmetry of knowledge in a 'fair' way. The problem with the legal discourse is all too often that an imbalance of knowledge is perpetuated with the ultimate purpose to achieve agreement about the proposed representation of the events. It requires a very sophisticated defendant to see through the opaqueness of this mechanism. The more experienced criminal may take advantage of the fact that legal agents sometimes lack information about the event which is to be reconstructed.

Unlike everyday discourse, legal storytelling is not spontaneous (Jefferson 1978), but 'functionalised' (Rehbein 1980: 27). A defendant is frequently not allowed to produce a narrative voluntarily, unless the judge is of the opinion that more information is required. Hoffmann (1980: 41) states that only when the court is unable to cognitively reconstruct a case or when it discovers incompatibilities, it invites the defendant to give further specifications, suitable explanations, or just 'to tell more'. In doing that, the court is capable of controlling
the selective exacerbations on decision relevant themes (id: 41), because the defendant does not choose when s/he wants to speak. His/her speech turns are largely predetermined by either the trial protocol or by the chairperson (the judge). Narrating in the police office or the courtroom is therefore elicited by those who conduct the interview or interrogation (this theme will return in chapter 8). The supervision of that narrating is frequently interrupted, preventing the defendant from producing a monologue. Such leads to the segmentation of the defendant’s narrative (Hoffmann 1983: 100; see also 1.6).

Furthermore, legal storytelling is often established by means of questions which already contain the information to be produced: interviewing legal agents seek confirmation or denial of the evidence which is contained in the dossier (which is probably more the case in continental procedures, although the examination of defendants and witnesses is constrained by available pre-knowledge as well). Consider the following fragment in which the judge interrogates a witness (from: Niehe/vernieling/pol.rech./17ab/tramdb291189; for details see Appendix No. II):

48 J Ahm, you
49 J just interrupt me - I will present my story if
50 J there is anything wrong in it...//

3.8 Conclusions

The claim that the reconstruction of crime is a narrative practice can be supported by the analogy between the forensic discourse and the writing of history, which are both practices which 'seize the past'. It can furthermore be argued that the narrativity of the forensic discourse is just an instance of an encompassing ontological practice: the communication of experience.

The claim that law is a narrative practice demands an answer to the question which theory of narrative is eligible for the analysis of empirical courtroom-narratives. A vote against application of the formalist theory of narrative is based on the domination of form over content, and on the "armour"-effect caused by the fixation of narrative structure on the basis of tales. A discussion of the structuralist
theory of language has demonstrated that there is no room for an analysis of creative or strategic language-use, because structures predetermine our choice and combination of linguistic signs; such a position is regarded as incompatible with the speech act theory, which allows for a continuum between convention and intention. Suggestions put forward by text-processing theories are considered to be very helpful as long as we abstract from the psychological and objectifying constraints which it imposes on the researcher. We have therefore taken recourse to a number of discourse-analytic theories, which remove the emphasis from the text of the narrative to the act of narrating itself. This step allows for the implication of the transformations which occur at the communicative dimension (i.e. the shifts which are unaccounted for in a narrative algorithm).

The act of narrating (not the narrative) in the legal-discursive context is considered to differ from that in other contexts, especially in respect of the lack of spontaneity and initiative. In the legal sphere, narratives are elicited, fragmented by questions, guided toward a certain outcome and strategically interpreted in the light of an anticipated success-strategy.

It remains to be said that textual and narrative analysis are not controversial. But they tend to become controversial when applied to the legal discourse, or stronger, when its application is inspired by the presumption that the legal discourse is a narrative practice. The claim that the legal discourse is a narrative practice is therefore insufficient. We have to account for a theory of law which sets the parameters of narrative analysis. If we accept that the legal discourse is a dogmatic taxonomy of syllogistic reasoning, our narrative analysis might not reveal much more than information about how the law neatly classifies crimes and offences under the law. If we accept on the contrary the presumption that the legal discourse creates reality, then it is also necessary to criticise and neglect semantic-narrative theories which assume the classification and labeling of crime only. Claiming that the legal discourse is a pragmatic-creative rather than a semantic-articulative game hence determines the choice for a certain theory of narrative.

Finally, a painful question: is narrative analysis a useful metatheory for the analysis of legal reasoning? In this specific context, a narrative analysis cannot pretend more than to try and reveal the moments and positions of legal-narrative transformations.
Moreover, narrative analysis potentially offers an insight in the interpretation sketches which the legal discourse employs for the reconstruction of actions and events. But these merits remain unrewarded if they fail to identify rational patterns which adumbrate the legal-narrative performance. A hypothesis is needed to explain whether narrative shifts are either merely casual occurrences which are by no means connected with their discursive context, or carefully chosen steps which keep the development of the narrative on the route of a discursive strategy: narrative coherence.
NOTES CHAPTER 3


2. "History and fiction are alike stories or narratives of events and actions. But for history both the structure of the narrative and its details are representations of past actuality; and the claim to be a true representation is understood by both writer and reader. For fiction, there is no claim to be a true representation in any particular respect. Even though much might be true in the relevant sense, nothing in the fictional narrative marks out the difference between the truth and the imaginary: (...)" (Mink 1978: 130).


4. As under 3.

5. Many historical causes may be "intentions, resolutions, desires, hopes, plans, calculations, and so forth", or at least, explanations by means of these quasi-causes are typical for the writing of history, since they are inherently related to human action (Gardiner 1961: 119).

6. Veyne borrows the concept of 'infinite regression' from White, who borrowed it from Lévi-Strauss; White defines "infinite regression" as a (dangerous) circumstance which forces the historian to abandon factual domains: "Our explanations of historical structures and processes are thus determined more by what we leave out of our representations than by what we put in." (White 1978: 44).

7. "Point of view, I will say, designates in a third- or first-person narrative the orientation of the narrator's attitude toward the characters and the character's attitudes toward one another." (Ricoeur 1985: 93). Prince (1988: 73) defines "point of view" as follows: "The perceptual or conceptual position of which the narrated situations and events are presented (...)". Ricoeur calls the point of view one of the main factors in the plurivocity of art.

8. As under 3.

9. For literature about models and metaphors or analogies in science, see: Rottleuthner (1988); Black (1962); Ricoeur (1986: 240); Hesse (1980: 111f) and Lakoff & Johnson (1980).


12. The very possibility to construct story-grammars while taking into account the discursive context of stories has been discussed at great length within linguistics, but not without considerable criticism (see for example: *Journal of Pragmatics* 6, 1982, which is...

14. Ricoeur's main hypothesis is that "(...) time becomes human to the extent that it is articulated through a narrative mode, and narrative attains its full meaning when it becomes a condition of temporal existence" (1984: 52). In other words, universal time becomes human time through narrative configuration: "(...) the (...) prefigured time (...) becomes a refigured time through the mediation of a configured time." Universal time -history and future without the structure of chronology or prediction- has to be grasped by means of an entity, the plot (see 4.5).

15. Stempel (1982: 12) is cynical about the proposal to regard narrating as a speech act. He says that the act of narrating cannot count as a performat; the narrative can, but not the act of narrating.

16. It is in this context also crucial to develop the notion "narrative perlocution" (Gülich 1976: 232ff).

17. Labov distinguished four types of evaluation, namely the external justification ("The narrator can stop, turn to the listener, and tell him what the point is."); 1977: 371), the embedding of evaluation (preservation of "dramatic continuity"; the narrator quotes himself as addressing someone else; the introduction of a third person who evaluates the antagonist's actions for the narrator; id: 372f), the evaluative action (telling what people did rather than what they said; id: 373f), and finally the suspension of the action as evaluation (id: 374f).

18. Narratives which have a certain communicative function in a higher ranked context are 'functional narratives' according to Gülich (1980: 335) and 'communicative narratives' according to Quasthoff (1980: 160).

19. Schütze (1978) mentions five strategies, namely discrediting, prolongation, interference or overlap of narrative scheme and argumentative scheme, alternation and undermining.
CHAPTER 4: NARRATIVE COHERENCE AS STEPWISE JUSTIFICATION

4.1 Introduction

"Coherence" is usually opposed to "correspondence". The main theoretical presupposition of the correspondence theory of truth (empiricism) is that statements about facts should correspond with events or facts in reality. Hence, factuality should be the criterion of truth. But in the eye of the advocate of the coherence theory of truth, truth is determined by the coherence between one judgement and a set of other judgements. Coherence should therefore always be related to a relevant system of knowledge and value-judgements (Blackburn 1984: 235f).

Those who adhere the correspondence theory of truth regard coherence as 'unreal' and 'produced', because a system of propositions may be coherent without claiming any link with reality: coherence can therefore be established, produced or created (id: 238). It may well be an artificial product in which statements or propositions are knitted together into a logical pattern. On the other hand it is claimed that it is possible to produce a narrative about a real event which is totally inconsistent, or which fails to make sense.

The forensic discourse is frequently under pressure - not only from scientists, but also from the public - to demonstrate that its reconstruction of crime corresponds with reality. Stronger, it is canvassed about the methods of proof and evidence which are traditionally hailed as the safeguards of this correspondent relation (see f.e. 2.4). Coherence alone cannot be regarded as a sufficient criterion of truth within the legal discourse. From a strictly logic point of view, correspondence is indispensable for a theory of true discourse (i.e. Levy 1981). Both the legal and the historical discourse must thus perpetuate the myth of having contact with the facts. But their indirect access to the event remains unsatisfactory. A lack of credibility resulting from this unsatisfactory circumstance may be compensated with the introduction of eyewitnesses, by which the narrative at least continues to seem factual (Kermode 1979: 102).

Despite of possible legitimacy problems resulting from the lack of a correspondence with the real, both the historical as well as the legal discourse fail to grasp reality without interpretative and discursive
mediation (3.2). In such a state of affairs, coherence can only be a device vital to the discursive production of legal or historical fact. It follows that discourses which fail to provide sound methods to establish correspondence, correspondence and coherence are each other's necessary complements:

"Thus all we can claim is to have a point of contact with past events, enabling us perhaps to divine their true shape in some degree, but not such that we can check our reconstructions by comparing them with it to see how far they are correct. For the rest, the sole criterion of truth available to us, in history as in other branches of factual knowledge is the internal coherence of the beliefs we erect on that foundation." (Walsh 1951: 93)

If a discourse is unable to establish a direct referential relationship with a (possible) factual world, it requires rational compensation by means of a device which at least establishes the plausibility, credibility and acceptability of a narrative. The criminal justice system, although implicitly claiming that the crimes and offences it encapsulates correspond with a world of real events, is forced to produce coherent accounts of these events. In other words, even a positivist institutional ideology cannot deny that coherence necessarily compensates a potential correspondence with 'the facts'.

Coherence, unlike correspondence, may be related directly to discursive features such as reference and transformation. Correspondence is a semantic function which presupposes the existence of closed and controllable meaning-domains. In contrast, coherence is a pragmatic function which encloses and dominates the semantic function. This means subsequently that what we claim to be true is not primarily correspondent with 'the real' world, but that what we claim to be true is coherent with possible world-views.

On that account, saying that "(S)torytelling is a poor policy for delivering the truth (...)" (Blackburn 1984: 241) is in itself a poor claim. Although narratives may fail to correspond directly with reality (see 4.2), it is in the nature of any language-use that reality is primarily filtered by our interpretations. Therefore, no word, no proposition, no text is superior to the narrative as far as the delivery of truth is concerned, if at least our language is not any longer regarded as a closed system of semantic concepts.
It will be argued throughout this chapter that coherence is a necessary device for the support of the plausibility, credibility and acceptability of the narrative. We will refrain from a conception that defines 'coherence' as an intrinsic property of text of narrative. Instead, it is our view that (in-) coherence is the correlate of interpretive judgements. We will thereby assume that every communicative agent is competent to produce and express coherence-judgements (i.e. Adam 1985: 186). It will no doubt be clear that this shift from 'text' to 'communicative actor' is a direct consequence of the priority of a pragmatic-discursive over a semantic framework.

Instead of defining coherence as an intrinsic textual feature, we will also assume it to be an ideal projection of successful communication, that is: communication which is in principle not hindered by incomprehensibility or lack of consensus. Language-users bear coherent communication in mind as a tacit or underlying plan, and gradually realise their attempts to establish that coherence in successive interactive steps. The consequence of this "gradually-working-towards-model" is that language-users may locally adapt and modify their communicative plan of action (i.e. Schiffrin 1987: 28). The projection of coherence and the gradual realisation thereof (4.5) facilitates the occurrence of narrative transformations. For example, a narrative is judged as coherent when irrelevant bits are left out (relevance and selection), when its sentences are temporally reversed (temporal transformations), when its content is embedded within an institutional-communicative context (the framing of experience) or when contradictions are weakened or even deleted (chapters 6, 7, 8, 9 and 10). Striving for coherence is therefore not a restriction of creative interpretation and production of narratives, but the reverse: a stimulus. In such a conception, coherence may be defined as an in-built anticipation to the justification of the contents of the narrative. Furthermore, this anticipation aims at the accomplishment of approval (i.e. consensus) among the legal-professional audience (4.6).

In this chapter we will discuss to what extent our narrative model of the legal-institutional discourse matches with either a correspondence or a coherence theory of truth, after which we will pay attention to the theoretical implications of these theories. Coherent textual or discursive relations are often conceived as logical relations between the 'whole' (the legal system; the law) and its 'parts' (i.e. legal cases; legal decisions). In 4.3 we will discuss this conception from a
radical hermeneutic point of view, with the help of which we can establish a dynamic notion of coherence. Section 4.4 is devoted to the debate surrounding MacCormick's distinction between narrative and normative coherence, leading to the development of the notion of narrative coherence as a discursive strategy which is to secure professional agreement.

4.2 Correspondence versus Coherence

The notion of 'coherence' often appears in relation to logical and linguistic notions such as 'consistence' and 'cohesion'. 'Consistence' means that a text or argument should be logically watertight. Contradictions between propositions, ideas or facts ought to be absent. Consistence has since long been regarded as a criterion for the truth of a system or of a theory, provided that true premises lead to a true conclusion via a valid syllogism. Unlike consistence, 'cohesion' is not always associated with criteria of logic. Rather, the concept resembles biological functions, such as the "sticking together" or "cleaving together" of molecules or other non-biological elements. In linguistic terms, cohesion means the connection between morphemes, lexemes and words in sentences (see 4.2.1).¹

Coherence may be established among various entities, such as propositions, texts, knowledge-domains, belief-systems, attitudes, roles and strategies. Every proposition or set of propositions which contains less than the complete system of propositions becomes self-contradictory; contradictions may be reconciled only in a complete system. This 'complete system' does however not correspond to reality, it is a reality (see 4.3).

Because coherence seems a rather difficult concept to define, some have opted for a loose and flexible definition of coherence. For them, coherence is the 'fitting or hanging together' of elements. We know that something 'fits together' on an intuitive basis. This marks rather vaguely and arbitrarily the difference between coherence and incoherence on the basis of one decisive criterion, namely: 'making sense' (MacCormick 1984: 38).

But it soon turns out that the definition of coherence as a 'fitting together' of elements is insufficient for that the description of its character and functioning has variably been made dependent on divergent
views on the law. Some argue that in law, the 'fitting together' or 'harmony' is tied up with the consistency between judicial decisions and the existing valid law. In this latter sense, coherence is not the creation of new law, but the discovery of "principles and rules of justice already existing in the law." (Ehrlich 1975: 180). But others argue in the reverse way, namely that judges may create new law but if they do so (free legal construction), then every creation should fit to and harmonise with the cases which are arranged within law (i.e. Wiarda 1972: 17).

After having defined the legal discourse as a narrative practice (3.2; 3.3) an unavoidable and crucial question is whether a narrative can truly correspond with reality. A question which follows is whether there can be a reliable method to test this correspondence.

Formally, the only way to test the truth-value of the narrative is to check its correspondence with the actual occurrence of an event. But when we attempt to determine the truth of narratives, we face a few thresholds, namely the hidden or deleted referentiality, its evaluative character and its intricate textual structure.

In relation to the correspondence theory of truth, Ankersmit (1981: 77) claims that it is formally impossible to answer the question whether the narrative corresponds to a real state of affairs or not. One logical possibility would perhaps be to test the correspondence between the real and each narrative proposition. But an attempt to 'chop' a narrative in separate propositions is bound to fail because narrative propositions lose their meaning when lifted out of their immediate textual context. Narrative propositions only make sense when taken together.

However, such a global objection against the possibility of a narrative correspondence does not sufficiently meet all objections against the possibility to check the correspondence between the reality of the past and the narrative. For example, why should it be impossible to test whether the narrative macro-proposition (e.g. containing abstract semantic information about a criminal event: X stabbed Y) corresponds to an event? We can ask somebody who witnessed the event to confirm the information contained in that macro-proposition.

However, a method which establishes correspondence between narrative proposition and real event needs to remove its focus to the narrator's sincerity (witness or suspect; see 2.4). The claim that a narrative or
its propositions correspond with the event is built in by the narrator, and the condition for the truth of that correspondence is the observance of a sincerity-maxime. When recounting an event, the narrator relies on his/her personal observation of the event, which means that the narratee does not have access to that observation other than by relying on the sincerity of the narrator.

One way to capture the beliefs of the audience is by observing the logic of the narrative. Coherence is a major text-linguistic device which helps to support the logic links within the text, enabling the audience to understand, believe and accept the contents of that text. The latter mechanism shows that coherence is indispensable: a narrative cannot prove its correspondence with the real, but it can only assert it.

4.2.1 Textual Coherence

It is crucial to know from the start of the text (or alternatively beforehand) what the text is going to be about or how the text will be developed. Such information enables the reader to generate the meaning of the smaller parts of the text. When people interpret or process a text, they organise the meaning elements into a coherent whole. This kind of hierarchical organisation of textual information is predominantly responsible for the establishment of coherence.

But apart from hierarchical organisation, the linear or sequential relation between sentences constitutes textual coherence as well (i.e. Glowalla & Collonius 1982: 111). The linear organisation of text corresponds with the local ordering of textual elements, whereas the hierarchical organisation corresponds with the global ordering of textual elements. Van Dijk (1977: 95) defines linear or sequential coherence as

"(...) the coherence relations holding between propositions expressed by composite sentences and sequences of sentences."

The macro-structure (see also 3.5, 5.2 and 7.4) is a semantic structure on a more global level, and entails a relation not between single propositions, but between "sets of propositions, whole sequences and certain operations on sets and sequences of propositions of a discourse." (Van Dijk 1977: 95).
In discourse analysis a distinction is drawn between cohesion and coherence, cohesion generally being regarded as a precondition for the attainment of coherence (i.e. Black & Bern 1981: 267). Cohesion and coherence are both regarded as parts of coreference, which concerns the semantic deep-structure of the text. According to Kintsch and Van Dijk (1978: 367), referential coherence is "probably the most important single criterion for the coherence of text bases"; "A discourse is coherent if and only if its respective sentences and propositions are connected, (...)" (id: 365). Van Dijk (1977: 102f) defines five coherence-conditions, namely situation (the situation in the next sentence must be identical or accessible from the situation in the first sentence), individual (consistency in characters or personnages), series (defined by relations of partiality), property (it must be possible for a semantic property to belong to a certain semantic class or category) and fact (facts or events are conditions for certain consequences). The coherence (or cohesion) between sentences may be established with the help of various linguistic devices that are responsible for the linear organisation of text, for example:

- anaphora, which are linguistic elements that refer backward:

(1) Suspect Jansen inflicted grievous physical harm on his brother in law
(2) It was meant to be a revenge

The example shows a so-called text-anaphor, which is an expression with a referent to something which has already been introduced. Apart from text-anaphors, we find situational anaphors, which refer to something of which the existence must be inferred from the prior discourse (Sanford & Simon 1982: 100); for example:

(3) He killed the woman at three o'clock at night
(4) The murder took place in a dark shed

- cataphora, which are linguistic elements that refer forward:

(5) It was completely empty
(6) John took the apples from the tree

- pronominalisation (she, him, his, it, etc.):
(7) Jansen repaired the roof
(8) His neighbour took his tools

- conjunction (coordination, adverbs, subordination);

(9) Karin felt sick because she drank a bottle of whisky

- lexicalisation (repetition of the same item which is derived of the same lexical root, synonyms, hyponyms, superordination, the use of a general item, collocation):

(10) The cottage was situated on a beautiful spot
(11) The house contained antique furniture

Cohesion or linear coherence could be schematised according to the following pattern:

a1, a2, a3,....an

Hierarchical coherence on the other hand allows for classification and grouping of elements around a thematic core, and could be schematised as follows:

0a1, 0a2, 0a3,....0an

More in particular, narrative coherence seems to be defined mainly as a matter of causal connections, in which events and states continually transform (i.e. Schank & Abelson 1977: 28; Trabasso & Sperry 1985: 597; Trabasso et al. 1984: 85f). This is rather self-evident, since the special feature of the narrative consists in the causal organisation of information about action, event and time (3.3; 3.5).

It needs to be said however that neither cohesion nor consistency can be considered as states of affairs, or rather, as intrinsic properties of text or conversation. Both are established through the work of interpretation, or the drawing of inferences (i.e. Grice 1989; Clark 1978; Schiffrin 1987: 13). When we interpret speech-utterances, actions or texts, we have to draw these inferences. This does not only occur in cases where the objects of our interpretation show gaps, lacunaes, incompleteness, a minimal elaboration or clues to misunderstanding.
Normally, the interpreter is expected to make assumptions on the development of the text, dialogue or action: **clues in the text create expectations**.

### 4.2.2 Discursive Coherence

Coherence is not always a matter of a self-evident establishment of a sound sequential structure (Jacobs & Jackson 1983: 64). Consider for example:

A: Did you drive into school today?
B: Would you like a drive home?

The sequence above illustrates that the tacit presuppositions of the interlocutors which propel the emergence of a coherent sequence are based on shared knowledge. Someone who does not know in which situation A and B are involved perhaps fails to establish the coherence of this sequence. In the example above, A presupposes that B knows that A's car is broken and A expects that B will be as nice as to give A a lift, upon which B assumes that A will accept B's offer.

Formal characterisations of coherence as in the section above therefore ought to be embedded "in a more embracing definition taking into account pragmatic (...) features: (...)" (Van Dijk 1979: 54). Coherence carries a *pragmatic* function, which means that the speaker or author presupposes the existence of knowledge about the message (i.e. Van Dijk 1978: 93). The coherent matching between the the speaker's presuppositions, expectations and anticipations and those of the recipient are thus part of an encompassing pragmatic situation.

Coherence is also inextricably related to **understanding**. We often notice problems of coherence (i.e. incoherence²) when confronted with problems of misunderstanding (Fritz 1982: 1). But **is coherence** so central a concept to many text-linguists- always a necessary precondition for successful understanding? If we look at jokes as a textual genre, incongruities form a substantial part of the text; incoherence is indispensable when one wants to make people laugh (the intended effect). Humour, or the interpretation of a funny text or remark, is often based precisely on the implications of incoherence. On the more serious side of life there are some striking examples of what seems to be incoherent discourse as well, but which is generally well...
understood by the participants. Sanders (1983: 75) illustrates this phenomenon with the following example:

A. How about taking out the garbage?
B. I don't have to do things just because you say so.

Hence, misunderstanding is not always an indication of incoherence either in speech production or in speech interpretation, and coherence is no guarantee for understanding. The problem of understanding can now be turned around. It is not just the speaker (we assume that s/he tries to produce a coherent utterance) who is responsible for possible misunderstanding of what he/she says. The problem is rather the question how a speaker 'predicts' that the recipient will judge his/her speech-utterance as coherent.

If during a courtroom-interrogation the defendant is unable to make sense of the judge's question, the judge's question is not necessarily incoherent. Rather the knowledge, language or goal-orientation of the judge does not match with the defendant's. Judging a linguistic utterance as incoherent is first and foremost a matter of divergent perspectives (see 1.6). Coherence in fact presupposes an underlying 'cooperative game' between interaction-partners. The attempt to be coherent with the knowledge and jargon of the recipient is the attempt to be comprehensible, thereby constituting a coherence of two worlds or perspectives.

Jacobs and Jackson (1983) reach the conclusion that a rationality-model of coherence is superior to models of sequency-rules:

"An utterance is coherent if it proceeds rationally toward the achievement of some goal or toward modification or obstruction of the goal." (id: 65)

But this might well bring another problem to the surface. It requires us to define coherence as a rational strategy. The problem with strategies is that speech-utterances cannot be claimed a priori as intentional or goal-rational (section 2.6), even not when observed as such. However, we do not deny the possibility that coherence- or consistency-building in texts or dialogues can be manipulated by such instrumental strategies (i.e. Iser 1978: 126).

Another, perhaps more careful approach which avoids a teleological account is the definition of coherence as a latent or implicit basis of
text-production and -interpretation. Language-users take account of this tacit basis when producing utterances. In fact, the idea is that the average language-user tries to avoid the incoherence, and if it does interfere, one employs conversational devices to solve incoherence. In such a way, coherence should be regarded as an ideal-discursive norm.

After this re-definition, coherence may be regarded as an underlying criterion which is not merely applied to linguistic acts, but also to goals, strategies, beliefs, attitudes, knowledge-domains, ritualistic aspects and action-patterns. Nofsinger (1983) states for example that the courtroom-session itself is coherent because of its collective orientation to communication-goals. At least, it is the overall goal of each party to produce a story. But, even if there is a collective orientation on the production of a narrative, individual or role-defined strategies may challenge the collective orientation on coherence.

To recapitulate, the attribution of coherence to a text-sequence is not a process which goes without saying, for that it implies active judgements which are not always of a strictly logical nature. Coherence cannot be regarded as the result of linguistic action, but as a rationale which underlies this linguistic action and interpretation.

In the process of the production of texts and dialogues, one is able to organise coherence by means of regulative coherence-judgements (Fritz 1982: 98). Linguistic devices allocate attention at changes within the action-sequences, for example when one uses the word 'suddenly', or when one steers a dialogue by means of repair-mechanisms (for example by means of explicit discussion about the ground-rules of the interaction or conversation) if the dialogue seems to be incoherent.

This ultimately means that a criterion of coherence cannot be uniquely determined. Coherence is a crucial organisation principle of human communication, even if it is not a fact, but mere presumption or phantom. Interpretation in the construction of coherence is indispensable: "Interpretation seems the most basic and necessary aspect of coherence production." (Hopper 1983: 81). Pragmatic coherence is thus not an intrinsic property of text or a result of communication, but instead a stepwise and creative process which anticipates understanding and justification.
4.3 Hierarchy and Completeness of Discourse

The interpretation of a proposition may fail a "hermeneutic uptake" if the interpreter is not informed about the macro-proposition which generates the meaning of the minor propositions. If somebody asks me "Tonight at eight o'clock?", there is a possibility that I will not understand that question without being informed about the global plan that generates the meaning of that question, namely that we made a prior arrangement to go out for dinner tonight. It is equally hard to interpret three movie-shots when ignorant about theme or story of the movie. The coherence of our interpretation is therefore supported by the availability of information which surrounds or superordinates the proposition. In text-linguistics, this particular matter is discussed under the heading of the relation between minor-propositions and macro-propositions (section 3.5 and 4.2.1).

The relation between major (or macro-) and minor proposition has long been the subject of discussion in other, but related, disciplines too. Schleiermacher (in: Dilthey 1974: 330) regarded the relation between whole and part as a central problem of hermeneutics. This relation poses the circular problem that a text can only be understood from its words and their interconnections, but simultaneously the full comprehension of its parts presupposes the full comprehension of the encompassing text. In a modern version this circular problem would be characterised as the 'top-down-interpretation' alternated with the 'bottom-up-interpretation'. Neither of the two discovery procedures is satisfactory when not simultaneously applied (i.e. Blackburn 1984: 276). All understanding is therefore relative or circular and cannot be terminated. As a consequence complete knowledge of the whole is unattainable (Schleiermacher in: Mueller-Volmer 1986: 76).

The theoretical starting point for dogmatic legal hermeneuticians remains the idea that the law or the legal system should be understood as a complete unity: legal propositions (either in the form of the legal-normative qualification of an action or in the form of a legal decision) should be interpreted in light of that totality (i.e. Coing 1976: 309). Hierarchical interpretation, as it has been promoted by Betti (1967: 601), should reveal the objective meaning of the law, which occurs by means of 'fitting' the meaning of the text in a higher unity: Quod non est in lege, nec in iure. Betti calls this search for the coherence of legal meaning the "hermeneutic canon of totality" (in:
Bleicher 1980: 59f): the coherence of meaning is reconstructed as a meaningful relation between parts and whole. Within the legal sphere, the hermeneutic canon of totality is applied "in the interpretation of explanations and modes of conduct as well as legal norms and other legal directives and maxims of judgments." (id: 60). Hruschka (1972: 61) explains this 'dogma' of legal hierarchical interpretation as the claim that a norm is valid when it coheres with superordinate norms or with one "super"-norm, or at least that no mutual contradiction exists. In a strongly resembling line of thought, MacCormick (1978: 195) writes that:

"There is a fundamental judicial commandment: Thou shalt not controvert established and binding rules of law."

Interpretation, whether performed in the context of a legal discourse or elsewhere, thus constitutes coherence by means of relationality (a legal proposition vis-à-vis a legal text or law; a legal decision vis-à-vis a corpus of precedents; inside vis-à-vis outside; part vis-à-vis whole) and the hierarchical process of grounding (i.e. Japp 1977: 109). Broekman (1983: 102) defines relationality as a 'discursive strategy' by means of which legal agents attain the unity of legal discourse; the legal discourse is a mixture of references which necessitates the stipulated existence of a basic system (legal dogmatics).

Hence, the criterion of coherence encourages us to regard a theory, a system or a discourse as a unity which is complete and consistent with methods of reasoning such as subsumption and syllogism.

'Subsumption' generally means 'ranking' or 'ordering' under a general proposition. Subsumption is to be regarded as the mediation of reason by means of syllogism: first we have to subsume a certain fact under a (more) general principle (classification), and only after the subsumption we can realise the logic of the syllogism, which presupposes the 'truth' of the major proposition. Neither subsumption nor syllogism can possibly be applied without stipulating the totality of discourse. Without discursive borderlines it would always be possible to find principles which are more general, and this would disfunctionalise the operationalisation of subsumption and syllogism. Interpretation would become an infinite process if we did not imagine figurative legal-discursive borderlines, thereby endangering the institutional process-economy.
The stipulation of the totality (or completeness) of the legal discourse, and the acceptance of subsumption and syllogism within that systematic paradigm, stands in sharp contrast with the modern hermeneutic position. Gadamer rejects subsumption in the legal discourse by labelling it as 'a layman's imagination' (1975: 489). The subsumption model as a model of legal reasoning has become increasingly inconceivable because the distance between the generality of the law and the concrete legal position cannot be simply elevated. Gadamer 'admonishes' legal thinkers for their insistence on a conception of legal reasoning as if it were deductive reasoning:

"Es scheint nicht einmal zu genügen, daß man sich in einer idealen Dogmatik die rechtsproduktive Kraft des einzelfalles als deduktiv vorbestimmt denkt, in dem Sinne daß eine Dogmatik sich denken ließe, die alle überhaupt möglichen Rechtswahrheiten in einem kohärenten Systems wenigstens potentiell enthielt. Selbst die 'Idee' einer solchen vollendeten Dogmatik scheint unsinnig, ganz abgesehen davon, daß faktisch die rechtsschöpferische Kraft des Falls stets neue Kodifikationen vorbereitet."
(id: 489)

The conception of law as a complete discourse implies the presupposition that legal agents are capable of solving every problem of interpretation by reference to a closed dogmatic system: solutions are supposed to ready available in the law. The modern hermeneutic rejection of the completeness of the legal discourse subsequently undermines the prescriptive dogmatic force of law. However, such a rejection should not be incompatible with the idea that the completeness of the legal discourse may be a projection of possible meaning and application serving as a guiding principle for the tuning in of interpretations.

This alternative conception bears more than important relevance for the perspective of our analysis. All the segments of legal-institutional action, experience and knowledge have to be taken together before they make sense as a legal discourse. These separate segments rather possess "an internal coherence and thereby constitute what may be called 'life-system'" (Mannheim 1982: 91). The (internal) coherence of knowledge and experience is according to Mannheim a precondition for the "totality of the structurally interconnected experiential facts (...)" (id:91);
"The totality of what is knowable is divided among various individuals, each of whom only takes part in a particular segment of the representations possible in a collective experiential space."

Completeness can therefore alternatively be defined in terms of the 'set of possible states of the world in a knowledge situation' (Gärdenfors 1980: 407). We can thus employ two descriptions of the set of possible states of the world, namely the description of what we know in a certain situation, and the description of what we do not know in a certain situation (we should be able to specify what states of the world are compatible with what we know). Such an approach makes it possible to regard completeness as the stipulation of a shared knowledge and as everything which is excluded by this shared knowledge; one person gives another explanation than the other (id: 421). An example is a definition of God as the total of all beliefs of all the Christian people in the world. Not is it only possible to imagine different definitions with such an idea of God, it also abolishes the ideal of a finite explanation of God. Knowledge is always perspectivistic and bound to a certain experience. The totality of knowledge and experience can only be a projection, and can be imagined as a supra-individual objectivity. But if coherence is a supra-individual phenomenon, the question should be raised how agents manage to coordinate their interpretations so that they merge into one coherent narrative account.

How do legal agents guarantee that their participation in these social shemas coheres with the participation of other legal agents? Is coherence something which is an intrinsic part of a latent and 'unknown' overall plan of rational action and goals?

4.4 Narrative and Normative Coherence

The discussion about correspondence, coherence, and hierarchical interpretation, returns in full flow in the debate about the distinction between normative and narrative coherence which was introduced by MacCormick (1984). In the years which followed his publication, the distinction has been commented upon by various
authors, to whom we will devote more attention after a brief review of MacCormick's ideas.

In his article, MacCormick argues that in legal justification, there are two distinct ways of testing coherence. The first is normative coherence, which relates to the justification of legal rulings or normative propositions "more generally in the context of a legal system conceived as a normative order." (id: 37) The second is narrative coherence, which has to do with the justification of the "findings of fact" and the "drawing of reasonable inferences from evidence" (id: 37). A common feature in both is that a lack of coherence "involves a failure to make sense" (it does not 'hang together'). The principle of hierarchical grounding returns also here in MacCormick's work: he defines normative coherence as "a set of rules is coherent if they all satisfy or are instances of a single more general principle." (id: 40). This notably differs from justification procedures in practical reasoning.

"(...) the coherence of a set of norms is a function of its justifiability under higher order principles or values, principles and values being extensionally equivalent; provided that the higher or highest-order principles and values seem acceptable as delineating a satisfactory form of life, when taken together." (id: 42)

Coherence justifies because it matches with "universality and also the greatest possible degree of generality in practical principles." (id: 46). Relatively detailed rules are thus "instances of more general principles." (id: 46). This is as we saw in the previous section: a formalistic and relative perspective on legal-normative justification.

Narrative coherence on the other hand is "a test of truth or probability in questions of fact and evidence upon which direct proof by immediate observation is unavoidable" (id: 48). Unlike normative coherence which concerns derivability, narrative coherence concerns intelligibility, explicability and probability. Narrative coherence is only employed where immediate observation of facts is absent or fails:

"(W)hatever propositions about unperceived events fit into our explanatory schema in rational relationships with true propositions about perceived events are, under the second supposition, true propositions about the reality of the unperceived events." (MacCormick 1984: 51)
The most coherent story is not the story which makes most sense, but which "involves the lowest improbability (...)" (id: 52). To prejudge MacCormick's contribution, it should be made explicit that our own definition of narrative coherence does not discriminate between the observation of facts and the absence thereof. Instead, we believe that whether or not "facts" are being observed, a narrative is always required for the reconstruction of a case (see also Jackson below), and furthermore, that the coherence of that narrative is a strategy which does not only embark on the relation between "reality" and "qualified legal fact", but on the chronological and paradigmatic order of the criminal process. We will come back to that in section 4.5.

MacCormick concludes that there is a parallelism between normative and narrative coherence in terms of their rational justification. On the one hand, there is coherence which justifies normative conclusions, and on the other hand, there is coherence which justifies factual conclusions. Normative coherence corresponds to a rational normative order ("a mutually consistent set of principles and values such that these principles and values propose an ideal pattern of a satisfactory way of life, and such that all the more detailed practical rules are justifiable under (......) the highest-order principles and values.") (id: 53). Narrative coherence corresponds to a rational world-view ("a mutually consistent set of explanatory principles such that these principles delineate an intelligible pattern of events in a possible world, and such that they make intelligible (......) the events which our perceptions disclose to us." (id: 53). MacCormick's conclusion is (with Weinberger) that coherence is always a matter of rationality, but not always a matter of truth.

Jackson's (1988: 37-60) main objection to MacCormick's model is that the latter explicitly locates the concept of narrative coherence "within the traditional paradigm of a correspondence theory of truth." (id: 18). Narrative coherence comes for MacCormick only into play "in the absence of truth based upon observation (and communicated through referential language) (...)" (id: 19). Jackson proposes an alternative model of adjudication ("adjudicatory syllogism"), which circumvents his own rejection of the referential character of the legal fact and of the deductive application of law to fact. Jackson's difficulty with the traditional syllogistic model is reference: the classic deductive algorithm fails to refer to the actual discourse.
But in his 'pragmatised' alternative model, Jackson insists on the maintenance of the syllogism. In his view, the major-premise "conceals narrative structures" in the sense that "subconscious narrative models" may inform legal rules (id: 58). Major premises thus embody an opaque narrative-symbolic representation. These narrative structures inform the content of the story which is told. This is the minor premise which is itself either constructed as a narrative or the construction of a particular narrative. The major premise and the minor premise are related to each other by means of coherence or pattern-matching. Major and minor premise do not have to be strictly identical; it is enough that they are similar (id: 59). Our view is that the syllogistic model even in its narrativised form ought to be abolished, for that it keeps alive the illusion that major and minor premise are a dichotomy rather than a synthetic composition.

In yet another comment, Van Roermund (1985; see also 1990), focuses on narrative rather than on normative coherence. The author proposes to regard narrative coherence as the principle of the relation between facts and norms (i.e. between case and decision). This idea differs from MacCormick's, because the latter regards narrative coherence only as the ordering principle of that relation (1985: 1). The distinction between norms and facts presupposes an irreversible order, that is to say, the fact/event precedes what is spread over it. The distinction between norms and facts resembles the distinction between story (fact) and discourse (norm) (id: 3; see also section 3.6). Applying Culler's argument, events or facts would as such be the product of legal-discursive qualifications (id: 3ff). Van Roermund however argues that there is no final hierarchy between the "noumenal" and the "phenomenal" world, i.e. between (discursive) meaning and event. Rather, the hierarchy is distorted. Narrative coherence cannot "be restricted to a test of probability or plausibility concerning (presuppositions of) what happened." (id: 10). Stories in the legal discourse are told in terms of the rule. The role of storytelling "is the best way to keep the belief intact that each rule is apriori applicable or not in any given situation, that each action accords or conflicts with any given rule, and that this can be decided by comparing the action a and the rule r." (id: 10).
Similar ideas reverberate in an article put forward by Nerhot (1990), albeit argued along a different theory. The author claims that MacCormick was mistaken in drawing the distinction between normative and narrative coherence: the distinction is inoperative (id: 204f; 214). Although in agreement with Dworkin (see below) about his idea of "law as an interpretive concept whose justification is narrative in nature" (id: 211), Nerhot rejects Dworkin's epistemological conceptions as a viable alternative to MacCormick's distinction. As a matter of fact, Dworkin omits a discussion about the "context of discovery" (id: 207) while paying major attention to the normative basis of legal decision-making. Nerhot therefore turns to Gadamer's philosophical hermeneutics (2.7) for a discussion of MacCormick's distinction between narrative and normative coherence. Nerhot clearly sees no point in MacCormick's distinction between a cognitive and a normative function. The legal interpretation always involves the attribution of sense, since the text itself has no ambition. But interpretation is neither arbitrary nor free (id: 218). Interpreters only have to keep one single aim in mind when interpreting: coherence. Coherence is thus not an intrinsic feature of the legal discourse, but something that goes along with the interpretation and application of legal texts (Nerhot 1990: 219). It is, in our own words, something that never is, but always will be. In Nerhot's view, narrative coherence is the fundamen of legal argumentation (id: 220). There are no 'brute facts' and 'narrative facts'; rather, all facts are the product of narrative emplotment or creative imitation (id: 223). We can therefore dispense with a concept of normative coherence. The coherence with norms, or the normative qualification, is already 'inside' the narrative. The norm constitutes its applicable meaning through the narrative, assuming that all interpretation of reality or fact involves the application of norms (Gadamer).

A question which has been left unanswered concerns whether the notion of "normative coherence" should be thrown overboard when thinking of the relation between norms or legal decisions instead of the relation between narrative and norm. However, as Nerhot (1990) has illustrated, Dworkin's metaphor of legal interpretation, the 'chain novel', makes the notion of normative coherence (between decision and norm) a redundant category. We will not here discuss the variety of Dworkin's rejections, which include the descriptive character of law, evaluative
and consequentialist accounts of law, intentionalist theories of interpretation and his preference for talk about 'hard cases' within the common law, the interpretation of which should result in "one right answer".

Dworkin puts forward an aesthetic hypothesis, by means of which he compares legal and literary interpretation (1983: 252), he first lays aside debates in the literary camp (id: 253) and then restricts his idea of interpretation as the attempt to make it the best work of art (id: 253): "Interpretation of a text attempts to show it as the best work of art it can be, (...)" (id: 253; see also Glass 1988: 444). In attaining the answer of "best", the interpreters rely on either theoretical or normative beliefs: "Both sorts of beliefs figure in the judgment that one way of reading a text makes it a better text than another way." (Dworkin 1983: 255). Dworkin selects from the literary practice a technique in which some novels are written: the chain novel (id: 261). He prefers not to apply literary interpretation, but the writing of Dallas or Dynasty as a model "for the central method of legal analysis". The metaphor employed by Dworkin evolves around the thesis that the judge seeks to achieve normative consistency: a certain decision is correct when it follows from a political theory which delivers the best justification (Van den Burg & Van Willigenburg 1986: 355).

Dworkin unfolds metaphorical idea of the 'chain novel' is described as follows:

"Suppose that a group of novelists is engaged for a particular project and that they draw lots to determine the order of the play. The lowest number writes the opening chapter of a novel, which he or she then sends to the next number who adds a chapter, with the understanding that he is adding a chapter to that novel rather than beginning a new one, and then sends the two chapters to the next number, and so on. Now every novelist but the first has the dual responsibilities of interpreting and creating because each must read all that has gone before in order to establish, in the interpretivist sense, what the novel so far created is. He or she must decide what the characters are "really" like; what motives in fact guide them; what the point or theme of the developing novel is; how far some literary device or figure, consciously or unconsciously used, contributes to these, and whether it should be extended or refined or trimmed or dropped in order to send the novel further in one direction rather than another. This must be interpretation in a non-intention-bound style because, at least for all novelists after the second, there is no single author whose intentions any interpreter can, by the rules of the project, regard as decisive." (id: 262f)
Fish (1983: 273; see also Glass 1988: 445) protests against the idea that it would be more difficult for novelists who are further in the chain to interpret and create. In fact, what Dworkin argues is that the more 'history' there is, the narrower the creativity becomes. Fish holds in contrast that all novelists in the chain are equally free and constrained at the same time; also the first novelist is constrained because he 'commits' himself and opens the novel "under the same constraints that rule the decisions of his collaborators." (1983: 273). Fish's supporting thesis is that all information comes as interpreted information (id: 274). But in his reply to Fish, Dworkin answers that he did not intend to say that authors later in the chain are less free; rather he claims that their activity is of a different nature: the "number and identity" of the constraints are different (1983a: 304-305).

What Dworkin means with the last sentence in the quotation above is that somewhere there is cooperation or common responsibility for the end-product. Obviously, Dworkin has also chosen for the metaphor of the chain-novel because he unilaterally defines it as "non-intention-bound", which matches his rejection of intentionalism. However, it seems that implicitly, Dworkin also rejects the principle of hierarchical interpretation. He claims that the first author (i.e. the legislator) cannot be responsible for the creative interpretation of other authors (i.e. judges) that compose their art (i.e. adjudications) in line of the same theme. But unfortunately, an elaboration on the criterion "in line" is absent. Although Dworkin talks eventually about "coherence", "integrity" and "fit" (1983: 266), it seems that "in line" is determined by the author's or judge's theoretical, moral or political conviction. Dworkin's theory of interpretation is thus essentially a political theory (id: 270)\(^5\), which suggests that the consistency of legal interpretation relies on criteria which are external to the legal practice:

"Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively done, in the way that each of our novelists formed an opinion about the collective novel so far written. Any judge forced to decide a lawsuit will find, if he looks in the appropriate books, records of many arguably similar cases decided over decades or even centuries past by many other judges of different styles and judicial and
political philosophies, in periods of different orthodoxies of procedure and judicial convention. Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures and conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is." (id: 263-264)

However, Fish rightly claims that one does not 'find' a history. The materials, i.e. the previous judicial decisions are already organised by judicial concerns

"(...) similarity is not something one finds but something one must establish, and when one establishes it, one establishes the configurations of the cited cases as well as of the case that is to be decided. Similarity, in short, is not a property of texts (...)." (Fish 1983: 277)

Therefore, 'finding arguably similar cases' - which is the mechanism of analogical reasoning by which judicial precedent is established - is a constructive practice. But at this point the question whether Dworkin would at all disagree with that. Perhaps Fish's criticism is just a storm in a tea-cup. And indeed, Dworkin himself does not attempt to hide his disgust with Fish's criticism. Almost to his or her embarrassment, the reader gets to know that Fish's essay is incompetent (1983a: 287) and a "treacherous report" (id: 288) and that Fish has "brutally misread" Dworkin's essay (id: 287).

At this point we should return to the two main issues, namely, the qualification of 'coherence' as a truth-criterion in a legal-narrative enterprise, and a comparison between MacCormick and Dworkin as far as their ideas about narrativity are concerned.

In fact, Dworkin does not speak much of 'coherence' but of 'consistency'. Contrary to MacCormick, Dworkin seems to presuppose a unity in the world of the law in the coherence of the act of justification (law taken as a whole). MacCormick uniquely relates coherence to communal questions and taken in a particular domain of law (Nerhot 1990: 207). Dworkin uses narrative and normative coherence in a large sense, that is to say, he either regards law as a chain novel or
as the body of law as a whole (all principles together make a coherent system). MacCormick uses narrative coherence in a 'stricto sensu', which implies processes of justification, fact-selection and qualification.7

Another question is whether Dworkin and MacCormick mean the same thing with narrativity. The difference seems to be, at least to us, that Dworkin only compares the legal and the literary exercise: he turns the literary practice into a metaphor for legal practice and avoids, unlike MacCormick, to devote discussion to the relation between the 'factual world' and 'legal propositions' (i.e. Nerhot 1990: 207). In one of the few remarks Dworkin makes about the relation between the legal propositions and the real, he actually says that "propositions of law do not describe the real world in the way ordinary propositions do, but rather are propositions whose assertion is warranted by ground rules like those in the literary exercise." (Dworkin 1985: 135). Do legal propositions not refer to reality, whereas ordinary propositions do?

If ordinary propositions correspond with the real world and legal propositions do not - which, to our mind, is an unhappy distinction, then it certainly means that there is no room for MacCormick's notion of narrative coherence in Dworkin's theory.

In our view the recapitulation of the norm in the legal narrative, and the subsequent redundancy of the notion of normative coherence, should not mean that it is impossible to conceive of explicit references to the norm within the legal narrative. Normative coherence could as such be the explicit intertextual link between what is generally called 'fact' and 'norm' (this definition differs once again from MacCormick's definition, because he defines as a relation between norms). Explicit references to the Criminal Code in a police record (see 6.3) can be tracked down by examination of the employment of legal vocabulary, such as "intention" and "self-defence". It seems logical and predictable that every legal narrative, or more concretely, every police record, should start with the explicit reference to a legal norm. This has a justificationary function: it functionally discloses the contents of the narrative to enable a legal interpretation. In the "Jansen versus Bertinus"-case for example (discussion in chapters 6 - 10) normative references legitimate the taking of Jansen into custody (i.e. reference to the norm authorises the choice for legal actions against the
suspect). Explicit reference to article 287 in relation to article 45 or article 302 of the Dutch Criminal Code, occurs at the beginning of the documentation of this case. Such normative references also have another function, namely the avoidance of a possibly elaborate and laborious search for further clues. In this sense, inserted normative references may set the scope of legal-normative interpretation in that they support a restrictive focus on clues which are generated by the definition of the norm.

However, in agreement with Nerhot and Van Roermund it is our contention that - even though these explicit normative references to the Criminal Code allow for a fine demarcation between 'factual' and 'normative' expressions in the narrative - the boundaries between the two entities dissolve when a narrative is written in terms of the rule (Van Roermund), thus making the distinction between a "context of discovery" (the construction of the facts) and a "context of justification" (the justification of the legal decision) redundant. A narrative and a normative coherence then coincide in a legal narrative in which the coherence between the elements is interwoven, implicit and latent, thereby operating as a tacit anticipation in view of the legal decision. In such a conception, the interpretation of the legal norm influences the way in which the narrative is construed, and vice versa, the interpretation of the story determines which legal norm is to be integrated in the construction of the legal narrative (see also 2.2). Narrative coherence is in that sense not an explicit test of the probability or improbability of the story, but a constitutive and underlying discursive procedure which gives a sense of direction to the performance and the interpretation of the narrative.

4.5 The "Plot-Character" of the Legal Narrative

In the previous chapter we have seen that the 'story' - the core of the narrative - is continuously surrounded, shaped and dominated by its pragmatic-discursive context. Hence, narratives, which carry the performative aspect of storytelling, should be regarded as compositions which obscure the demarcations between the story-plot (see section 3.2) and the discursive ordering strategies, anticipations to the audience and narratorial value-judgements. The narrative core is a construction which absorbs implanted evaluations and opinions.
A very important aspect of the pragmatic analysis of narrative is the consideration of the attitude the speaker or hearer with regard to the contents of the story (i.e. Schiffrin 1987: 18). A personal commitment is of particular interest in the legal practice where communicative agents take an argumentative position in order to realise goals when narrating and interpreting. Schiffrin claims that one can display commitment by means of an assertion which contains a claim to the truth of a proposition (see section 2.4), or by intensifying that assertion (see section 6.2).

In the theory of literature, the vitality of the notion of "point of view" has been emphasised by various authors (see also 3.2). "Point of view" reaches beyond the perspective of the actor in the story alone, because it entails the pragmatic influence of the author and the reader. Stanzel has examined the notion of 'point of view' under the aspect of "mediacy" (1984: 10):

"The mediacy of presentation of the narrative text provides latitude for the author in which he can design an appropriate form for the transmission of each story. It goes without much saying that the act of conception and the act of shaping the agents of narrative transmission are intimately connected and occur at much the same time."

However, he says, for methodological reasons it is absolutely necessary to distinguish between "the rendering of mediacy" and the "conception of the story." (id: 20). Yet, 'point of view' and 'narrator' are the two most important concepts for an analysis of the transmission-process in a narrative (id: 20). Ricoeur (1984: 140) has developed the notion of 'point of view' into the notion of "reflective judgement", which he employs to explain that neither author nor reader are restricted by the directive contents or force of the text: narrating requires reflection on the event which is to be narrated. Due to the disappearance of the actual narrator, a certain amount of narratorial reflexion remains interior to the narrative when the narrative is transmitted through discourse.

Traditionally, "events" in the story are seen as the components of a plot. Chatman (1978: 43) says that "Aristotle defined plot (mythos) as the "arrangement of incidents"." The structuralist theory of the narrative holds in contrast that "plot" is a function of the discourse or the narrative representation of the story (id: 43). The function of
"plot" is thus to "emphasize or de-emphasize certain story-events, to interpret some and to leave others to inference, to show or to tell, to comment or to remain silent, to focus on this or that aspect of an event or character." (Chatman 1978: 43). Chatman adds that a narrative without a plot is a "logical impossibility" (id: 47). Ricoeur, who characterises narratives as a linguistic means of productive imagination (mimesis), claims that the narrative performs a transposition or displacement from "literal" to "non-literal" by means of a synthesis or plot (1984: ix).

Narrators are able to account for the relation between the concept of action on the one hand and the discursive rules of narrative composition on the other hand (Ricoeur 1983: 90). On this basis narrators construct "emplotment" (id: 64). The logic of "emplotment" is thus responsible for the opaqueness of the relation between story and narrative.

The act of emplotment mediates between time and narrative, because it synthesises and transforms heterogenous elements in the form of a composition or plot (id: 102). The "mise en intrigue" marries two temporal dimensions, the one being chronological ("concordance") and the other non-chronological ("disconcordance") (id: 103). The chronological dimension constitutes the episodic dimension of the story ("l'aspect épisodique") and transforms events into a history ("l'aspect configurant"). The episode of the narrative is a "unity" of rather loosely related events, whereas the configurative aspect is the taking together ("prendre ensemble") of actions; it triggers the temporal totality (id: 103). The configurative arrangement -the emplotment-transforms the succession of events into a meaningful totality which is the correlate of a projected jointure of events. Ricoeur calls the act of emplotment a reflexive act. The plot is thus a "thought" ("pensée"), which is the point or the theme of the narrative configuration.

In retrospect, the most important lines of thought which Ricoeur displays are that narratives are synthetic compositions which owe their structure to a pre-conceived plot, that the borders between plot and argument are hard to trace due to the inscription of those elements in the narrative and that the act of emplotment is reflexive.

It would be unsatisfactory if we were to leave Ricoeur's intriguing philosophy of narrative composition unapplied to the legal sphere. Before going into the question of what may be the special character of
a legal plot, we should first establish a tentative resemblance between Ricoeur's "plot" (see above), Gadamer's "question" (see 2.7) and Popper's "conjecture" (Popper 1981: 87). The three notions have in common that a certain sense of direction is given to the process of interpretation (be it of a scientific or a practical nature) and that the choice of plot, question or conjecture defines selective expectations according to which the outcomes are going to be formulated (i.e. Ricoeur 1983: 167)\(^\text{10}\). A selective choice of theory, plot or question therefore determines or 'narrows' the outcomes. Ideally, these outcomes cohere with the expectations outlined by the hypothesis. Gadamer and Popper agree that these outcomes may fail to meet the expectations following from the definition of theory, plot or question, and therefore rely on a mechanism of "trial and error" which allows the designer of the expectation to revise and correct that expectation (Ricoeur does not seem to worry about this problem, for that his interests lie mainly in the construction of the "data" or the substance of the narrative). Popper (1972: 228) would say that a conjecture turns out to be wrong when sufficient corroboration lacks, whereas Gadamer would say that an answer is wrong when an argumentative dialogue fails to achieve a consensus between the partners. Neither of them provides further specification of the quality or sufficiency of that corroboration or consensus.

Although the problem of how one can know that the choice of plot, question or conjecture is "wrong" is solved to a certain extent, it must be the case that the very choice itself is based on a reasonable expectation that the outcomes will indeed confirm the hypothesis. Positive confirmation cannot be predicted with unfallible accuracy however, especially not when the discursive contributions to the emplotment are manifold. It should therefore be possible to either revise the plot when it threatens to result in an incoherent narrative, or when the proposed narrative-discursive representation of events is being opposed to by those from which agreement is required for its justification.

Despite of the lack of development of these ideas for application on complex discourses, these ideas are helpful for the formulation of our thesis in 4.6, namely that the 'rightness' or 'wrongness' of the choice of a plot (or conjecture or question) may be anticipated by the narrator, provided that the narrator takes part in a professional community of which s/he knows which criteria prevail when the choice of
plot is to be justified in due course. However, it requires that the narrator is able to reflect on the narrative elements, a reflection which enables the narrator to weigh the relevance of the narrative elements, to place them in a normative-argumentative context and to preview the endorsement of a legal decision resulting from it. An significant difference between Ricoeur on the one hand and Gadamer and Popper on the other hand is more than relevant in this context. Ricoeur introduces the role of reflective judgement in the act of emplotment, based on the distinction between "énonciation" and "énoncé" via an analogy with respectively propositional act and illocutionary act (the judicative act; Ricoeur 1984: 161). We just memorise Ricoeur's agreement with Collingwood (in 3.2) that "rethinking the past already contains a critical moment." Gadamer would oppose this idea, because a discrimination between prejudice and past cannot be drawn on objective grounds (see 2.7). In his outline of a philosophical hermeneutics, there is no such thing as a "meta-language" or an "extra-linguistic critical understanding" (Lenoble 1990: 155). Consequently, for Gadamer the choice of 'plot' or question rests on the negativity of knowledge or experience, not on interest. Habermas strongly rebelled against this position, and his theory of communicative action which evolves around the speech act theory therefore seems compatible with Ricoeur's theory of time and narrative. Whilst endorsing Habermas's view, it is our contention that the choice of a plot is a strategy which has to ensure a coherent mutation and (re-) combination of rule-elements and narrative elements with which the narrator expects that his/her fellow-narrators will agree.

If it can be claimed that every legal narrative is predetermined by a plot, the choice of which is critically reflected upon by the narrator, what should the "nature" of that legal plot be? Frank (1949a: 100) claims that judges always start with conclusions and work backward to the premises. Because Frank eschews "rule-fetichism", he avoids to say that judges start with the rules and work back to the facts. The advantage of "conclusions" to "rules" is that we can avoid to define the legal act of emplotment as the imposition of rule-definitions onto fact-definitions (2.2).

A shortcoming in Frank's approach is that it does not take account of the fact that the premises have to be made explicit before the conclusion can be made explicit. This is the precondition of a normal,
chronological trial proceeding and this is also the representation of the succession of events in the trial record. Therefore, if we want to maintain the idea that judges start with conclusions from which they work backward to the premises, at least three modifications are required:

1) Conclusions must have a discursive basis with which they cohere, which means that the judge or whatever legal agent has access to (some of the) components of the story (i.e. the premises).

2) (Selective) access to these story-components is directed by a projected conclusion.

3) This projected conclusion may be modified and revised in the course of trial-proceedings, due to:
   a) new information which changes the juxtaposition of the elements within the narrative, or b) to persuasion or dissuasion in the argumentative interaction, leading the judge to regard the projected conclusion in a new light or perspective.

These modifications redefine the "conclusion" as a plot in itself, as a narrative containing reference to the story about the real and the inferential imagination following from that. The conclusion as projection continuously infiltrates the definition of the premises, which implies that 'premises' and 'conclusion' collapse into each other.

Bogen & Lynch (1989) attribute the status of "master narrative" to this kind of narrative-conclusive projection. This concept is linked to the idea that the 'legal archeologists' (i.e. those who reconstruct a past event) have a kind of generalised narrative in mind, comparable to Gadamer's idea of 'horizon'. The elicited testimonies from defendant, witnesses and experts are 'fused' into that "horizon of a conventional historical account" (Bogen & Lynch: 16) or "project" (id: 6). Testimonies become embedded in the master narrative and witnesses are being called to give 'unique contributions', which "must be heard as instances of a larger 'narrative package'" (id: 5). Thus, the personal, diffuse, fragmentary and perspectival (id: 6) character of separate testimonies is being suppressed and transformed in favour of the orientation to the coherence of the pivotal 'discovery'. The 'plotted' project constitutes the selective framework which manipulates the use of testimonies and documents, thus enforcing built-in protections against uncharitable investigations (id: 8). The "master narrative" seldom comes to light, but instead remains a coherent plot on the
background. Such implies that the master-narrative is characterised by an "anonymous voice" (id: 2).

The invisibility of the master narrative throws us back to Habermas's use of the speech act theory in a theory of communicative action (2.6) and its repercussions on an illocutionary theory of storytelling (3.6). The latent project of the legal "master narrative" can be identified as the perlocution which coincides with the referential and rhetorical plane of the act of narrating. A fundamental point is that the master narrative can only be defined as a perlocutionary act from the point of view of the communicative actor who is unaware of this hidden plan. Those who take part in the realisation of perlocutionary goals are the legal agents. Those who do not are the defendants and witnesses.

One important question is left unanswered so far, namely: how can it be that the projected master narrative coheres with the private projections of each legal agent (or narrator)? How is it possible that legal agents reach an agreement about the question which interpretations "match" the master narrative?

4.6 Narrative Coherence Anticipates Professional Consensus

Narratives are not mere reflections of our claim on real events, but may also serve as explanations and justifications in the context of an ongoing dialogue or a superior normative action framework (such as the legal discourse). To explain or justify something by means of the narrative implies that one judges and 'weighs' ("peser") the event, action or experience. The judgement is the nuance of the evaluation (Ricoeur 1983: 183)\textsuperscript{11}.

Some authors regard coherence as a mode of 'fitting together' as a strategy of deciding what ought to be accepted as 'true' or 'false':

"One might say then, that it is this fitting together which gives us our criterion of truth: things which don't fit with what we accept, we then regard as false. But someone might now say: this is just how we operate. By fitting things together, accepting those propositions which cohere with what has antecedently been accepted, and rejecting those which do not." (Danto 1985: 67)
In this sense, coherence is a strategy for the construction of acceptable narratives. Once the historian or lawyer has decided on the plot of the saga or crime, it is just a matter of 'wiping out' what does not fit a predetermined intelligible and acceptable structure (Walsh 1951: 33).

Intelligibility (Walsh) and acceptability (Danto) are the correlates of coherence. This has for example been shown by linguists who found that the less coherent a text is, the longer it takes a reader to process a text. The first correlate of coherence – intelligibility – is of a hermeneutic nature, whereas the second correlate – acceptability – is of a rhetorical nature (i.e. Hawes 1983).

Truth-criteria for narratives cannot reach beyond their internal logic and plausibility (i.e. Danto 1985: 122f). According to Danto (id: 135) and Ankersmit (1981: 235) the (historical) narrative can be no more than a truth-proposal. Says Ankersmit (id: 235):

"The narrative meaning of a narratio is a proposal as to what possible statements we should select for structuring our ideas on certain historical topics. Therefore, the historian's main aim is not what statements he should select for his narratio but rather what proposal he should make for selecting statements on some part of the past."

The basis for this selection is established by the chosen plot, i.e. by the historian's precomprehension of a fact, event or action. The narrating historian selects on the basis of what may be called his standard of moral rightness, probability, plausibility and acceptability. The pre-comprehension goes hand in hand with the historian's bias, which enters the story-structure (i.e. Bennett and Feldman 1981: 171). Finally, the 'truth-proposal' is chosen on the basis of an expectation of the audience's response. In the latter sense, the truth of the story is an extension of the narrator's anticipation to justification and the audience's expectations (Stempel 1982: 14; Schütze 1976: 11, 15; Caesar-Wolf 1984: 207).

It thus seems that the narrative appeals to acceptability rather than truth, with the implication that narrative rationality departs from the traditional standards of scientific rationality (Fisher 1984: 9). Narrative rationality is not ruled by standards such as calculation, inference-making, appropriate tests and rules of advocacy (id: 9). In that sense, narrative rationality is 'accessible' to everyone, and
traditional rationality only to an elite. Without taking explicit recourse to a discussion about different forms of rationality, we will claim that the narrative does not make an appeal to the audience's criterion of truth, but instead to their criteria of fidelity and probability (verisimilitude in the antique rhetorics), plausibility and acceptability. Although one can draw an analytic distinction between story and discourse, in practice the extricate narrative texture complicates the separation of chaff from wheat. If the story cannot be isolated any longer, its reference to a world cannot be identified either. Questions relating to reality, reference and the claim on truth thus become questions of interpretation, persuasion and anticipation. This requires a redefinition of narrative coherence as the establishment of a representationalist relation between fact and statement to an argumentative relation between the narrated event (alternative accounts are possible) and the underlying master narrative.

So far, we have consistently spoken of 'acceptability' instead of 'acceptance'. The latter notion corresponds with the actual realisation of consensus or agreement, whereas the notion of 'acceptability' leaves the final result of an argumentative interaction open, and corresponds with the idea that rational acceptability is a regulative principle which guides the argumentation about alternative interpretations (Aarnio 1985: 281). The justification which the legal agent seeks to achieve is 'contextually sufficient', because s/he is not required to dig into more profound questions. In fact, within the legal community, some of the answers provided by the narrative are taken for granted, whereas others are problematised. In the legal practice, 'challenging' the provided answers is often a strategy performed by the defence counsel. But is this not just a role which is coherent with the ritual?

Aarnio (1985: 282; Aarnio et al. 1981: in particular 437-441) claims that the achievement of consensus is regulated by the 'majority principle'. The legal agent who argues the rightness of a certain interpretation (in our case of a narrative reproduction of events) has to emphasise the arguments which will win the support of "most members" of his audience, the legal community. However, Aarnio fails to account for the double character of consensus, namely that consensus may be positive, in the sense that all members agree to agree, or negative, in
the sense that all members agree that some may disagree. Put differently, 'disagreement' still presupposes the existence of consensus: it can only be formulated and contrasted of it is known what the projected agreement is about (i.e. Glass 1988: 452f). A further problem with the majority-principle is that it is difficult to know whether a member who originally disagrees is forced to agree: if all my colleagues hold view X, they must be thinking that I am really crazy to hold view Y, so perhaps I should adopt view X as well. Although Aarnio is of the opinion that the discursive dynamics can change these argumentative positions, it is unclear whether the professional consensus comes about 'spontaneously' or 'under pressure' of the colleagues. However, if the conditions of this discourse are ideal-rational, no such question should arise, because the assumption is that the participants in the debate achieve a consensus without coercion (i.e. Habermas). Niiniluoto (1981: 176) justifiably claims that Aarnio's majority-principle requires compensation with a system of so-called "second-order beliefs", which are beliefs held by the members of the community about their fellow members.

It should therefore be the case that a member of the legal community takes recourse to a certain background-consensus and to a stock of knowledge and experience which has nourished anticipations to how his/her colleagues respond to a 'truth-proposal'. The mere participation in the legal community suffices for the recognition of standard-justifications: of some justifications one may reasonably expect that they will be accepted without further ado, and of some one knows out of experience that they will be opposed. Eventual 'surprises' or unexpected turns therefore need to be suppressed or transformed into an account which matches the plan on the background.

Rules of justification are thus inherent in the 'language-game' (Wittgenstein 1988 (1953)), 'disciplinary matrix' (Kuhn 1977: 297), 'peer-group' (Rorty; i.e. Goldman 1986: 66) or 'interpretive community' (Fish 1980). One of these rules of justification may be that the members of the legal community refrain from the acceptance of narrative reproductions which fall short of coherence (the members may then demand that the narrative be reworded, e.g. in the Court of Appeal).

Goldman (1986: 68) wonders rightly why this 'social perspective' on justification attributes privilege to the (legal) community. Indeed, various questions are still left open. Can it be that the legal decision -even if it rests on consensus- is wrong? And who decides on
the wrongness or rightness of legal decisions? What is the procedure
the correctness of legal decisions?

Answers to these questions may be provided in the counter-factual
context of the ideal speech situation. For, in this situation, the
legal community is not closed, but open. Legal decisions are
transparent for the members of society, and the legal consensus is
'corroborated' and 'legitimised' by a social consensus (i.e. Aarnio
1985: 282). To achieve this ideal state of 'openness' between the two
discourses, the legal institution ought to open its dossiers, to
abandon its archaic language and to instruct members of society about
its tacit principles and formulae. This is however not the world about
which we speak. Even worse is the fact that the consensus about which
we have spoken in this section is often restricted to the members of
the legal community only. A consensus between them is still a verdict
to the defendant.

4.7 Conclusions

Discourses which claim factual correspondence with the real, but which
at the same time fail to provide adequate tests to proof the existence
of that correspondence (history, law), require a complementary
establishment of coherent relations. The plane of narrative coherence
conceals this discursive lack of direct access to past events.
Narrative coherence is a dynamic and rational discursive strategy,
rather than an intrinsic property of text or discourse which can be
established objectively. We have redefined narrative coherence as a
tacit plan of cooperative communication which guides the goal-
orientation toward a legal decision. Furthermore, coherence-relationships
are rationally 'tested' by substantive judgements from professional
legal agents and linguistic judgements from competent communicative
actors (these two groups run parallel). In turn, these judgements
depend on whether world-views, beliefs, perspectives and knowledge-
states match with one another. It is our contention that they do so in
the context of an 'interpretive community'.

This line of reasoning has allowed us to define law as a possible
projection of a complete unity within which hierarchical interpretation
constitutes coherent relations. Almost paradoxically, narrative
coherence is the watch-dog of the imaginary legal-discursive
borderlines (for that it supports the constitution of harmonious relations between existing textual or discursive elements), but also a strategy which triggers an interpretative transgression beyond those borderlines. In the latter sense, coherence is a creative device which facilitates the production of new meaning.

Narrative coherence has been weakened as a necessary pre-condition for "making sense" or successful understanding. Incoherence makes often perfect sense, especially when it is backed up by a shared pre-knowledge of what is being communicated. The question which remains to be answered is whether distorted coherence, or incoherence, is an acceptable situation in law. The emergence of incoherence in law is regarded as a disturbing factor, for that it fuels problems of injustice or illegitimacy. We will presuppose that the appearance of incoherence is an unwanted state of affairs, and that legal agents employ strategies to either create a coherent narrative or avoid an incoherent narrative. Our hypothesis is therefore that coherence is a discursive rationale which generates the performance of narrative transformations (see chapter 5). By means of these transformations, legal agents are able to continuously re-adjust the structure and content of the narrative against the background of a projected 'master narrative'.

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NOTES CHAPTER 4


2. Incoherence comes into existence when one draws an illogical conclusion, when presuppositions are competitive, when one presupposes a consensus while there is none, when one presupposes common knowledge while there is none, when one expects someone to listen who does not listen, when one presupposes patterns of action ("Handlungsmuster") which are not consciously carried by the co-agents, or when propositions compete while the illocutive aspect is kept constant (Fritz 1982: 108f).

3. Broekman argued similarly ("Juristischer Diskurs und Rechtstheorie", in: *Rechtstheorie*, 11, 1980 pp. 17-46) in favour of the thesis that "legal norms deny their origin as narratives of a culture's self-image (especially as being rational), to present themselves as rational-discursive accounts of that culture's alleged nature." (ref. by Van Roermund, 1985: 10, fn. 4). In this context, we would disagree with Stierle (1973: 355) — who suggests that the move from the paragraph in the criminal code to the event which is classified under that paragraph is a move from the systematic text-range to the narrative text-range — and endorse Broekman's view that the paradigmatic structure of the law roots in a symbolic-narrative structure.

4. "Some novels have in fact been written in this way (...)" (Dworkin 1983: 263). The question remains whether the chain novel is representative for literary practice.

5. Judges develop a particular approach to legal interpretation by forming and refining a political theory sensitive to those issues on which interpretation in particular cases will depend; and they call this their legal philosophy." (Dworkin 1983: 266).

6. Dworkin (1985: 140) distinguishes between consistency in legal reasoning and (narrative) consistency in the literary practice. He says that the type of consistency in legal reasoning is normative, "which is plainly more complex than narrative consistency and may be thought to introduce new grounds for claims of subjectivism."

7. Erasmus-seminar on coherence 7 March 1989 European University Institute Florence organised by Prof. Dr. Patrick Nerhot (presentation by G. Huggins, J. Bengoetxea and I. Dwars, PhD-students from the University of Edinburgh and the European University Institute).

8. The Oxford English Dictionary describes the term "plot" as follows: "To make a plan, map, or diagram" of "something to be laid out, constructed, or made (...)". The narrative plot is the arrangement of incidents in a certain structure; this arrangement often has a causal character with a chronological representation ("Mary felt ill, because she ate too many apples"; Prince 1988: 71f).
9. From the original French version.

10. As under 9.

11. As under 9 and 10.
CHAPTER 5: NARRATIVE TRANSFORMATIONS

5.1 Introduction

According to the traditional subsumption-model, so-called 'brute facts' are first normatively qualified before being processed as a minor proposition in a normative syllogism. This legal-normative qualification of criminal events in the context of subsumption is but one imaginable model of transformations. But the subsumption-model is an abstract representation of legal reasoning and therefore neglects many smaller, linguistic transformations which occur when a criminal event is being institutionally framed. If the subsumption-model is an adequate representation of the operation by means of which the criminal event is qualified, then it could be put forward that the syllogism becomes a possible logical device only after a certain transformation or "institutional absorption" of social reality.

It is crucial next to note that the subsumption-model only takes normative or qualified propositions into account. Hence, it is tacitly presupposed that texts, i.e witness-testimonies, summons, police records and the like, have already been abstracted in the form of clear-cut propositions. However, the process of summarising and abstracting events into propositions cannot be simply taken for granted: if subsumption is to be held for real, then it should also be emphasised that these normative propositions are not automatic results following from a neutral, stable and regular legal-institutional interpretation. If these propositions appear at all, it should be admitted that they are the products of complex institutional goal-oriented action and interpretation.

Such an admission, however, does not sufficiently remove other criticisms levelled against the subsumption-model. A shortcoming of the model is the presupposition of a dialectic distinction and opposition between "norm", law or major proposition on the one hand, and "fact", criminal event or minor proposition on the other hand (see 2.2). In other words, the subsumption-model does not allow a dynamic interaction to take place between these two. A huge blank space in the subsumption-model concerns the discursive or intertextual network which is required to establish the link between "fact" and "norm". Furthermore, the model is restricted to a hierarchical relation between "norm" and
"fact", thereby omitting description and analysis of the chronological (accumulative) concatenation of textual documents which are the building-blocks of the qualification-process. Finally, the subsumption-model tends to put forward universal pretentions, thus failing to take account of the specific legal-institutional action-context which make transformations and decisions happen.

An alternative model will have to compensate for these handicaps, particularly by emphasising the various "smaller", perhaps less dramatic transformations which propell the legal-normative qualification of the "fact". In the succeeding chapters we will closely examine the details of the mysterious "jump" from "fact" to "norm" whilst backshadowing the alleged certainties of a finely demarcated "input"-fact and "output"-decision. This means concretely that we will focus on the processional aspects of legal interpretation while continuously looking at the links between the textual-discursive level and the legal-institutional action-level.

In line with the previous chapters, an alternative model of transformations will adopt a textual instead of a propositional approach. "Fact" and "norm" will be equally treated as narrative texts, which continuously interact with each other, even to such an extent that their stipulated demarcation vanishes. The proposal thus intends to reject the dogmatic relation between "fact" and "norm". At the same time it levels criticism against the idea that only the fact - and not the norm - becomes narrativised when being 'subsumed'. Unlike Stierle (1973: 355), who claims that the transition from the section in the criminal law to the event is a transition from the systematic to the narrative textual scope, our claim will be that this transition is reciprocal which creates a highly complex discursive network, even to such an extent that "fact" and "norm" become irrecognisable as two separate entities. Therefore, even models which give room to the narrativisation of the qualification-process (Stierle 1973; Caesar-Wolf 1984: 18), are governed by the strict distinction - connected with a hierarchy - between the systematic and the narrative textual domain. The vagueness of the distinction between the abstractly formulated, but widely applicable, legal rules and the concrete living-situation (Schütze 1978) forces us to acknowledge that there is a considerable amount of simplicity in the theoretical conception that subsumption is the device to overcome this cleavage. In fact, the only way to bridge the rupture between the everyday and the legal discourse is to exploit
a textual structure which is equal in both discourses: the narrative (see 3.3). The reliance on the narrative structure facilitates a relatively unproblematic transformation from the one into the other discourse (Bax 1986: 261). The exploitation of that structure conceals the normative transformation of event into a legally qualified case (i.e. Kallmeyer 1983: 143f).^ The narrative thus constitutes a fundamental condition for the gradual transformation from the one discourse into the other.

However, criminal evidence is composed not only of these two dialectically opposed narratives, but of several ones, namely the institutional chain of narratives performed by various legal-institutional agents (the police officers who are in charge of the inquiry and the reporting, the public prosecutor who is in charge of the summons, accusation and requisitory, the judge who leads the interrogation and the defence counsel who pleads) and the "clients" of the institution (the suspect/defendant who is questioned by both police and judge, the plaintiff and the witnesses who narrate their testimonies about their experiences).

Similarly, the legal-systemic text - by us defined as a narrative-symbolic expression of cultural values about crime and punishment (cf. Broekman) - is subject to various applications and interpretations which may modify and articulate its semantic scope. In other words, the variable interpretation of the norm triggers the emergence of divergent narratives in which the meaning of the norm is concretised.

It is also taken into account that these various narratives may be modified in the course of the criminal process, i.e. the narrator's perspective on the event may change due to the acquisition of new information and knowledge about the event, or due to being persuaded to adopt another interpreter's point of view. The narratives therefore stand in a dynamic relation to each other, the complexity of which depends on their position in the configuration of the "master narrative" (see 4.5). A model of legal-narrative transformations thus changes the so-called major and minor proposition in the subsumption-model into "plot"-entities which have a plural, heterogeneous instead of a singular, homogeneous character.

Transformations may be innocent. They routinely occur when we recall, quote, paraphrase or summarise narratives as they reach us by means of the newspaper, a television-interview or a policy-bulletin. Textual
reproduction is never perfect, but always creative. Nevertheless, this "innocence" is not incompatible with the view that transformations may be intentionally selected or strategically processed when the accomplishment of institutional goals is aimed at. Transformations of institutional texts are likely to be part of the procedural requirement of relevance and coherence. Inconsistencies or possible cues to misunderstanding - such as ambiguities or clashes between the common and the legal-dogmatic understanding of various aspects of the law - may be suppressed and deleted to make the narrative look smoother. Simultaneously, some elements of the narrative may be explicitly focused on and further elaborated, strengthened or intensified. Underneath that textual-discursive labour lies a legal-institutional constraint to select those parts of the narrated crime legal agents feel able to deal with. The latter constraint is rooted in the idea that law never recounts the story from its very genesis (i.e. Broekman 1982: 174).

In the subsequent chapter we will briefly review some linguistic models of transformations, notably a few syntactic, semantic and textual theories which have at least one element in common, namely the probe of transformations (5.2). We will subsequently concentrate on the notion of transformations as it is developed in the legal-philosophical camp (5.3). After a tentative establishment of the core-arguments, useful assumptions and limitations of these models, the foregoing will be recapitulated (5.4), resulting in a preliminary definition of hypotheses for an empirical analysis (5.5). Our main hypothesis embraces the view that textual and discursive transformations are the basic steps which are required for the creation of narrative coherence which functions as a precondition for the establishment of an anticipated professional agreement. We will finally discuss the "method of discovery" which we will employ for the analysis of legal-narrative transformations (5.6).

5.2 Reflections on Linguistic Transformations

Research on linguistic transformations has focused on the change of structure while maintaining the original meaning (our position holds the reverse, namely that the criterion of a transformation is the change of meaning or effect). There is little or no concern with the
reason why certain transformations are performed and others not. Similarly, there is hardly any consideration of the specific situational or discursive environment in which linguistic transformations take place.

In this section three schools on linguistic transformations will be discussed, namely the syntactic, the semantic and the textual school on transformations. Technical details will be omitted, because it suffices to discuss these theories to the extent that explicit knowledge is acquired about the differences between the traditional theories of transformation and a pragmatic model of transformations which is to be applied to the forensic discourse.

5.2.1 Syntactic Transformations

Perhaps the best-known theory of transformations is developed by Noam Chomsky, who gave a completely new "swing" to the ideas of his preceptor, Zellig Harris (see below). Chomsky's basic assumptions are that the relation between speaker and hearer is an ideal one, that the language community is homogeneous, that the members of this community know their language perfectly well and that they are not negatively constrained by "irrelevant conditions", such as limitations of memory-storage, change of attention and interest, and mistakes (Chomsky 1965: 3). Chomsky needs these assumptions, because his theory is a theory of language (id: 3), not of language-use. It is thus important to note that Chomsky's theory does not pretend to be an empirical theory, that is: a theory of which the model is a generalisation of observed linguistic facts, but a mentalistic theory (id: 4). "Mentalistic" relates to "competence" - the linguistic knowledge of speaker and hearer - as opposed to "performance" - the actual use of language in concrete situations (id: 4).

The theory therefore purports to be a theory of potential linguistic creation, bound by a system of rules. These rules resemble principles of mathematical logic and arithmetics (Dik & Kooij 1977: 76). The finite, explicit and well-described rules of construction generate an infinite amount of grammatical units (id: 77). If a rule definition results in an ungrammatical creation, then the rule is invalid. One of the weaker points of the theory of transformational grammar, or perhaps of linguistics in general, is that the criterion "un/grammatical" is
tested by means of the intuition or tacit knowledge of the native speaker, for that any reliable and objective testing lacks (Chomsky 1965: 19f). Yet another crucial aspect of Chomsky's theory is its universal pretention, which means to be a compensation for detailed or specific grammars (id: 6).

The basic assumption underlying the transformational grammar is that it has a syntactic component, the base of which generates and interrelates a **deep structure** and a **surface structure** (Chomsky 1965: 16f). The deep structure determines the semantic interpretation, while the surface structure determines the phonetic interpretation (id: 16). The surface structure (which is not a sentence) is determined "by repeated application of certain formal operations called "grammatical transformations" (...)." (id: 16). One deep-structure can thus be generated into one or more surface-structures, after it has entered the semantic component and has received a semantic interpretation. The transformational rule "acts as a filter", which permits only certain structures to be converted. The term "generative" in transformational generative grammar (TGG) stands for a set of recursive and context-free re-writing rules, whereas the term "transformational" stands for the "mapping" of a semantic interpretation into a phonetic representation (Chomsky 1965: 141).

The transformational grammar requires compensation of a less complex phrase-structure grammar, which distinguishes constituents at the linear sentence-level (a string of words). From the string, smaller strings are derived until one has reached the level of minimal syntactic units. The successive derivative steps together build a tree-diagram (which is a substitute for the bracketing of derivations).

This is Chomsky's theory in a nutshell, but before we move on to Harris's theory of transformations, it is perhaps useful to contrast the elements of the TGG with a provisional sketch of the elements which will be the constructive pillars for our alternative model of transformations:

<table>
<thead>
<tr>
<th>TGG</th>
<th>Alternative Model</th>
</tr>
</thead>
<tbody>
<tr>
<td>relation speaker-hearer is ideal</td>
<td>relation speaker-hearer is &quot;real&quot; and never perfectly symmetric</td>
</tr>
<tr>
<td>language of the community is homogeneous</td>
<td>language of the community is homogeneous, but there is a</td>
</tr>
<tr>
<td>Members of the community know their language perfectly well</td>
<td>Members of the community may have fallible competence; measurement of that is not possible, for that an ideal and objective standard lacks</td>
</tr>
<tr>
<td>-------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>No irrelevant conditions</td>
<td>Memory limitations, change of attention and interest; mistakes are relevant</td>
</tr>
<tr>
<td>Theory of language</td>
<td>Theory of language-use</td>
</tr>
<tr>
<td>Mentalistic theory</td>
<td>Mentalistic-empirical theory</td>
</tr>
<tr>
<td>Emphasis on competence</td>
<td>Emphasis on performance as it indicates aspects of competence</td>
</tr>
<tr>
<td>Potential linguistic creation</td>
<td>Performed linguistic creation</td>
</tr>
<tr>
<td>System of (pre-determined) rules</td>
<td>Not systematic; rules of transformation are not pre-determined, but will follow from the analysis of empirical cases</td>
</tr>
<tr>
<td>Formalistic, finite, explicit, well-described, unambiguous definition of rules</td>
<td>Open and tentative description of rules which underly transformations</td>
</tr>
<tr>
<td>Generating</td>
<td>Indicating</td>
</tr>
<tr>
<td>Transformed X must be grammatical</td>
<td>Transformed X must be (judged as) narratively coherent</td>
</tr>
<tr>
<td>Grammaticality is tested by means of intuition, introspection or tacit knowledge of the native speaker (i.e. researcher)</td>
<td>Narrative coherence is tested by means of professional consensus</td>
</tr>
<tr>
<td>Universal pretention</td>
<td>Situation-dependent</td>
</tr>
<tr>
<td>Transformation of sentences</td>
<td>Transformation of textual and discursive sequences</td>
</tr>
<tr>
<td>Grammar/syntax</td>
<td>Pragmatics, with minor attention for semantics and syntax</td>
</tr>
<tr>
<td>Transformations of deep-structure into surface-structure</td>
<td>Transformations of surface-structure into another surface-structure</td>
</tr>
</tbody>
</table>
This comparative inventory of differences—which may be illegitimate because it juxtaposes two entirely different theories—shows that it can be misleading to lift the concept of "transformation" out of its theoretical context. It can easily be noticed that, although the TGG and the alternative model employ an identical term, the meaning of the term "transformation" changes when placed in a diametrically opposed theoretical context.

The next step in our review of the literature on syntactic transformations is to look at some of the publications of Chomsky's teacher Harris (1981). The latter has examined the distribution ("ordering of the members of a class" or "sentence order") of linguistic elements in identical and equivalent environments. The advantage of Harris's model to Chomsky's is—at least when taking our specific purposes into account—that it is possible to analyse the transformation of linguistic elements within texts and between two texts:

"We call elements (sections of the text—morphemes or morpheme sequences) equivalent to each other if they occur in the environment of (other) identical or equivalent elements. Each set of mutually equivalent elements is called an equivalence class. Each successive sentence of the text is then represented as a sequence of equivalence classes, namely those to which its various sections belong. We thus obtain for the whole text a
double array, the horizontal axis representing the equivalence classes contained in one sentence, and the vertical axis representing successive sentences. This is a tabular arrangement not of sentence structures (subjects, verbs, and the like), but of the patterned occurrence of the equivalence classes through the text."

(Harris 1981: 117)

A recurrence of equivalence classes may be noticed in almost every text (Harris 1981: 117). An equivalence-class is determined by more frequent repetition (id: 118). Transformations are in Harris's view syntactical transformations which keep the meaning of the sentence that is being transformed intact. So, "constructional" differences may occur (Harris 1970: 441), but the "n-tuples" of word-classes must be the same (id: 441). Harris is not interested in the question to what extent (or not) "transformations hold meaning constant"; however, under "semantically controlled conditions" transformations may be "a possible tool for reducing the complexity of sentences (...)" (id: 450).

Harris is thus a believer in the neutrality of information-processing. In a paper about information-retrieval, he says that

"(F)or scientific, factual, and logical material, (...) it seems that the relevant information is held constant under transformation, or is varied in a way that depends explicitly on the transformation used. This means that a sentence, or a text, transformed into a sequence of kernels and transformations carries approximately the same information as did the original. (...) It is for this reason that a problem like information retrieval, which deals with content, can be treated with formal methods - precisely because these methods simplify linguistic form while leaving content approximately constant."

(Harris 1970: 461)

It may be noticed that Harris opposes poetry and "belles-lettres"-"fiction" in traditional terms- to science -or "facts" in traditional terms. In other words, Harris seems to suggest not only that information-retrieval is unique to contexts in which a reliable representation of facts has a crucial role to play, but also that "paraphrastic transformations" can be "disregarded" in the case of scientific or institutional information-retrieval. Two critical notes may be made here. First of all, the distinction between "fiction" and "fact" is largely artificial and arbitrary, and secondly, the constraint of keeping the content of information constant under
transformation cannot be excluded from the literary genre (including its discourse of literary critique).

Furthermore, the use of the word "approximately" in the above quoted fragment from Harris's papers manifests a weakness: it would be too extreme indeed to hold the claim that the text and the "after"-text remain identical after transformations.

5.2.2 Semantic Transformations

Both Chomsky and Harris suggest that transformations embody a structural change, either of the sentence or of textual fragments, which do not fundamentally alter the meaning of the linguistic element which is being transformed. Therefore, even if the lexicon or the phonetic elements change due to a transformation, the (linguistic) element which is eligible for transformation and the linguistic element which is the result thereof, need to be identical. The question is whether there is a criterion which defines the conditions under which the form of a linguistic element can be altered and the content kept constant. It is thus no surprise that grammarians, semanticians and language-philosophers have directed much of their attention to the phenomenon of the paraphrase.

Fuchs (1982: 7) explains that the paraphrase is currently defined as a sentence or a text $Y$ being a paraphrase of a sentence or a text $X$. $Y$ is thus considered to be the synonymous reformulation of the content of $X$. A looser way of defining the paraphrase is to say that, although $X$ and $Y$ may be different formulations of an identical content, they can be two modes of "saying the same thing" (see for this line of thought i.e. Nolan 1970: 44).

In order to make this definition successful however, one is required to draw a distinction between the expression or the form on the one hand and the content or the base on the other (Fuchs 1982: 8). The stipulated independence between form and content can be disputed by raising questions such as: to what extent is $X$ identical to $Y$ (paraphrase and synonymy (id: 49)); is it really possible to say exactly the same thing in different manners; how different or how identical are paraphrases when "only" containing modifications and modulations (id: 9)?

A problem of the linguistic analysis of paraphrase is that the phenomenon is only looked at from a strictly linguistic perspective,
that means: without taking pragmatic, sociological or psychological aspects into account. Paraphrases are thus conceived of as objective, stable and regular relations between certain linguistic sequences which are acknowledged by all interlocutors (id: 17f). This narrow stance results in a rather arbitrary distinction between linguistic and non-linguistic paraphrases and in a neglect of the speaking subject (id: 17f).

In the context of the analysis of legal-discursive transformations, it is naturally not our priority to focus on the paraphrase as a means to test the conditions of the "ideal paraphrase", that is: transforming the form of a linguistic element without changing its content or meaning. From a pragmatic perspective it is more interesting to look at the discursive contexts in which the paraphrase occurs, and also to examine the paraphrasing performance of the legal agents who are involved in the construction of criminal evidence (i.e. Fuchs 1982: 29; see section 7.3). Further questions may concern the localisation of references to various texts and interactional contexts, the extent to which rhetorical paraphrasing performances result in frictions between meaning, force and effect (a dissociation at the speech act level) and in what sense the paraphrase is a tenable category when applied in the analysis of institutional discourse.

5.2.3 Textual Transformations

Many of the insights of the syntactic and semantic schools on transformations, including enframed criticism, have contributed to the emergence of various theories of text, textualisation, and textual transformations. This means in particular that some elements of the paradigms described in the previous sections have been preserved and further elaborated. The most fundamental change concerns the jump from the unit of the sentence to the unit of the text, as it was already preceded by Harris (see above). Propositions of the text are now looked at, not in isolation, but in relation to their immediate textual context. One of the underlying assumptions in text-theories is that the text is not just a linear compilation of sentences, but that the elements of the text—whether these are words, sentences or paragraphs—are mutually "enchained" to the extent that they refer directly or indirectly to the global structure and meaning of the text. This intricate web of innertextual references is achieved by cohesive
and cohering means (varying from deixis, lexical repetition, reference, substitution, ellipsis and conjunction to thematic progressive development starting from a textual core; see section 4.2.1).

Various types of textualisation have been analysed by Petöfi (1971), who combined a transformational grammar with a theory of text (text grammar) on the basis of a progressive development of textual information ("thema-rhema", "topic-comment", "given-new" in psycholinguistic literature). Textual transformations may for example occur when the "given" and the "new" elements of the text are linked with each other by means of the insertion of a causal or contrastive relation.

A psychological dimension has been attributed to the theory of text by Van Dijk (1978; 1979; Kintsch & Van Dijk 1978), who has among various other interests focused on the psychology of text-processing. The author claims that the process of recalling complex discourse entails semantic transformations. Concretely, the reproduction of texts entails projection, or conversion of series of propositions into identical or modified series of propositions (Van Dijk 1978: 52). The term "semantic" bears upon the linkage between macro- and micro-structural information which the text contains. It should be noted that Van Dijk only allows sentence-sequences with a macro-structure -being an abstract representation of the global meaning of the text- to be called 'texts' (id: 49). To Van Dijk, these semantic transformations are of a cognitive nature. Language-users fail to keep the semantic structure of the reproduced text intact, because their memory-storage of semantic information is limited (id: 210). The author assumes that the semantic or conceptual transformations which may have to play a role in text-processing are: omission, addition, permutation, substitution and (re-)combination (id: 211f).

Although this inventory of possible transformations is highly relevant to our analysis, we will abstract from the cognitive aspect of Van Dijk's model. While admitting that this cognitive aspect, such as a limited storage of information, is one of the numerous dynamic forces behind transformations, we will assume that this dimension has nothing to add to the analysis of institutional text-processing: either the process is conditioned by the same cognitive constraints, in the sense that the language-user has no written information available which facilitates the occurrence of such transformations, or the process is protected against these cognitive constraints, in the sense that the
language-user can make use of written information when quoting, paraphrasing or summarising. Text-processing in the legal institution has a specific character, because the risk of making "cognitive mistakes" (as a possible cause of transformations) is reduced by the immediate access to written information, which enables the legal agent to read back. A further reduction of possible mistakes is embodied in the asymmetric role-division of interrogatory procedures which empower the police officer, judge or prosecutor to interrupt questioning of the suspect when an answer is being written down. However, as already implicitly suggested, this does not mean that legal institutional text-processing is totally sealed off against cognitive mistakes or limitations. Examples of speech situations in which the communicative agent has to rely solely on his/her own memory is where the police officer reports details of his/her observation of events surrounding a crime, where the suspect/witness has to recall the crime, where the clerk has to report the court-proceedings by means of notes (although the latter also relies on written documents; see chapter 8), and where the persons involved in the trial have to recall each other's previous contributions during the trial.

The final model we want to discuss in the context of textual transformations is the semiological theory of narrative of Greimas, who, in a way, remains very much in line with the ideas of respectively Chomsky and Propp (respectively in sections 5.2.1 and 3.4). Perhaps somewhat curiously, the author adds to terminological confusion when he distinguishes the apparent level (manifestation) from the immanent level (structural trunk; precedes manifestation) in the narrative. To do so is not self-evident for a structuralist with semiological and semantic tendencies. But perhaps the cleavage between post-Saussurean structuralism and applied Chomskyanism is not as monstrous as we believe.

That Propp's morphology, Chomsky's transformational generative grammar, Saussurean structuralism and generative semantics may all be united in one model, becomes apparent from a summary of Greimas's basic theoretical assumptions. The central question Greimas is concerned with is the development of a theory and method of the occurrence of significative articulations at successive levels of the narrative, and the way in which these successive steps (later called "transformations and manipulations") generate meaning (rather than structure).
To begin with, the theory comprises a theory of (deep) narrative grammar, which is made up of an "elementary morphology" and of a "fundamental syntax" (Greimas 1987: 69). The morphology contains the terms or narrative 'functions' in Propp's sense, onto which a semantic analysis can be performed (in which Greimas is mainly interested). These terms are the objects of syntactic operations which are carried out in light of a taxonomy, which makes the syntax responsible for the transformation and manipulation of narrative terms (id: 70): "the syntax thus transforms and manipulates these terms by negating or affirming them, or, and it amounts to the same thing, disjoining and conjoining them." (id: 70). Syntactic operations are "predictable" and "calculable". Finally, these operations are "ordered in series" and "constitute processes that are segmentable into operational syntactic units." (id: 70). Greimas has thus given his theory a strongly formalistic character, the method of which can now be applied to canonic narratives as well (i.e. it is not longer restricted to narratives such as fairy-tales, myths and legends).

The difference with our theory of narrative transformations is that we backshadow the occurrence of transformations within the borders of the narrative text (with exception of chapter 6) because our interest is in the transformations which take place between the various narratives.

5.3 Reflections on Legal Transformations

The theoretical insights of the heterogeneous linguistic camp have had a direct and indirect influence on the theories about legal transformations. In this section, we will review two legal-Philosophical theories of legal transformations, which -each in a different way- have concentrated on legal-dogmatic or normative shifts, and which are more formalistic, and somewhat detached from the empirical inquiries into the occurrence of transformations at the 'surface-level' of legal discourse (see 1.7).

A fundamental presupposition which interrelates legal-Philosophical theories with transformations as the main subject of analysis, is the idea that the rationality of the legal discourse has a specific character. This rationality is sometimes thought to be creative, and
sometimes repetitive. In light of these approaches, legal transformations can be regarded respectively as creative processes leading to the apposition or justification of legal norms, or as articulating processes leading to the protection and closure of the legal dogmatic discourse with respect to its surrounding discourse. Transformations are dynamic, although their outcome may be static. Thus, instead of putting forward a static view of legal discourse, the probe of legal transformations wants to bring to the surface the dynamic character of legal thinking and of legal decision-making.

Such a claim bespeaks a rather functional view of legal transformations, because they are sketched as analytical means. In contrast, we believe that legal transformations are discursive necessities, not only for the absorption of the everyday discourse, but also for the achievement of a coherence between the assembled narratives which together construct a case.

Central to this section are the works of two legal philosophers—Peczenick and Broekman—, who both developed a theory of legal transformations. It should be made explicit in advance that their approaches differ quite profoundly, and that our alternative model of transformations (section 5.4) resembles Broekman's theory.

5.3.1 'Jumps' and Non-Deductive Reasoning

Peczenick should be seen in the context of a group of legal philosophers (Aarnio et al. 1981) who are interested mainly in legal-dogmatic transformations and their underlying rational justification. Although Peczenick's distinction between a surface-structure (transformations) and a deep-structure (rational justification) resembles Chomsky's distinction (in 5.2), it should be made clear that Peczenick regards the deep-structure as meta-linguistic, whereas Chomsky regards it as linguistic. In Peczenick's model, transformations are thus a linguistic reflection of an underlying meta-linguistic rationality (i.e. Van Roermund 1983: 79). The deep level involves the justification of transformations or the justification of transformation rules (Aarnio et al. 1981: 138).

In designing a model of 'jumps' and 'transformations', Peczenick (1984: 280; Aarnio et al. 1981: 136f) has wanted to find a solution for the occurrence of non-deductive steps when the quality of a norm is
established. A norm is usually supposed to be system-related, and can thus be derived from other normative propositions that have a place in a system of norms. Peczenick argues that in the construction of the system-character of a norm, non-deductive steps are frequent (1984: 280; Aarnio et al. 1981: 152). He calls these creative\textsuperscript{17}, non-deductive steps 'jumps', which take place for example when one reasons from brute facts to institutional facts.\textsuperscript{18} Apart from their non-deductivity, a second condition for jumps is that the truth or rightness of one proposition is a sufficient reason for the truth or rightness of another proposition (1984: 281). Such a "contextually sufficient justification" (1982: 139) means that the one proposition supports or gives reasons for the other proposition (1984: 289f). This is the domain of the lawyer who is situated in the legal practice. Peczenick insists that the major task of the philosopher is to reconstruct the deep justification which underlies that contextually sufficient justification (1984: 296; 1982: 139). The philosopher must demonstrate that the conclusions of legal reasoning are rational or supported by non-arbitrary premises (1985: 266). Peczenick distinguishes between internal deep justification, which is the demonstration that a "given piece of legal reasoning" may be derived correctly from non-arbitrary premises in the light of a given legal ideology, paradigm or system of reasoning (1985: 266), and external deep justification, which concerns the justification of that ideology, paradigm or system (1985: 266).

The internal deep justification corresponds to - at least in the case where non-deductivity is involved - transformations inside the law (the establishment of the internal law-character of a given norm "through a transformation from a set of premises none of which expresses or mentions (valid) law" (Aarnio et al. 1981: 142) and transformations into the law (the establishment of the external law-character of a norm-system, i.e. assigning "legal validity to the lower sources of the law and in order to assign it to concrete decisions" (Aarnio et al. 1981: 149; Peczenick 1982: 141ff).

The transformations into the law are category transformations and criteria transformations (Aarnio et al. 1981: 148). The transformations inside the law are distinguished in three types, namely (1982: 143ff) a) the source transformation (the citation of legal sources - statutes, precedents, etc. - by legal authorities when justifying legal decisions) (Aarnio et al. 1981: 150f; Peczenick 1982: 143, 144), b) the general norm-transformation (the mutual adaptation of
sources of the law when statutes are constructed or when precedent-rules are identified) (Aarnio et al. 1981: 152; Peczenick 1982: 145, 146), and c) the individual norm-transformation (a concrete legal judgement is non-deductively derived and is the result of the constitution of an individual legal norm of which a general legal norm is one of the premises) (Aarnio et al. 1981: 152ff; Peczenick 1982: 146).

Transformations are, in Peczenick's terms, the jumps which lead to a creation or change of a valid theory of law or to a change of the law itself (1984: 284). It is here where the double terminology of 'jump' and 'transformation' tends to become confusing. Either jumps are transformations only when they lead to such a change (1984: 284), or jumps are transformations, at least as long as they are non-deductive (1982: 140). "Jumps" are therefore described as exceptions to a rule which purports that most legal reasoning is deductive reasoning. It is our contention that if legal reasoning must be regarded as a deductive process at all, "jumps" should form the necessary precondition for the performance of deductive reasoning. In other words, we believe that a deductive model of legal reasoning could not pass muster without the insertion of a model which allows for a translation or transformation of unfiltered discursive material into a sediment of legal-normative propositions which can be deductively processed. Distancing ourselves from Peczenick's position, we prefer not to speak about transformations (or jumps) as the counterpart of deductive steps.

Perhaps in order to safeguard the system-based character of his theory, Peczenick leaves a door open for the conversion of jumps into deductive steps. This conversion may be established by "changing, adding or rearranging premises according to a priority scheme" (1984: 284), but also by "adding and changing some inference rules." (1984: 284). Unfortunately, there is little or no reflection on whether such a conversion may be regarded as a transformation as well, and if so, how and under which conditions a conversion takes place.

Finally, Peczenick remains unclear about the question whether legal transformations are the result of the involvement of legal creative thinking when 'reality' is observed, or of an instrumentally oriented post-hoc establishment of rational justification. In the first case, legal transformations may be regarded as a legal-epistemological necessity (or: unavoidability), in the second case, they may be regarded as the result of either a legal-institutional strategy or of a
legal-philosophical question. In our model of transformations, the rational justification is an integral part of the transformation itself. To be more precise, transformations embody an anticipation on rational justification or the absence thereof. That means that the legal agent abstains from those transformations of which s/he can foresee that the result fails to cohere with the master-narrative or fails to obtain approval of professional colleagues (see 4.6). Rational justification is then a function of "forecasting" the narrative coherence of the master-narrative, which is subsequently determined by professional consensus. In our analysis, transformations between texts and discourses are the indicators of a stepwise rational justification-procedure.

5.3.2 'Shifts' and Discursive Articulation

Broekman's theory of transformations differs profoundly from Peczenick's. The first criticises the latter for inventing a concept ('jump') which understates the power of transformations to produce ideology (1983: 97). Broekman is neither interested in the establishment of the system-character of legal norms nor in its rational justification. Peczenick's theory pretends to be a rational theory, Broekman's a relational theory (inspired by structuralism, which we will discuss shortly) (1973: 9; 1982: 175). When talking about rationality, Broekman has the goal-rationality of the dogmatic legal discourse in mind (1983: 91): legal rationality is to be defined as a reproduction of dogmatically predetermined structures (1983: 90), with the purpose to create a legal unity and a legal univoqueness. A legal transformation is thus for Broekman not a counterpart of deductive reasoning, but an articulation of a discourse. Similarly, transformations are for Broekman not the means to establish the system-character of the norm, but the shifts which take place between discourses. Another, major difference between Peczenick and Broekman is that the latter's theory of the 'semantisation'-process is a-subjective, whereas Peczenick's is not (1983: 97).

The 'a-subjectiveness' of Broekman's theory - which becomes manifest from a decentralisation or even denial of the autarkic subject - is due to a structuralist starting-point (1973: 3, 15; 1977: 58). The idea behind this is that the text precedes the subject; subjectivity is
itself an element of the text (Broekman 1977: 58) and a discursive function (1982: 231). It is simultaneously denied that texts are 'original': texts are complex mosaics of references to other texts (1973: 15; 1977: 52, 53, 58). The advantage of this structuralist position is, as Broekman himself points out, that the repeal of the traditional opposition between subject (author) and object (text)-which is the implication of a rejection of the author as an extra-textual genesis-excludes the possibility of making ontologising interpretations (1973: 18).

Central is the communication of signs and texts, not of propositions, within a discourse by means of speech acts (1973: 5; 1977: 55). This discourse is responsible for the transformation of signs and texts into norms and goals (1973: 5). The structure of the legal transformation resembles the structure of everyday transformation (f.e. repetition (1982: 174), identification, differentiation, negation, opposition, etc. (1973: 23)); its nature is that of a semantic shift with ideological force (1983: 97). These shifts take place within a complex of discourses. Important transformations are the shift from life-factual discourse to legal-dogmatic discourse and vice versa (1973: 9, 26; 1977: 71, 72), and from unarticulated reality into articulated reality (normativity and causality: 1983: 97; 1977: 58).

Parallel to these semantic (narrative) shifts between discourses, Broekman distinguishes between the legal discourse (dogmatic) and its surrounding discourse ("life-factual"; "levensfeitelijk") (i.e. 1983: 95). On the one hand, the legal discourse is a "discourse of a discourse", in the sense that it narrates the profound cultural values (1982: 175), on the other hand, the legal discourse is a discourse in a discourse, in the sense that it articulates its surrounding discourse (id: 175). From the 'shifts', 'flaws', 'frictions', 'disconcordances', 'changes', 'evaluative and interpretative retardations' (1973: 6, 8, 9; i.e. 1977: 56) between these discourses, a specific episteme appears from which the legal discourse is organised (1973: 6; 1977: 56). The teleological speech acts which establish transformations between the discourses take the form of a discursive strategy (1983: 98). From these theoretical assumptions it may be concluded that the legal discourse is an artificial construct by means of natural linguistic elements (1973: 7; 1977: 56; 1983: 97). The result of this construct, which is itself the result of a discursive strategy, is a legal unity (1977: 56; 1983: 98).
The process of qualification and transformation happens through a 'strict, rule-bound application of a legal nomenclature', which is a dogmatic nominative activity (1982: 190). Broekman calls the latter an expression of a naive linguistic theory, in the sense that the legal-dogmatic discourse is driven by the assumption that meaning is an immediate result of nomination (1982: 196; Bax 1986: 284).

After this introduction of the basic arguments of Broekman's theory, some notes of reflection may point out that the theory cannot be adopted integrally from a discourse-analytic point of view. The main threshold is the a-subjectivity of Broekman's presentation of legal transformations. Although the author defines transformations as a result of a discursive strategy, subjects which communicate speech acts within that discourse are -from a strictly structuralist point of view- not responsible, much less accountable for the occurrence of transformations. For, as noted previously, subjectivity is a function of discourse, and not the other way around. The subject, according to the structuralist school, is supposed to act according to the constructed rules of the discourse in which they function. The discourse itself (or the speech acts within it) is teleological, not the actors. But such a definition seems somewhat infelicite, because goal-rationality or intentionality can only function by means of the category of the subject. Therefore, in order to maintain the strategic character of the legal discourse in our model of transformations, we will not abandon the category of the subject, but instead substitute it with the category of intersubjectivity, namely the shared conception of a master narrative which functions as a 'mirror' for the establishment of a narrative coherence between various 'smaller' narratives (4.5 & 4.6). Except for that, we will -by means of definition- allow a group of professionally related subjects to interact with the rules of the discourse itself. This means that legal agents are subordinated to the rules of the legal discourse, but at the same time they influence these rules by means of interpretation and application, if and only if they are working toward a consensus about a change or modification of the rule. In other words, we want to give our model of transformations a hermeneutical and communication-theoretical dimension, with which it becomes possible to regard a text or a discourse both as the subject of a dialogue (or interaction) between legal-professional interlocutors, as well as a "partner" in that dialogue or interaction. The making of ontologising interpretations is ruled out in our model as well, because
professional interlocutors are the products of the legal discourse, as well as that they are the communicative couriers and creators of it. We will therefore depart from the structuralist position, and not regard the place of a sign or text in a system as "the central motive of the process of transformations" (Broekman 1973: 29), but their place as determined by means of interpretation and application. In Broekman's theory, the pragmatic aspect of legal activities is implied in the joint application of rules within a structure (1973: 29). In our model, the pragmatic aspect is both the source and the result of this application, in the sense that each pragmatic move preconditions the performance of the next move.

5.4 Recapitulation: Remarks on Legal-Discursive Transformations

In the foregoing chapters we have argued that the legal institution interferes with daily reality and social disputes and that it isolates and 'strips' this discursive material by means of a transposition to its own discursive environment in successive steps by means of transposition, thereby triggering a transformation of experience. This discursive transformation implies a change or shift of various textual-linguistic features.

A first step in the transformation of everyday experience is the elicitation and screening of discursive material in the police interview. The standard-questions put forward during the interview cause a registration of the salient components of the various accounts from defendants and witnesses. Furthermore, interviewing and recording police officers are responsible for the distraction of information which fits or confirms pre-existing theories, expectations and judgements, thereby transferring the plurivocity of the accounts into a relatively objectified, practicable unity. Police officers are also the institutional mediators, in the sense that they perform the translation of the account into a legal-professional vocabulary.

However, the transformation of experience is not restricted to the mediatory performance by police officers. We believe that the enchainment of institutional judgement, argument and decision-making is further responsible for a progressive modelling of everyday experience. That what has become 'evidence' is passed from hand to hand. Furthermore, different stages in the criminal process each accentuate a
different aspect of that experience, causing a cristallisation of institutional relevancy and selection. Yet, arbitrariness in the interpretation of evidence is severely limited by the monitoring of administrative consistency and the protection of institutional process-economy: the legal institution must not perish under the weight of chaos, details, particular circumstances, exceptions, sympathy and professional disagreement. The leading principle is therefore that the risk of laboriousness and disconsensus is maximally suppressed.

In contrast with the prevailing linguistic theories (5.2), transformations are regarded as definitive changes between the "original" and the "reported" experience. Although these transformations may not be radical, in the sense that the original experience remains recognisable in the course of its discursive transposition, the new normative-evaluative embedding suffices to break with the personal perspective initially tied up with the account of that experience. It is therefore possible to define discursive transformations as changes in the interpretation and evaluation of some discursive kernel, made visible from argumentative shifts surrounding the quotation, paraphrase and summary of accounts. In terms of the speech act-vocabulary: different illocutions may be performed on the same propositional utterance. These argumentative shifts are again not accidental, but connected with the goal-setting of the discursive stage and the institutional role-definition of the interlocutor.

The immediate problem arising from this suggestion is that it is unpopular within the legal culture, because it distorts the dream of the truth, objectivity and neutrality of criminal evidence. We have argued in chapter 2 that the legal-forensic discourse buries its vulnerability to the ambiguity of natural language, creativity, human error, misunderstanding and institutional bias under a bed of methodological paraphernalia. It does not face a deconstruction of accepted self-evidentialities, such as the "unproblematic" passage from experience to fact, the movement from fact to assertion, the work of discursive filters, the dichotomy between fact and norm and so forth. The subsumption-model cannot satisfactorily deal with the mysterious shift from discursive chaos to propositional neatness, nor can it cope with the plural character of legal qualification (different stages, different legal agents) and their emphasis and prejudice, because it only allows for the modelling of a vertical passage between well-defined and contoured entities (norm-proposition and fact-proposition).
The term "narrative transformation" implies a refutation of the assumptions underlying the subsumption-model. Preference for a narrative model for the construction of criminal evidence allows for a perception of law as a mediatory practice, which integrates its institutional perspective in the available discursive material. The shift from everyday to institutional discourse is obscured because the narrativity of the legal practice parasitises the common narrative exchange of experience. The coherence of the intricate legal narrative is equal to a reflexive performance in which the selection of the applicable norm is made to coincide with the interpretative direction unfolded by the narrative. The main hypothesis in this dissertation is that narrative transformations are the successive steps which jointly achieve the coherence of the narrative which is the subject of legal-decision-making. "Narrative transformations" are thus the adaptations, modifications and re-organisations of narrative material in the performance of a variety of legal-institutional functions (f.e. "factfinding", "qualifying", "defending" and "moralising"). Although the surface of these narrative transformations looks heterogeneous, in the sense that the narrative core undergoes different discursive strategies in different stages of the criminal procedure, the rationale beneath that surface is to safeguard the coherence of the narrative. However, the latter may imply that the narrative transformation is inherently paradoxical: on the one hand it maintains the boundaries of the narrative text because the coherence-constraint limits free interpretation, whereas on the other hand the introduction of new elements is invoked by the unpredictability of interpretation. We believe however that the interpretation of legal narratives and the performance of transformations is bound by professional conventions, thereby making the free variation of narrative transformations dependent on their expected acceptance among professional colleagues.

5.5 Theses on Narrative Transformations

It is clear that in order to conduct an empirical analysis the ideas put forward in the previous sections and chapters ought to be concretised at a level where the concept of narrative transformation becomes operative as an analytic concept. The following intends to be
an inventory of the levels at which legal-narrative transformations may occur.

I. Expansion to the levels of text and discourse
Unlike Chomsky, who designed a transformational grammar for syntactical units (sentences), and Peczenick, who developed a theory of legal transformations on the basis of propositions, an alternative model of transformations will adopt a textual and discursive approach. Such implies that the limits of the sentence or proposition will be exceeded. When units smaller than a text or a discourse are taken into account, they will be textual or discursive sequences, the meaning of which is generated by their textual-narrative or discursive-argumentative environment.

Expansion to the textual level entails the analysis of two kinds of transformations, namely inner-textual transformations and inter-textual transformations. An inner-textual transformation is our definition for a structural, semantic or pragmatic shift which takes place within the original boundaries of the text (more or less in Petöfi's or in Greimas's sense). An inter-textual transformation is our definition of a structural, semantic or pragmatic shift that takes place between two or more texts, normally between an "original" and a "reported" text. The so-called inter-textual transformations will be given far more attention in the analysis, because we are interested in the oralisation or scripturalisation of texts, which requires us to compare original text and reported text in two or more stages of the criminal procedure.

It is because of this priority that the terms "inner-textual" and "inter-textual" are frequently improper. The reported text appears as a monologue or interaction when it is oralised, and the reported monologue or interaction appears as a written text when being scripturalised. The term "inner-textual" transformation must therefore be restricted to the references within the text, whereas the term "inter-textual" can only be applied to situations in which a written text is being referred to in another written text (for example: the references in the summons to the narrative substance in the police record).

We have maintained the category of "intertextual references" for situations in which a fragment of a written text is quoted,
paraphrased or summarised (see chapter 7), because the fragments - even if they undergo a transformation - can be identified perfectly well. The category of "innertextual references" is substituted with "innermonologue references" if the performance refers to a linguistic item which has been brought forward earlier in the oral interaction (anaphora, or alternatively cataphora when reference is anticipated).

Legal narrative texts are the objects of exchange in both a written and an oral discourse. It depends on the discursive rules and principles, as well as on the inter-subjective (speech) action level how texts are to be interpreted, applied or ultimately transformed. We have however not explicated and formalised these discursive rules (unlike for example Habermas and Alexy). The reading of the texts along different axes has to result in empirical findings which will be regarded as tentative indications of discursive rules and strategies which underlie the performance of narrative transformations.

II. Transformations are semantic-pragmatic

Narrative transformations are defined as changes which entail a shift in meaning or effect, due to the work of interpretation and argumentation. The nature of the narrative transformation is therefore not primarily structural or syntactical, but semantic and pragmatic. Namely, a syntactic dimension is by no means particularly related to the outcome of the rules and principles of a specific (legal-institutional) discourse. However, the discovery of a structural transformation may be regarded as an indication of the occurrence of a semantic or a pragmatic shift (we have previously expressed skepticism with regard to the semantic neutrality of structural transformations; see 5.2.2). Semantic and pragmatic transformations are both the outcome of discursive strategies as well as the conditions of the interpretation and application of textual sequences and interactional utterances.

A semantic shift may be defined as a change of meaning, due to the discursive re-allocation of a sequence in a new context (this context being either textual or interactional). It must be made explicit that in our vocabulary a semantic shift does not imply a change of reference to an external reality, because it is assumed that all meaning is discursively (pre-)organised. A shift of meaning can hence be defined as a change of the relation of a linguistic element or narrative

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sequence with its surrounding discourse, not of the relation to a reality, world or fact. An example of a non-referential semantic shift is the transformation of the expression of doubt by a witness into a clear denial by that witness (see 7.2).

Furthermore, a pragmatic shift may be defined as a change of force (illocutionary) or effect (perlocutionary) of a sequence or utterance. An example is the judge's transformation of a narrative statement of fact into an admonition towards the defendant (illocution), which may or may not achieve the defendant's admission of guilt (perlocution) (see 7.2). We will assume that the change of meaning (semantic transformation) is always caused by the performance of a certain speech act.

III. Transformations are "horizontal" and "vertical"
Legal-discursive transformations generally occur along two different axes. On the one hand, transformations occur between texts and interactions which succeed each other in a chronological order. This means nothing more than that the reported text A' is a change with regard to the 'original' text: text A. We could call this level the "horizontal", linear or chronological axe, which covers the course of the accumulative and revisionary construction of the criminal file, and the successive transformations performed on that material:

<table>
<thead>
<tr>
<th>police-interview --&gt; dossier --&gt; trial --&gt; trial-record</th>
</tr>
</thead>
<tbody>
<tr>
<td>A-------------A'-------------A''------------------------</td>
</tr>
</tbody>
</table>

On the other hand, transformations occur where pre-existing texts are "inscribed" or "woven into" the narrative text to be created. An example is the adaptation of the summons to the contents and structure of the legal statute which is to be applied. We could call this the "vertical" or "hierarchical axis", in particular referring to the traditional hierarchical relation between "norm" and (qualified) "fact" (see sections 6.3, 8.4 and 10.5).
IV. Transformations reach beyond textual boundaries
The scope of transformations is not limited to the relation between an original "mother"-text and a reported text, or alternatively, by a "textual input" and by a "textual output". The creativity of legal interpretation is responsible for a "reaching beyond" the semantic clues to which the text(s) gives access. That means either that the semantic clues generate information which is not strictly contained in the text, or that the (pre-) knowledge, prejudice or strategy of the interpreter dilates the horizon of textual meaning. Textual transformations are thus a constructive discursive web of inferences as well.

This constitutes the main reason why we call narrative transformations discursive processes instead of "rounded-off" products. An empirical analysis can aim at the tracing, uplifting, isolation, reconstruction and abstraction of transformations which occur on a surface-level by means of a comparison between two fragments. But in that case a number of transformations would escape our attention. In our view a transformation also occurs when there is no indication of a textual or discursive source: a narrative transformation can also be an introduction, addition or creation of discursive material which was not previously present in the dossier or the interaction.

V. Narrative transformations are rational
We will assume that narrative transformations are not arbitrary and do not vary freely or infinitely. The supportive thesis is that the legal discourse is a rational discourse in which the coherence of the narrative crime-reconstruction is a process rather than a status quo, the production of which is a reflexive or justificationary act. Narrative transformations are therefore rational-discursive shifts which are inserted in the course of the production of a coherent narrative with the aim to maximalise the anticipated acceptability of the narrative among the members of the professional community.
VI. Narrative transformations conceal evaluation
The 'chain' of transformations obscures the original evaluation of the event: evaluations become progressively embedded in the course of the criminal procedure, which increases the gradual institutionalisation of the original narrative.

VII. Instances of narrative transformations
Transformations may be performed on various linguistic elements. A criterion is needed to establish the occurrence of a transformation in specific positions. The following is a provisional list of these positions:

1) Emphasis may be changed, added or removed both in a written as well in an oral context. Underlined sentences, stripes in the margin and exclamation marks are devices in a written text which draw attention to details. In an oral context, vocal stress (raising of voice, loudness) supports the specific attention for certain details.

2) Lexicon may be changed, omitted or added due to a translation from ordinary language into professional language or the other way around. Other reasons for the change of lexicon may be: communicative function (explanation), shortening, distancing, rhetorical-argumentative function (evaluative commentary).

3) Tempus and verb-use of the narrative may change, for example from passive into active, or from conditional into definitive.

4) The sequence of the text may be changed (reversed, inverted, omitted etc.). This is often due to a reorganisation, but can also have a rhetorical function. The change of sequence may have repercussions on narrative time, action and causal relations.

5) The mediator of the narrative text may be changed, substituted, backshadowed, emphasised or backshadowed, with the aim to either obscure the plurivocity of the narrative (heterogeneous performance) or to accentuate identification of the narrative in support of an argument.

6) The illocution performed on the narrative may change due to the variation of goal-setting or role-definition.

7) The quantity of the text to be reported is almost always condensated due to the constraint of the process-economy: only that
which is considered to be relevant to the legal-normative evaluation of the narrative is selected.

5.6 Method of Discovery

The best possible method of "discovering" the occurrence of narrative transformations is by means of comparison. However, the method of juxtaposing and contrasting two texts, or a text and an interaction, necessarily entails a selection of fragments. It would be impossible to quote the complete texts and interactions of the five cases (see Intermezzo) we will analyse. A full account of every detail would lead to a text twice as long as the current text. Furthermore, the labouriousness of such an analysis should be taken into account (translation; transcripts). The analysis in the succeeding chapters is thus a selection of selected fragments, which creates a double transformation of the available material.

The interpretive method employed in the analysis requires the researcher to read and re-read the text as many times as possible, partly by "letting the text speak for itself" in the sense that the text or interaction may contain transformations which would remain unregistered if the discovery were to be totally restricted by predictions and hypotheses, partly by actively looking for the differences between two texts on the basis of the general expectation which we have unfolded in the previous chapters.

The available empirical material is not only rich in quantity, but also in quality, in the sense that aspects of the same material could reveal a variety of transformations and shifts when perceived from a different angle. This will become clear from the next five chapters, which have been developed and written on the basis of four separate questions, namely:

1) If it is the case that everyday experience is transformed into a legal-discursive substance, then by means of which discursive devices does the legal institution "absorb", isolate, screen and transpose that experience? This question forms the red line in chapter 6, in which we have focused on the first part of the police record which contains a provisional inventory of the first inquiries into a crime.
2) If it is the case that the transformation of everyday experience is performed by means of a range of successive discursive steps, then in what sense and to which extent do the "oralisation" of the dossier and the "scripturalisation" of the trial contribute? Possible answers to this question are formulated in chapters 7 and 8, in which on the one hand oral references to written texts are analysed and on the other hand a written reproduction of the oral trial-proceedings.

3) If it is the case that narrative transformations locally adapt and modify the narrative substance of the crime in favour of coherence, then in what sense do narrative transformations prevent or avoid the emergence of inconsistency and contradiction? In chapter 9 we will analyse narrative incoherence as it emerges from the divergence of witness-testimonies and the intervention by legal agents to dissolve or suppress this incoherence.

4) If it is the case that narrative transformations function against the background of a legal-normative interpretation of crime, then how do narrative transformations enforce and support the argumentative strategies performed by the legal agents? Chapter 10 will focus on the trial-rhetorics which are centered around rival interpretations of the essential ingredient of every criminal event: criminal intention.

The questions thus comprise analyses of complicated text-processing strategies and of the formation of meaning, conducted on a sequential level (the isolation of interaction- or text-clusters), a medium level (i.e. the text or interaction as a whole) and a macro-level (exceeding the linguistic parameters of the legal text or interaction). A starting-point is the tentative distinction between the 'oral' and the 'written' discourse. The references between these discourses makes the distinction however a weak distinction, in the sense that the 'oral' discourse is almost entirely based on the contents of written documents, be they the police record or the law:

- police interviews: Oral Discourse I
- criminal file or dossier: Written Discourse I
- trial-proceedings: Oral Discourse II
- trial-record and annotation of sentence: Written Discourse II
The method of analysis is hermeneutic-interpretative (we have pointed out previously that this may sound as a contradiction in terms), but the questions which lead the process of 'discovery' are directly or indirectly fuelled by knowledge derived from publications relating to the various issues. Because there are only a few publications resembling subject of research, method and material, the chance to compare and measure the results of the analysis is minimal (other publications either focus on different aspects of the Dutch criminal procedure (Bal 1988; Sauer 1989; Pander Maat & Sauer 1989; Hoefnagels 1980) or the publications are based on the analysis of comparable, but distinct criminal procedures, such as the West-German procedure (Rehbein 1989; Seibert 1981; Seibert 1989a; who focus on the integration of written material in oral discourse and vice versa); reference to Anglo-Saxon publications may be useful but misleading, because the procedural rules are too divergent to be measured against each other). That means that this research stands more or less on its own, and that only future analysis may or may not refine and confirm the results.

5.7 Conclusions

The model of "narrative transformations" intends to compensate for the various shortcomings of the subsumption-model of legal decision-making. The deficits of the model particularly relate to the pretended "self-evidentiality" of clear-cut legal propositions and the sheer unproblematic closure of the gap between everyday and legal discourse on the one hand and the "fact" and the norm on the other hand. Narrative transformations are defined as gradual changes of discursive material (that what is evidence or what has to become evidence), which progress toward a desired state of narrative coherence which is conditional for the establishment of professional agreement.

A discussion of linguistic and legal-philosophical theories which center around the issue of transformations has carved the profile for our own theory of narrative transformations. Not a semantic identity, but a discursive shift is the criterion for a transformation. Furthermore, transformations are rational steps which are integral to the process of discourse-interpretation and -production. The ultimate aim of the successive performance of transformations is to safeguard
the institutional process-economy (by avoiding the repetition of laborious information-processing), but also to facilitate a legitimation of judicial decisions (by avoiding professional disagreement).

The formulation of theses about narrative transformations and a methodological framework operate as a basis for the case-studies which are presented and discussed in the second part of this dissertation. We will see that the term "narrative transformation" will make its way for a refined vocabulary with which we will present the findings of our case-studies. "Narrative transformations" should therefore be regarded as a general concept for the various discursive shifts which we will encounter when analysing the transposition of evidence from the one discourse to the other.
NOTES CHAPTER 5

1. This terminology is derived from Peczenick (1984: 291), who writes that "(...), if one reasons from 'brute' facts to 'institutional facts', one needs 'jumps'."

2. Kallmeyer (1983: 148f) claims that the transformation of the life fact to justifiability is executed by keeping normative relevancy criteria latent for defendants. Transposing this idea to our context, this could mean that defendants are largely kept ignorant of the legal transparence of narrative transformations.

3. Chomsky makes explicit that his distinction between "competence" and "performance" differs from De Saussure's distinction between "langue" and "parole", because according to his own words, "langue" is a syntactic invention (Chomsky 1965: 4).

4. An interesting application of Zellig Harris's theory is the analysis of linguistic-institutional transformation in a psychiatric context. The author, Tony Hak (1985), concentrated on the perspectives and problems which are involved in developing a formal method for the analysis of judgements of consultants as products of a transformation-process. During this process observations are diverted into a judgement (diagnosis). Hak's paper deals particularly with textual transformations of the transcript of a consultation into its summary (the text which is written by the consultant). After comparison of the two texts, the author found a striking similarity in order; he also found that the text is much shorter than the conversation. In addition, and as an extension of Harris's method, the author measured the (pragmatic) effects of these transformations.

5. One of the attempts which has been undertaken to specify the nature of the paraphrase by means of its diversified appearance is Ungeheuer (1969: 195), who largely distinguishes three different types of paraphrase:

   1. Paraphrase by minimal variation:
      a) reduction or expansion "um" een woord;
      b) syntactic transformations while maintaining word elements;
      c) exchange of synonyms;
      d) tropic word-mutation.
   2. Paraphrase through total variation
   3. Paraphrase through maximal variation.

Ungeheuer speaks of paraphrastic transformations:
Phase a: Original formulation of speech --> paraphrastic transformation --> Phase b: Canonic formulation of speech (id: 210)

In chapter 7 it will become clear that although the model of paraphrastic transformations may be a valid starting-point, the origin of the "canonic formulation" is not always traceable, for that the paraphrase can be a referential amalgamation of different original texts at the same time. Furthermore, classifications as cited above fail when applied to any discourse, mainly because the paraphrase "en bloc" is frequently alternated with textual references of another nature, such as quotation and summary.
6. Droste (1974: 27-31) distinguishes three levels of paraphrase, dividing semantic and pragmatic questions of paraphrase:
1. the semantic field examines the paraphrase detached from context and/or situation, with major interest in the truth-value, identity and abstract conceptualisation of the paraphrase.
2. the referential field examines the paraphrase related to context and/or situation, with major interest in truth and presuppositional identity which affects the co-referentiality of the paraphrase.
3. the inferential field examines the paraphrase related to a speaker-hearer understanding, which corresponds to questions of result, subject-matter and the intention of the interlocutors. Droste claims that his model abstains from a self-consistent, language-independent state of affairs (interaction with situational and communicational means).

7. Petöfi's types of textualisation are: thematisation of non-new objects, causal linkage, motivational linkage, diagnostic interpretation, specification, meta-linguistic ordering, temporal linkage, presuppositional linkage, adversative contrasting, correspondence between questions and answers, comparison; correction of "vor erwähnten" expressions or utterances (1971: 210f).

8. Omission (deletion, elimination) means that one or more proposition(s) can be omitted from a series of propositions, but also parts (or facts) may be omitted (Van Dijk 1978: 211).

9. One or more propositions are added to a series of propositions, under the condition that the propositions are derived from other textual propositions (or macro-propositions), that the propositions are derived from a relevant framework of knowledge and that they are construed on the basis of relevant conceptual associations (Van Dijk 1978: 211).

10. Permutation is the removal of propositions with regard to the original linear structure of the text (Van Dijk 1978: 212).

11. Substitution means that one or more (parts of) propositions are substituted by other concepts which are lexically equivalent (Van Dijk 1978: 212).

12. (Re-)combination is the construction of new propositions on the basis of given propositions (Van Dijk 1978: 212).

13. In another publication (Van Dijk 1979) the author groups a few of these semantic transformations together under the title "semantic information reduction": deletion, generalization, combination. The author regards these categories as specifically relevant for the process of recalling and summarising. Some aspects of summary will return in 7.4.


15. For a critical discussion of Greimas's theory of narrative grammar, see Chabrol (1973: 14-23). Chabrol claims that although Greimas has widened Propp's formalism to canonical narratives (id:
15), still no solution is found for the conversion of deep narrative structure into surface narrative structure (except for the formulation of ad-hoc rules which rely on the particularities of the corpus) (id: 15, 16) and for the recursive regression of the attribution of modal values (id: 21). Therefore, there is in principle no limit to narrative transformations. Chabrol has claimed that rules of restriction and constraints of derivation are required. "which raise the surface structures to the underlying semantic and syntactic structures." (id: 121).


17. Creative legal thinking is involved when one interprets received information about a legal case (Peczenick 1984: 280). "Jumps" occur in the legal practice when one reasons from 'brute' facts to 'institutional' facts (id: 291), in particular when one observes causality, brute or institutional facts (id: 278ff) or when one connects causality with liability (id: 279). In these instances, creative understanding, weighing or rearrangement is part of the reasoning.

18. Interesting in light of Anscombe's distinction between brute and institutional facts (see section 2.2) is the debate between Peczenick and Weinberger, quoted and commented in Peczenick (1984: 294ff). Weinberger argues that even although legal conclusions follow non-deductively from premises about legal facts, 'jumps' are an improper description of the transformation from brute into institutional fact. Weinberger argues that the concept of 'jump' suggests an addition of a legal-normative evaluation to the brute fact, whereas he himself believes that the legal-normative aspect is inherent in the social fact: "one interprets the purchase as an event in the legal framework. That is, the law is an integrated part of the event, and only in this way one can explain the event." (Peczenick's translation from: Ota Weinberger, Logische Analyse als Basis der juristischen Argumentation, in: W. Krawietz and R. Alexy (eds.), Meta theorie juristischer Argumentation, Berlin 1983: pp. 170-172). Peczenick responds that even if Weinberger's argument were true, then still "one must be allowed to philosophically reconstruct" the spontaneous "seeing" of legal facts "as dependent on complex relations between "brute" facts and creative acts of jumping." (1984: 296).

In agreement with Weinberger's criticism (which Peczenick calls a "psychological thesis" (1984: 295)), which has pointed out that the distinction between 'brute' and 'institutional' fact or between 'everyday' and legal-institutional' discourse is only analytical, we shall refrain from attempts to maintain the distinction as a basis of our alternative model of transformations (see also section 2.2).

19. Peczenick emphasises creative legal thinking and non-deductivity as sources of transformations in one article (1984), but suggests the importance of forms of teleological rationality for transformations in another article (1982). The indication of goal-oriented rationality becomes apparent from Peczenick's formulations such as: transformations inside the law occur "when one performs a transformation in order to (italics mdb) derive a conclusion concerning (valid) law from a set of premises at least one of which
expresses or mentions valid law." (1982: 143); and: "The transformations create innumerable opportunities for a lawyer to optimally balance the following aims (italics mdb): to support the legal conclusion by moral standards and by the sources of the law simultaneously; to promote generality of legal thinking; and to set aside inconsistencies. By making this optimum, the lawyer tries to reach the practically right answer. From another point of view, this optimum is the same as legal certainty. Legal certainty and rationality are thus closely related." (1982: 160).

20. Alternatively, the legal agent abstains from the performance of narrative transformations when the discursive material (criminal evidence) is pre-ordered to a satisfactory degree, so that it does not need extra screening, re-formulation or argumentation.

21. Our approach resembles Van Roermund’s, who defines transformations as jumps in the production of rationality (-criteria); the rationality of transformations is thus not judged post-hoc (1983: 79).

22. Such a goal-oriented legal rationality is not remote from Peczenick’s ideas, who has related legal rationality to the accomplishment of legal certainty and transformations as a means for example to set aside inconsistencies.

23. Broekman does not define the notion of 'transformation' in the realm of Chomsky’s theory (Broekman 1982: 220).
PART II: CASE-STUDIES
CHAPTER 6: THE INSTITUTIONAL FRAMING OF EXPERIENCE

6.1 Introduction

If we can speak of "transformed" stories, then in what respect do institutional narratives diverge from "natural" narratives? So far, we have circumvented the drawing of a sharp-edged distinction between everyday and institutional narratives, mainly because we believe that the two overlap in form, style and performance. In this chapter we will elaborate the theme of institutionalisation, based on the assumption that everyday experience is 'framed' according to institutional protocols and procedures (see section 1.3). We will further assume that the change of narrator is crucial to what we have previously called the "expropriation" or "abduction" of the narrative, that the narrative about everyday experience is institutionalised by means of its ordering in a new discursive context (causing the imposition of legal-normative evaluations), and that the expansion of the narrative content is restricted by the continuous infiltration of a specific legal-interpretative scope which lingers on the background.

In order to reduce the apparent 'chaos' of everyday experience, the absorption of social events or everyday experience by the legal institution needs to be performed along a process of bracketing and framing (Goffman 1986: 251f):

"Activity framed in a particular way - especially collectively organized social activity - is often marked off from the ongoing flow of surrounding events by a special set of boundary markers or brackets of a conventionalized kind. These occur before and after the activity and may be circumscriptive in space, in brief, there are temporal and spacial brackets. These markers, like the wooden frame of a picture, are presumably neither part of the content of activity proper nor part of the world outside the activity but rather both inside and outside, a paradoxical condition already alluded to and not to be avoided just because it cannot easily be thought about clearly."

The "wooden frame" encloses a particular meaningful situation which is organised in a specific way; it 'protects' this situation from "the ongoing flux of everyday affairs." (Kevelson 1977: 24). Discursive boundary markers which close off the event or situation may be opening and closing signals (e.g. the ritual initiation and termination of a
courtroom session or a church service) (Schiffrin 1987: 36). "Bracketing" and 'framing' procedures thus organise a transformation of episodes or social activities (Goffman 1974: 255; Schiffrin 1987: 37).

For the time being, we will focus on the narrative structure of the first part of a criminal file: the 'prologue' of the police record which describes the actions of the police and the first results of the inquiry into what is to become the "Jansen versus Bertinus"-case (see Appendix II for details). The 'prologue' is a kind of inventory of first impressions, statements and observations. In other words, this report is as it were the introduction to the succeeding 'chapters' which deal with the crime in more detail. To draw the metaphor perhaps somewhat into the extreme: the introductory chapter of the 'novel' (the criminal file) introduces and presents the dramatis personae, the figuring actors, the narrators of the crime.

6.2 The Narrator of the Crime

The tension between the 'prologue' of the police record and the succeeding documents in the criminal file is considerable. The 'prologue' is a clinical, succinct, scenic and rather distant summary of the events surrounding the crime, whereas the remaining 'chapters' which contain the narratives of the suspect, the plaintiff/witness and other witnesses are elaborated, more personal and perspective-bound.

However, although the narratorial perspective changes, the actual narrator remains identical throughout the various 'chapters'. A 'literal citation' of the narratives produced by witnesses and suspect suggests that the alternation of narrator is merely an illusion. Besides, the narrator, who operates as the mediator of other narratives, coincides with the author of the narrative: the reporting police officer(s).

But an important aspect of the narratorial change tends to be neglected here. Although narrator and author coincide—a coincidence which is not removed until after the novel/criminal file have ended—the narrator/author belongs to the world of the novel-characters itself, but only in the 'prologue'. There, s/he narrates what other characters in the story experienced (the figural narrative situation). After that chapter, the narrator/author becomes invisible as novel-
character, but remains as narrator and author (the *authorial* narrative situation). The position of the narrator therefore undergoes a transformation, namely from 'figural' to 'authorial' perspective. Stanzel has argued (1979: 15) that the change of role, personality or point of view of the mediator or the narrator entails a change of effect on the interpreter of the narrative. In this particular case, the effect of the narratorial transformation is the differentiation and removal of narratorial accountability. When the second narrator is brought to the fore by means of a change from third-person singular into first-person singular, the actual narrator moves to the background and pretends not to be the mediator anymore. We speak therefore of "differentiation" in the sense that the reporting police officer cannot any longer be identified as author/narrator; "removal of narratorial accountability" in the sense that the reporter is seemingly not any longer liable for the narrative structure and content. This puts the *impression* on the interpreter or reader of the document that the narratives of the suspect and the plaintiff/witnesses are narratives which are literally reported rather than *filtered* and *mediated* by the police officer. The *substitution of the narratorial position* feeds the suggestion that the information is neutral, reliable and literal.

The description of the police-activities in the 'prologue' is frequently alternated with chunks of information which stem from the police themselves or which were collected from eye-witnesses. This information paves an important semantic basis for the construction of the legal-institutional narrative about the crime. However, there is not yet much of a 'narrative' in this part of the police record. Rather, it has the appearance of a linear string of 'narrative bits' of information, without a narrative core, but which -when taken together- construct a motive for further judicial inquiry.

The reference to and quotation of witness-information results in a narrative in which most of the statements containing information about the event are preceded by the identification of the witness or narrator. It also seems that in practice, the legal discourse relies for a great deal on the observation of facts, which becomes manifest from the employment of verbs which literally refer to the 'observation through the senses' (seeing, hearing). With regard to observation itself, it appears that the police equally relies on its own observations as on that from others. Each informer is held personally
responsible for his/her own observation and the statements thereof by means of the identification.

Most narrative statements in the 'prologue' are thus quoted or paraphrased and preceded by the name of the actual informer, the dual style of which is performed by a so-called 'free indirect style' which makes the mediation of the narrative quite clear (i.e. Stanzel 1984: 191). The 'prologue' of the police report contains relatively few statements of which it is impossible to trace the informer: identifiable narrative statements thus dominate the narrative scene. The difference in the structure between identifiable and non-identifiable narrative statements may be represented as follows:

<table>
<thead>
<tr>
<th>person p (saw, heard, etc.) that X (identifiable)</th>
</tr>
</thead>
<tbody>
<tr>
<td>X (narrator not identifiable)</td>
</tr>
</tbody>
</table>

But it is perhaps artificial to invoke this distinction. In law, it is simply a principle that it is clear who says what. Confusion about the actual source of the information ought to be avoided. But on reflection it may be added that the actual narrator is obscured because the actual alternation of narratorial perspectives is largely kept latent or made invisible. Generalising from the police report in the "Jansen versus Bertinus"-case we can say that all the direct narrative statements are reproduced, if not produced, by the police.

The other parts of the police record are in a way all embedded narratives. The difference with the 'prologue' is that - at least at the surface - no interruption takes place (in other words: the question-answer-pattern of the interrogation has been transformed into a continuous narrative sequence): the narrative is presented as if it comes straight out of the mouth of the informer. The institutional embedding becomes apparent from a performative opening and closure of the narrative:

**Performative Opening:**
"We [names and functions of responsible police officers] declare: [narratives]."

**Performative Closure:**
[We wrote this police record, each relying on his/her own observations, on the oath of office/affirmation, closed an signed this at Turp, 9 March 1985 [signatures of responsible police officers]]
Furthermore, each narrative testimony is inaugurated by an identification of the institutional narrator (Al) and the actual narrator (Pl) (witness, suspect or plaintiff), and terminated by an official closure (the signature of the witness or suspect under the condition that he/she sticks to the contents of the draft-testimony):

(INTR.IDENT. Legal Agent Al hears (INTR.IDENT. Person Pl (who) tells NARRATIVE) (CLOSURE: SIGNATURE Al ♦ Pi))

A formal inauguration and closure of each document thus constitutes a link with the larger criminal file. This encompassing dossier, which starts with an introduction of the case and ends with an 'epilogue' concerning the details of the appendex, is ordered within a higher-ranked discursive context by virtue of a performative opening and closure as well (see above).

6.3 Normative-Discursive Embedding

In the police record about the "Jansen versus Bertinus"-case, one finds the insertion of the double reference to the statutes from Dutch Criminal Code. References to statutes of the Criminal Code are presumably inserted ex post, since it is a practice that the document is an official reproduction of a previous draft. The explicit reference to a statute (article) in this stage of the inquiry relates to the previous discussion about normative coherence (4.4).

In order to take the suspect into custody the police are required to reinforce the suspicion which rests on the shoulders of the assumed offender. Normally, the police opt for explicit reference to the supposed infringement of a certain article of the Criminal Code (see also chapter 10). In the introduction of the police record about the case Jansen vs. Bertinus (JaBe/mishandeling/politierechter/24b/ tramdb101189) we see that the arrest of suspect Jansen is given a justifiable ground by reference to supposed infringement of "Article 287 in relation to 45 or 302 of the Criminal Code"). In the case Ter Haar/heling/politierechter/15b/tramdb141189 the suspect is arrested on the basis of supposed infringement of "Article 416 of the Criminal Code"; in Van Straaten/drinken/politierechter/20b/tramdb161189 we find
a reference to Article 26 of the Road Traffic Act; in Sint/diefstal/politierechter/20b/tramdb151189 there is a reference to Article 310 of the Criminal Code at the very beginning of the police record. We believe that these explicit normative references give support to the first framing of the crime in terms of the law itself, at least in the sense that this reference at the beginning of a criminal file opens a normative interpretation-register.

It should be made clear that we discuss the normative coherence of the criminal file in the light of an *intertextual link* between what can be called 'fact' and 'norm'. (The 'fact' is naturally not conceived as a brute fact, but as narratively processed in the form of a coherent text). The intertextual reference to a norm may be explicitly recognisable, but may also be interwoven with employed vocabulary of the narrative text. Normative references are generally indirectly indicated by the employment of a legal jargon, such as "intention" and "self-defence" (see chapter 10).

Within the criminal file of the "Jansen versus Bertinus"-case, explicit textual reference to a penal norm occurs not only in the introduction, but also in the 'prologue' to the police record (Appendix III), in S41 and S45. The explicit reference to Article 287 in relation to Article 45 or Article 302 of the Criminal Code, occurs at the beginning of the documentation on the Bertinus-Jansen-case (for the full text of these statutes, see section 10.5).

The norm is explicitly referred to prior to the testimonies of suspect and plaintiff. Reference to a norm in the beginning of the judicial inquiry prevents the legal institution from a further inquiry, and is as much capable of protecting the institutional process-economy. The police is merely required to focus on factual aspects which fall within the scope of the norm. In other words: the limitations on the inquiry are constituted by the semantic scope of the norm, even while several alternative interpretations may be established. Where the interpreter of the norm chooses against an open interpretation of the crime, the story may become 'cut off'. Such a procedure facilitates interpretation of the crime and strongly resembles the classificatory operation of legal subsumption.

It should be clear however that the integration of a semantic scope of the norm does not constitute a predictive algorithm for the construction of the legal narrative. Instead, the semantic options which are provided by the selected norm are the parameters of the
interpretation in which the norm progressively constitutes its applicable meaning through the narrative. Normative references are never arbitrary, because they are selected in the light of a success-strategy. Reference to a penal norm requires a legal-institutional machinery of choices and decisions, which often remain unreflected and implicit. Given the fact that the norm is explicitly referred to at the beginning of the documentation of the case, the norm may be regarded as an institutionally defined clue for the interpretation (and the further 'dealing with') of the case. A normative definition of the problem in such a premature stage of the procedure, provides the lawyer (judge, counsel, public prosecutor) with a filter which narrows the search for a variety of alternative clues. In other words, a normative definition of the problem at the start of the narrative makes it possible for the lawyer to focus on the clues which are provided by the norm.

Perhaps one more issue should be raised in connection with normative coherence, before we come back to it in section 10.5. It concerns the opening of Bertinus's (institutionalised) narrative, in which the police officers dangerously obvious translate Bertinus' notification in legal-institutional terms: "He reported an attempted manslaughter casu quo severe ill-treatment" (Appendix V: S2). In section 1.7 we have expressed mild astonishment about the fact that police officers are apparently allowed to cite the victim (or the suspect or witness) with words which are not their own. The rephrasement (if the case cited is 'rephrased' at all) of normative statements is a delicate matter, especially when it concerns crucial moments in the legal construction of fact.

6.4 Institutional Evaluation of the Crime

From an analysis of the 'prologue' "Jansen versus Bertinus"-police record, it can further be established that the structure of the legal-institutional narrative is multi-levelled. In fact, the narrative shows a gradual continuum between 'neutral' narrative statements which tell about the established police action and narrative statements which refer to the event itself.

Unlike elements, such as time and action, evaluative commentary remains rather implicit and interwoven with the meshes of the (legal)
narrative text. "Facts" and "values" are hardly distinguishable, and especially so when narratively processed. "Facts" which are first purchased with a perspective on their future relevance, gain an entirely new status once mediated by a narrator of the legal discourse. Legal spectacles are responsible for the infiltration of normative evaluations in the narrative. We may even define the narrative as an intrinsic form of evaluation (see section 3.6).

When we speak about explicit evaluations of the narrative content, we usually have in mind that the speaker/narrator refers to actions and events in support of an explicit evaluative statement. One could say: "Obviously, this was a very stupid thing of him to do", or "That pigeon really frightened me". The narrator takes as it were a step outside the narrative and attributes an explicit evaluation to the narrated actions and events (i.e. Labov 1977: 371).

Narrated actions and events may be evaluated in many different ways. The statement "he clearly intended to steal her purse" expresses an implicit evaluation in terms of the narrator's presumption with regard to the mental state (mens rea) of the perpetrator and his/her actions.

Whilst backshadowing the fairly weak distinction between "implicit" and "explicit" evaluations, our assumption with regard to legal-institutional narratives is that personal evaluation is severely reduced when the narrator is an agent of the legal institution (whether the narrator is a police officer or a lawyer). Such, however, does not contradict the assumption that legal-institutional narratives are evaluative accounts, especially not after having excluded narratives as objects of analytical distinctions between statements of fact and statements of value (3.3; 4.2).

Subjective evaluations are - in the case of narrated crimes - substituted by 'normative' evaluations, although the terms of this evaluation may diverge from the wording in the law. The narrative which is laid down in the criminal file contains a direction toward legal-institutional narrative activity and interpretation. This institutional evaluation underlies the selection of actions and events to be narrated. Character, gravity and legal relevance of the event are evaluated prior to the realization of the narrative. The criminal case which forms the subject of our inquiry is the sediment of these rational, but latent operations. In this manner, evaluations are an important source of interpretive transformations.
The legal-institutional evaluation of the crime therefore embodies an important discursive shift: the evaluation of the event is transferred from the subjective (the subject of the narrating legal agent; in this case the police officer) to the intersubjective legal level (the professional community of legal agents; in this case the criminal justice system) by means of the insertion of a norm into the narrative. The anticipated professional agreement which we discussed in 4.6 can be constituted on the level of this legal-normative evaluation of crime.

Perhaps we should look somewhat deeper into what we have provisionally called "implicit evaluations" in the context of the 'prologue' of the police record. These kind of evaluations may be generated by means of the use of intensifiers (mainly appearing in verbs and prepositions). In the 'prologue' of the case JaBe/mishandeling/politierechter/24b/tramdb101189, the employment of the verb squirted in "the blood squirted out of both wounds" (S21, Appendix III) triggers an evaluation which sounds distinctively different from a replacement of the verb with "came out" for example: "the blood came out of both wounds". So does the utterance "his clothes were smeared with blood" (S12; Appendix III) sound much more dramatic than for example "his clothes were covered with blood". Similarly, "Bertinus had a yawning wound" (S19; Appendix III) implies the severeness of the physical harm, whereas "Bertinus had an open wound" does not immediately suggest that meaning. Furthermore, "Jansen had hurried away by bicycle" (S38; Appendix III) characterises Jansen as a sneak with severe scruples, while saying "Jansen had gone away by bicycle" would accomplish a more gentle evaluation of the offender's personality.

The employment of specific semantic references within the narrative implicitly contributes to a labelling or stigmatisation process. The narrative dramatisation of the event implicitly expresses the severity of the case, anticipates the attribution of criminal intent and liability to Jansen (chapter 10) and finally emphasises and legitimates the quick and heroic action of the police. Central to the cause of the drama is only one person: Jansen. The dramatic elaboration of Bertinus' injuries coins the basis for a legal justification: the police officers and their authorities were fully entitled to arrest the person who inflicted the wounds and to qualify the event as "attempted manslaughter".

After two confirmations of witnesses (S25, S29; Appendix III), the police establishes an inquiry (S33; Appendix III) and identifies the
perpetrator (S35; Appendix III). Crucial is the utterance "Jansen had hurried away by bicycle" (S38; Appendix III), because it suggests to the reading audience (the public prosecutor, the judge and the defence) that apparently, Jansen himself did not regard the stabbing-event as an unwanted accident, but as a deliberate and voluntary attempt to kill his brother-in-law Bertinus. The attribution of these scruples, along with Jansen's hurrying away before the police would arrive at the spot of the action, contribute to and intensify the suspicion raised against Jansen: apparently, Jansen had no valid excuse to remain at the scene of the crime.

This procedure indicates that the narrative itself forms a precondition for a stigmatisation-process. The stigmatisation is a clue of implicit and explicit references to the norm, intensifiers that dramatise the event and confirmations from witnesses. In the 'prologue' (Appendix III) Jansen is not yet a fully developed personnage, except for being labelled the perpetrator, the suspect, a person with a name and an address and a brief testimony. No personal motive for the committal of the crime has been established. No alibi is stated yet. But the grounds for suspicion have been introduced.

At this stage we should briefly return to our initial question: do 'natural' narratives differ from institutional ones, and if so, how do they differ?

When comparing the two testimonies of Jansen and Bertinus (respectively Appendix IV and V) with the 'prologue' (Appendix III), the difference between "institutional narrative" and "natural narrative" becomes manifest from the kind of evaluations introduced in the narratives. In contrast to the legal-institutional narrative, which we characterised as the accomplishment of a reductionist operation, the "natural narrative" contains many explicit and implicit subjective evaluations (chapter 9 and 10).

But despite of such a noticeable difference, we should keep in mind that the narratives which are told by the suspect or the plaintiff also contain a pre-evaluation of anticipatory nature. This pre-evaluation forms an integral part of the attribution of relevancy to portions of personal experience, with reference and in anticipation of the narrator's estimation of what the legal institution may consider as relevant for a favourable decision. Hence, the layperson's pre-evaluation also determines the selection of story-fragments to be
narrated. As a result of a compromise or cross-section between legal pre-evaluation and subjective pre-evaluation, the testimony is deprived of its natural character. The narrative or testimony is the result of an interrogatory question-answer-pattern, the questions of which contain suggestions about the cause of the crime: the institutional pre-evaluation enters where the interviewing police officer carefully weighs and selects the questions and where the recording police officer selects and paraphrases the answers given to the questions.

6.5 Transformation of the Major Action

Semantic-lexical descriptions to the major action (i.e. the crime) differ from narrator to narrator, or from witness to witness. When isolated statements are enchained in the form of a narrative sequence, it is as if the descriptions of the major action transform in the course of the narrative. We deliberately say "as if", because the transformation is the outcome of the change of narrator: the statements are paraphrased summaries embedded in a narrative which is produced by the police.

In the 'prologue' of the police record (Appendix III), successive narrative statements inform us about the performance of the police in the initial stage of the inquiry. In this section we will discuss questions such as: "What is said about the (major) criminal action?", "By whom is it said?" and "When was it said?". In short, we will lift out the various narrative descriptions of the major action, all of which are summarised statements made by witnesses (some of them are later called to give more elaborate testimonies). Afterwards, we will see whether there are any noticeable differences among these versions.

(i) On the basis of information from unknown person

S3 TWO PERSONS WERE FIGHTING
(major action)

ONE (OF THEM) WIELDED A KNIFE
(description of major action)
On the basis of information from bystanders

S25  JANSEN STABBED BERTINUS

WITH A KNIFE

On the basis of information from Bertinus's wife

S29  JANSEN STABBED BERTINUS

On the basis of information from suspect Jansen

S52  JANSEN STABBED BERTINUS

TWICE

On the basis of information from Jansen's mother

S66  JANSEN STABBED SOMEONE

WITH THE KNIFE

The 'prologue' contains five references to the major action, which is "the core of the crime". The references are repeatedly elicited from people other than the involved police officers. The first reference to (or description of) the major action is very general. The references and descriptions which succeed are semantically more refined.

One may notice that in (i) above, the description is relatively neutral with regard to the actual result of the major action (presented in a later stage of the narrative - in S9 and S23 of Appendix III): "fighting" does not necessarily accomplish severe injury. After that, the "fighting" is consistently transformed into "stabbing". Significant is the "responsibility transformation" which takes place between descriptions (i) to (ii) above, which demonstrates that not two, but only one person is accountable for the performance of the major action: there is a transformation from shared responsibility to single responsibility.
More concretely, the transformations between the descriptions (i) and (ii) are:

a. **VERB**: "FIGHTING" and "WIELDED" (S3) are substituted by "STABBED" (S25).

b. **PERSONAL PRONOUN**: "TWO PERSONS" (S3) are substituted by "JANSEN" and "BERTINUS" (S25); "ONE OF THEM" is substituted by "JANSEN" (S25).

c. **TRANSITIVITY**: the major action becomes 'split': in S3 two persons were active, while in S25 only one of them ("JANSEN") is active ("HAD STABBED"), while the other ("BERTINUS") remains passive.

It is crucial to note that the transformations between (i) and (ii) are mostly due to the time-gap between the two descriptions (the chronological order in which the information is reported in the 'prologue'). The actual time (section 6.6) in S3 in (i) runs parallel with the telephone call which reaches the police office, just before the performance of the major action (the stabbing): the person who calls (from a telephone box opposite of the scene of the event) tells the police that he sees two people fighting. The actual time in S25 (ii) coincides with the arrival of the police at the scene of the crime: this is just after the major action (the stabbing) has been performed.

A number of transformations succeeds the transformations mentioned above:

- Descriptions of the major action in (iii), (iv) and (v) successively **underline** and **confirm** the information which is provided by the witness in (ii). A rule of evidence manifests itself in this procedure: in order to create a firm basis for suspicion initial observations need to be corroborated.

  - The rephrasing of the major action in (iii) and (v) is **less specified** than in (ii):
    * in S29 in (iii) the object **KNIFE** lacks
    * in S66 (v) the **NAME OF THE VICTIM** lacks

  - The rephrasing of the major action in (iv) is **more explicit** than in (ii):
    * in S52 it is mentioned that the stabbing occurred **TWICE**

  - The information given in (v) indicates that the object with which Jansen stabbed Bertinus was **already known** by the informer (the mother of the suspect): THE knife (S66) instead of A knife (S25).

6.6 Transformations of Time

Narrative references to time play a crucial role in the structural organisation of narrative action. Time is active on various levels.
When the judge takes note of the criminal file of the case about which s/he has to decide, there is an intersection of at least four time-dimensions:

- the moment at which the crime or the major event took place;
- the moment at which the event was reported and narrated to the police;
- the time-dynamics in the account of the event accomplished by textual devices;
- and finally the moment at which the judge reads and interprets the narratives.

In this section we will examine the time-transformations which occur in the 'prologue' of the police record (Appendix III). The narrative about the police activities concerned with the inquiries into the "Jansen versus Bertinus"-case is formally introduced by date and time at which the police received the first information about the crime (S2). This is the moment at which -formally spoken- the institutional concern with the case starts. The urge of the police reaction to the event is expressed and motivated in the narrative summary of the event (S3): "Just now".

The time references within the narrative which reports the police activities may be characterised as very precise: the exact date and time of action is referred to 6 times, namely in S6, S44, S49, S55, S59, S70. The urge of the matter appears 3 times and is expressed by means of the terms "immediate(ly)": S5, S40, S46. These time references are significant for official documents or reports which account for (legal) institutional action. But in the case of police reports, one must take into account that this being 'punctual' bears direct relevance for the possibility to check a proper construction of the evidence and a legitimate procedure. In addition, the precision of the time-references functions as a "marking off" of the event.

In order to analyse the various other time-references in 'prologue' of the police record (Appendix III), we have made a distinction between three time-levels which continuously interact within the narrative. The first time-level we have identified is the actual time-level: the moment at which the event is being reported. It represents the actual "here-and-now" of the report: S1 "We declare". The second time-level is the factual time-level, which concerns the various moments at which
the police was active. And finally, the narrative time-level concerns the chronological sequencing of the narrative itself:

```
ACTUAL TIME-----MOMENT OF RECORDING
FACTUAL TIME-----CHRONOLOGY OF POLICE ACTION
(COINCIDENCE OF PAST TIME AND ACTUAL TIME)
NARRATIVE TIME---CHRONOLOGY OF THE NARRATIVE
```

Although these time-levels frequently "coincide" within the narrative, there are also "discrepancies" between the time-levels. It appears for example that the chronological sequence of the major action itself (i.e. the cause-effect-dimension of the crime) is interrupted, reversed, accelerated or delayed by the narrative references to time. The narrative thus 'juggles' with the chronology of action. However, the margins of that play are limited by conditions and rules of institutional reporting. At least the 'prologue' of the police record (Appendix III) is a narrative in which the narrative time frequently coincides with the factual time: its 'style' is to take the successive police actions as the time-axis along which other narrative information is arranged. But in contrast, when the perspective on this narrative changes, namely, to regard it as a report about the major action (the crime) rather than the performance of police activities, it appears that the narrative time does not coincide with the factual time (see also Van Dijk 1977: 103f). The police report seen as a narrative about the major action is in fact a narrative which has absorbed the summaries of various other, smaller narratives, which often appear as isolated single phrases. At places where factual time and narrative are not isomorphous, there is compensation by means of a range of 'time-jumps' (S25, S27, S32, S36, S53, S64; Appendix III). In short, there are variations between the factual time and the narrative time (which in its turn reports about observations of the past time from different perspectives: the crime).

Only the narrative time is variable in the sense that narrative time-references can play with the past time of the event. The strongest example of this playfulness of the narrative time is the inversion of 'fact' and time. In the police report this inversion occurs 6 times. In every case, two or more narrative statements are chronologically
inverted. The inversion of a narrative statement requires another narrative statement (or sequence) in order to transform the inversion. In other words, transformations of inversions require pairs of narrative statements.

The narrative inversion of time is of course not a privileged feature of legal narratives. Rather, the narrative inversion of time is a result of narrative organisation itself. The inversion seems to result mainly from the causational ordering of action-accounts. What happens is that one first describes the consequence or effect of an action (or event) and only afterwards the cause of the consequence or effect (the terms "cause" used here not in any specific sense of the word). Therefore, the report of the factual observation (consequence) that Bertinus's clothes were smeared with blood, precedes the explanation (cause), that his blood squirted out of both his wounds.

The explanation (that the blood squirted out of both wounds) of the observation (that Bertinus was smeared with blood) is cut off here: there is no further exploration of "the cause of the cause", which is a perfect illustration of the narrative prevention from infinite regression.

Let us have a look at the transformed inversions which occur in the 'prologue' of the police record (Appendix III):

1. S12/S13 INVERSION S25
   
   TRANSFORMATOR (S16/S18)

(his clothes were smeared with blood as well as the pavement in his neighbourhood)

   TRANSFORMATOR (We saw (S17/S19/S20))
2. S9/S11/S12/S13/S17/S19/S20/S21/S23

(a man was lying on 
(arteries had been hit)

(bystanders told us namely)

3. S22/S23

(we presumed that arteries had been hit)

(bystanders told us namely)

4. S29

(her husband had been stabbed by J.)

(bystanders told us namely)

(shortly before the J had stabbed B with a knife)

(bystanders told us namely)

(we presumed that arteries had been hit)

(bystanders told us namely)

(J. and B. have had a quarrel for a long time)

(at the same time it became clear to us officers)
The narrative inversion of consequences (punishable facts) and causes (historical antecedents; explanatory facts) requires in all the examples mentioned above a transformator, which is an observatory statement ("we saw"; "we heard"), an information provided by others than the police (witnesses: "bystanders told us namely") or information provided by others of which the police presumes that it is right ("it became clear to us"). The explanations in the narrative are again frequently 'quotations' from witnesses.

When consequences are made to precede their causes in the narrative, the question may be raised whether that has any possible effect on the interpretation by the prosecutor, judge and defence-counsel. However, we will see that the 'prologue' of the police record remains untouched in the courtroom: the narrative about inquiries made by the police will not be used as a means to test the reconstruction of Jansen's crime.
6.7 Conclusions

The expropriation of the narrative of the individual (including the possibility to control a manipulation of that narrative) is performed by means of a *narratorial substitution*: although the individual (i.e. the suspect or witness) is recognisable in the police record as the *first-person-singular* "I", the narrative is opened and closed by an institutional narrator, which means that the original narrator is encapsulated by an institutional narrator. The narrator who tells in the first-person-singular is transformed into a 'pseudo'-narrator, because the structure and substance of his/her narrative are the outcome of questions raised in the police-interview. The recording police officer is therefore the real narrator/author, although s/he remains on the background.

Narratorial substitution accompanies the *institutional embedding* of the suspect's or witness's narrative. Each of these narratives are "enframed" when they are placed in a larger textual context; they maintain a recognisable individuality by the insertion of *performative openings and closures*.

Most police records contain a provisional legal definition of the event: we call this a process of *normative framing*, which is predominantly an intertextual phenomenon (the use of normative references to a legal statute in the text of the police record). The purpose of this premature normative framing is to restrict the interpretive scope of the criminal event. Normative framing is also achieved by the employment of a non-legal, but accusatory style (f.e. the blood *squirted* out of both wounds) which invokes suggestions about the severity of the crime.

Seemingly 'innocent' transformations may also contribute to the ascription of criminal responsibility. Transformations of action and time, which are characteristic to all narratives, support a narrative progression in which the character and the actions of the criminal become increasingly detailed and individualised.
1. It should be noted that not all criminal files are comprehensive to such a degree. When looking at alcohol-offences for example, it appears that the narrative structure and content is squeezed into a pre-printed document, which determines which information will be put into the file and which will be left out. Neither do such files have a chapter-like structure (e.g. the case Van Straaten/drinken/politierechter/25a/tramdb161189).

2. This terminology is borrowed from Stanzel (1979: 12). The paragraph which follows is inspired by his elaboration of the ideas of Quintilian, who distinguished two ways of narrating, namely summarising and elaborating.

3. The labeling-process remains invisible until the transformed matters suddenly appear in accompanying documents (the police record, the medical card). The criteria of which penal norm to apply are unfortunately unknown. It would be interesting to find possibilities for research which examines the hidden rational basis of these institutional choices.

4. We do not primarily identify 'time-jumps' as means of condensation of narrated time with the help of narrative devices.
CHAPTER 7: COURTROOM REFERENCES TO THE WRITTEN DISCOURSE

7.1 Introduction

Much of the forensic discourse consists of a finely mazed network of references between various texts, such as police records, summonses, social inquiry reports, statutes of law and written motivations of legal decisions. Furthermore, the content of legal statutes is mediated by legal agents (Brinckmann & Rieser 1972: 83). This is what we have previously called the intertextuality of the legal discourse (see sections 1.5 and 5.5). The intertextual chain within law is robust and complicated: the origins of the numerous intertextual references are often unknown. Most of the texts which are the points of reference for other texts are themselves written replicas of the legal oral discourse.

Not only are these textual or discursive references of a highly autoreferential nature -in the sense that all cited information has an acquired legitimate legal status-, but also of an allegedly reproductive nature. In the eye of the legal discourse, quotations, paraphrases, summaries and references are justifiable references or textual citations, for that their reliability is supposed to be guaranteed by their strictly reproductive nature, which means that references do not change or modify the meaning of evidence. In other words, the forensic discourse nourishes the myth that "references" are essentially of a non-damaging nature because they are supposed to maintain the truth of the original assertion right through their transposition to other discursive contexts.

Information-processing in the legal discourse is undoubtedly constrained by accuracy, verifiability and consistency. In particular, the purpose of the Dutch (or continental) trial is not to collect new information, but rather to test the verisimilitude and the value of evidence which has already been made available and accessible to the parties. Fragments selected from the documents are therefore subjected to an argumentative exchange in which claims which are raised with regard to the value of the evidence are tested.

Oral references to written texts delimit the criminal case, in the sense that 1) they appeal to a specific statute of law for the qualification of the case; 2) they refer to material which can be
related to the accused only (individualisation of the case; revocation of previously existing discourse; biography of the individual); 3) every set of references delivers a new combination, a new cross-section of meaning.

In the subsequent chapter, so-called reliable, reproductive and static references - namely the quotation, the paraphrase and the summary - will act as a tentative basis for an empirical analysis of narrative-discursive transformations. A temporary restriction is that only the discursive references from the oral to the written will be taken into account, notably the reference during the trial to documents, such as the police record, the summons and the social inquiry report (see section 1.5 for a description of these documents). We therefore discuss the transposition of the contents of the criminal file to the trial.

This restriction means that in particular, we will look at the consequences of Article 297 of the Dutch Code on Criminal Procedure\(^1\). The statute determines that documents (police-records, reports of experts or other documents) ought to be read over when the chairperson, one of the judges or the public prosecutor wishes so. The defendant has some influence on this too, because s/he can request the reading over of documents (when it concerns a witness-testimony, the court and/or the public prosecutor have no power to prevent this from happening). A crucial starting-point for this analysis is that the principle of immediacy determines that the reading out of documents may be substituted by an oral announcement of their brief contents, unless the public prosecutor or defendant protests against such a performance by the chairperson. It is also important to mention that documents which have neither been read over nor briefly announced during the trial are not taken in consideration for the legal decision (on penalty of a nullification).

7.2 Quoting in a Context

The legal-institutional preconditions of accuracy, consistency, verisimilitude and verifiability have far from negligible effects on the linguistic aspects of the construction and testing of criminal evidence. In this section, we will assume that the legal agents in the continental trial rely on documents when chairing, charging or
pleading, and that they safeguard the consistency of their complex text-processing task by means of a literal reference at the documents.

Generally, a quotation is a word, sentence or text-fragment which is "cut out" or "lifted out" of a text, interview, monologue or interaction, and subsequently transposed to another text or interaction. "To say it literally with the words of someone else" is approximately the best description of a quotation. The function of the quotation is to explicate, underline and establish the accuracy of information, which is visible in news-reports for example. By means of a quotation, the journalist demonstrates that s/he received the information out of first hand. Another function of quotations is to confirm, explain, underline or strengthen a statement, result or point of view, which is a rhetoric device also frequently to be found in scientific documents.

This latter function of quotations implies that the activity of "quoting" cannot be regarded as a strictly static, innocent or neutral event. The selection of a quotation from the text rests on a strategic choice which is to be connected with the rhetoric claim which the interlocutor seeks to pursue or defend (see chapter 4.6). In other words, quotes are not to be incidentally found, but to be intentionally selected. They may be the 'underpinning reasons' justifying the purposive interpretation of a (relevant) piece of evidence.

Quotations thus fit the purpose of the writer or interlocutor, rather than the other way around. The text has no will or desire; it is the interpreter or applicator of that text who decides how the text is going to be used. The selection and interpretation of quotations are closely entangled with the determination of their position within the argumentative context. Although quotations are said to be more reliable than respectively paraphrases and summaries because of their 'literalness', they are yet defenceless against discursive manipulations. Various transformations may be performed on the quotation. The most important transformation of the quotation is achieved by its transposition to an argumentative context, often entailing the attribution of meta-linguistic devices such as emphasis or suppression of fragments of the quoted phrase, or the emphasis or suppression of intonation or volume when iterating the quoted phrase. These meta-linguistic devices contribute to the rhetorical effect which the interlocutor wants to achieve. One may want to ridiculise or uplift the quoted phrase, or may want to persuade or dissuade the
audience of a certain shortcoming or importance in the quoted phrase. Furthermore, the speaker or author is free, not only to select and affect the quoted phrase, but also to delete or omit words (or bigger parts) which are considered to be "irrelevant" in the new discursive context. At the same time, the quoted phrase may be interrupted or accompanied by evaluative comments.

But let us now focus on the employment of quotations in courtroom. In the material, which consists of five "politierechter"-cases (see Appendix II), quotations are found to be rarely performed. Significant for the strategic use of quotations is a fragment from the recorded police-interview of two witnesses who are involved in the case about the illegal reception of an alarm-clock. Twins, by :s called Karel and Kees, are both the burglars as well as the witnesses. During the trial of defendant Mr. Ter Haar (Marcel), the judge questions the two witnesses about the truthfulness of their previous statements to the police. Defendant Marcel persistently denies that he knew that the alarm-clock was stolen when he received it. However, the two witnesses, burglars Karel and Kees, both stated the opposite when they were interrogated by the police. To summarise: the evidence which can be inferred from the witness-testimonies in the criminal file contradicts the evidence which the defendant provided at the police office and again during the trial.

Ter Haar/heling/politierechter/15b/tramdbl41189

119 R Tegen de politie hebt u
119 J You then stated to the

120 R toen gezegd: "Hij wist dat de klokradio van diefstal afkomstig was. Toen Marcel de klokradio vroeg, vertelden wij hem dat deze was gestolen."//
120 J police: "He knew that the alarm-clock came from burglary. When Marcel asked for the alarm-clock, we told him that it had been stolen."//

The content of Karel's statement in the police-record which runs parallel to this quotation is:

"He knew that the alarm-clock came from burglary. When Marcel asked for the alarm-clock, we told him that it was stolen." ("Hij wist dat de klokradio van diefstal afkomstig was. Toen Marcel de klokradio vroeg vertelden wij hem dat deze was gestolen.")
Nothing in the quotation above has been changed, except for a modification of the *emphasis*, and the addition of a *discursive introduction*, which enables the judge to attach the quoted phrase to its new discursive environment. The discursive introduction *contrasts* Karel's statement during trial with his previous statement at the police office in the subtle emphasis on "police", because at first, Karel maintains during the trial that he or his twin-brother Kees did *not* inform Marcel about the fact that the alarm-clock was stolen (which would lead to the dismissal of the charge against Marcel) (117/118; not transcribed). But this quotation *convinces* Karel that he was probably right at the police-office, and wrong during the trial. The fact that it was *written* down by the police is evidence to him that Marcel was indeed informed about the source of the alarm-clock. (This reaction matches with remarks put forward in sections 2.3 and 2.4: suspects and witnesses are inclined to accept assertions as true assertions when based on statements performed not long after the event and when subsequently signed). But the judge is doubtful about this quick shift in Karel's memory, also reinforced by the defendant, who explicitly denies again that he did not know at the time that the alarm-clock had been stolen. She first asks Karel whether he might have stated something to the police which was untrue (126/127), but he maintains that he thinks that he probably told them the truth (127/128). She then turns to the defendant asking him how it is possible that his statement contradicts Karel's while reiterating the quotation, this time somewhat more selective and briefer (131-135):

---

Ter Haar/heling/politierechter/15b/tramdb141189

131 R Want Karel zegt/
131 J Because Karel says/
132 R heeft tegen de politie gezegd en hij zegt nu dan was 't
132 J has told the police and he now says well then it was
133 R ook vast zo, want dan heb ik daar (vast) de waarheid
133 J probably like that, because then I think I did tell
134 R gezegd, "toen Marcel de klokradio vroeg vertelden wij hem
134 J the truth, "when Marcel asked for the alarm-clock we told
135 R dat deze was gestolen."/
135 J him that it had been stolen."/

...which is subsequently denied again by the defendant (135-137). The judge feels at this stage that she cannot remove the contradiction and
asks the public prosecutor whether he wants to ask Karel any questions (138). The prosecutor asks Karel whether suspect Marcel has indeed asked a few times whether the alarm-clock was stolen (140/141). The witness "breaks" and tells the court that he did not confirm to Marcel that it was stolen, to some surprise of the judge (142/143). Karel told Marcel that it was not stolen, and he told the police the opposite (143). The judge then returns to her role as principal interrogator and confronts the witness again with the same quote, based on his statement in the police office:

Ter Haar/heling/politierechter/15b/tramdb141189

144 R Oh ja, maar je hebt tegen de
144 J Oh yes, but you told the

145 R politie gezegd: "Toen Marcel de klokradio vroeg,
145 J police: "When Marcel asked for the alarm-clock,

146 R vertelden we 'm dat deze was gestolen."//
146 J we told 'm that it had been stolen."//

This brings witness Karel in total confusion (147), but he does an attempt to repair his misunderstanding of previous questions (148-156). The judge interrupts him to ask whether he remembers now what he told the police (154), and the witness answers:

Ter Haar/heling/politierechter/15b/tramdb141189

154 G1 Da/nou okay,
154 W1 Tha/well okay,

155 G1 eh/ okay/misschien/misschien wel eh/ in 't begin la/
155 W1 ah/ okay/ maybe /maybe yes ah / at first la/

156 G1 telkens nee gezegd, maar later wel ja.//
156 W1 each time said no but later we did yes.//

Witness Karel now begins to understand that the court's assumption is that neither he nor his twin-brother informed defendant Marcel about the actual source of the alarm-clock. He takes up this implicit assumption, but in asserting it he is about to lose credibility because the weakness of his explanation. The judge thus again reads over the quote (156-159), this time introduced by an explanation which once more contrasts Karel's statements with his previous statements:
Witness Karel "corroborates" his account, which supports a transformation of the earlier doubt into a definite negative assertion: Marcel had not been told anything (see section 2.5 for the transformation of illocutionary forces). But the public prosecutor, skeptical about Karel's somewhat hesitant answers, elicits information from Karel which asserts that Marcel had been told something, namely that the alarm-clock was not stolen (170-173):
167 O Eh: wanneer hebt u nou
167 P Ah: when did you then

168 O tegen Marcel gezegd dat de klok gestolen is, voor
168 P tell Marcel that the clock is stolen, before

169 O hij wegging, of nadat hij al helemaal weg was met de
169 P he left, or after he had already completely gone with the

170 O klok, een paar dagen later of ( )
170 P clock, a couple of days later or ( )

171 Gl toen hij bij ons was, hebben wij die klokra/radio aan
171 W1 when he was with us, we gave him that alarmclo/clock

172 Gl hem gegeven en we hebben gezegd dat ie niet gestolen is.
172 W1 and we said that it was not stolen.

173 O En toen heeft ie die klok meegenomen, maar hebt u
173 P And then he took that clock with him, but did you

174 O dan naderhand toch nog gezegd eh: dat die klok gestolen
174 P then afterwards say ah: that that clock was stolen?

175 O was? Of heb je dat naderhand ook niet gezegd?
   - (1.9) (4.6)
175 P Or didn't you tell him afterwards either?
   - (1.9) (4.6)

176 Gl Nnee.//
176 W1 Nno.//

The prosecutor repeats his question (176-178; not transcribed), again succeeded by a negative answer. Karel then begs permission to speak and resumes the information which he had wanted to give, but did not get the chance to because of the confusing and fragmentary questions: he now states that the brothers gave Marcel the clock-radio, without the latter knowing that it had been stolen, and then afterwards, when the police interrogated the brothers, they told the police that Marcel possessed the clock-radio (180-185; not transcribed).

Let us just recapitulate the successive stages of the interrogation of the first witness (Karel) in order to reconstruct the progressive transformations of his position:
W1 (KAREL)  

J (JUDGE) AND P (PROSECUTOR)

117/118: W1 + W2 did not tell D that X was stolen

119/120: J confronts W1 with quoted statement to police, namely that W1 + W2 told D that X was stolen

124: W1 switches: believes that quoted statement is true

129: J invites D to confront W1: D did not know at first X was stolen, only later

131/135: J confronts D with quoted statement of W1 to the police and W1's reiteration during trial

135/137: D says that he asked W1 + W2 explicitly whether X was stolen:

W1 + W2 both said no.

143: W1 switches again: W1 + W2 said no when D asked whether X was stolen

144/146: J confronts W1 for second time with quoted statement: W1 + W2 told D that X was stolen

146/148: W1 confused: we did not tell D that X was not stolen

150/153: J asks W1 to repeat statement + confronts W1 with his statement to the police (not quoted)

154/156: W1 produces unclear answer: in the beginning we said no, later yes
156/159: J confronts W1 for the third time with quote of his statement to the police: W1 + W2 told D that X was stolen

161: W1 repeats answer (in the beginning no, later yes)

167/170: P asks question

172: W1 + W2 told D that X was not stolen

173/175: P asks question

176: Afterwards, W1 + W2 did not tell D either that X was stolen

176/178: P asks question

178: W1 denies that D had taken X after D was told that X was stolen

179: P reiterates W1's denial

180/185: W1 resumes: D did not know that X was stolen when W1 + W2 gave X to D: W1 + W2 told the police when interrogated after which police collected X from D.

In retrospect, there are eight transformations in Karel's position, three of which are the outcome of a direct confrontation of the witness with his quoted statement made to the police (t$_1$, t$_3$ and t$_5$), and three of which are the result of indirect confrontation (t$_2$, t$_4$ and t$_7$, respectively via the defendant; by means of paraphrase or rephrasal). The two remaining transformations are catalysed by questions posed by the prosecutor, the content of which is slightly more remote from the literal contents of the quoted statement from the police record (t$_6$, t$_8$):

$t_1$: 117/118: W1 + W2 did not tell D X was stolen --- direct confrontation with quote by J --- 124: W1 + W2 told D X was stolen;
The transformations are complex, because Karel's position does not just move in between affirmation or denial of the question whether he and his twin-brother informed Marcel that the clock was stolen. Instead, a vast part of the complexity of these transformations is caused by the flux of the questions put to him. The various shifts in Karel's position thus seem to be performed within a larger matrix of potential 'binary oppositions':

<table>
<thead>
<tr>
<th>INCriminating Testimony</th>
<th>Alleviating Testimony</th>
</tr>
</thead>
<tbody>
<tr>
<td>I W1 + W2 TOLD D X WAS STOLEN (124)</td>
<td>W1 + W2 DID NOT TELL D X WAS STOLEN (117/118; 146/148; 154/156; 161; 176; 178*)</td>
</tr>
<tr>
<td>II W1 + W2 CONFIRMED X WAS STOLEN (φ)</td>
<td>W1 + W2 DENIED X WAS STOLEN (143; 178*)</td>
</tr>
<tr>
<td>III W1 + W2 DID NOT TELL D X WAS NOT STOLEN (146/148)</td>
<td>W1 + W2 TOLD D X WAS NOT STOLEN (172; 178*)</td>
</tr>
<tr>
<td>IV D KNEW X WAS STOLEN (φ)</td>
<td>D DID NOT KNOW X WAS STOLEN (180/185)</td>
</tr>
</tbody>
</table>

From the 'distribution' within this matrix it may be said that Karel, even though he contradicts himself twice, definitively undermines the accusation which rests on the shoulders of the defendant. The resemblance between the binary categories above indicates the
subtleness of the transformations in Karel's position. Besides, to this variation of categories, another dimension is added during the trial-interrogation, namely a time-dimension. To make the interrogation even more complex, a line is drawn between the moment at which Marcel visited the house of the twin-brothers and got the clock-radio ("at first"; "in the beginning"), and the time-span in between his departure from the house and the moment at which the police came to collect the clock-radio ("later"). A final remark on the trial sequence in 178, in which Karel denies the suggestion which is embedded in the prosecutor's question, namely:

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176 O Ja, kijk, waar het om gaat is dat wij willen weten
176 P Well yes, look, what it is about is that we want to know

177 O of Marcel die klok heeft meegenomen nadat hem gezegd was
177 P whether Marcel took that clock with him after he was told

178 O door jullie dat ie gestolen was.
178 G1 Nee, dat is eh/ dat is
178 W1 by you that it was stolen.
178 P No, that is ah/ that is

179 G1 niet zo.
179 W1 not the case.
179 P So that is not the case.//

The suggestion laid down in the question is ambiguous about the information which Marcel received from the brothers before he took the clock away with him. Karel's negative answer to the suggestion contained in "whether" (177) conceals three possible answers, i.e. W1 * + W2 did not tell D X was stolen; W1 + W2 denied X was stolen; and W1 * + W2 told D that X was not stolen. In other words, the answer fails to reveal whether Marcel received any information about the origins of the clock at all, and it does not bring to the surface either whether Marcel remained inactive or not concerning the question to the brothers where the clock came from.

The second witness, Karel's twin-brother Kees, cannot remember whether they discussed the origins of the alarm-clock with Marcel or not (221; not transcribed), but he knows that he did not sell the clock to Marcel (222; not transcribed). It is significant, that when the judge confronts him with a quoted parallel-statement derived from his
testimony to the police (226/227), Kees reacts in a way which is almost identical to that of his twin-brother: he believes that it is probably true (that Marcel was told that the alarm-clock had been stolen) if it was written down in the police-record (228/229). The twins both consider the written text to be authoritative and most reliable, also because their statement was recorded not long after they gave the alarm-clock to Marcel:

Kees's corresponding statement from the police-record is:

"Marcel knew that the clock came from burglary, because that has been told to him."
The previous examples demonstrate that the relative 'defencelessness' of the quoted text-fragments has not been misused, but rather has been argumentatively employed as an authoritative and reliable pressure-instrument in order to decrease and minimise the apparent contradiction between the various accounts (see chapter 9).

That quotations in courtroom, rare as they are, are used as instruments in an argumentative combat can further be illustrated by means of another case, the "Jansen versus Bertinus"-case. In his plead, the defence-counsel attempts to disqualify the truthworthiness of plaintiff (and witness) Bertinus's statements. More in particular, the defence-counsel underlines the ineptitude of Bertinus's arguments, respectively that he threw a conifer through the window of Jansen's front-door because of self-defence, and that - in a later stage - he lifted Jansen's bike up and it pushed forward, also because self-defence. From the attempt to weaken Bertinus's two arguments emerges, by means of a juxtaposition of the two adverse accounts, a justification of Jansen's action, namely on the basis of the suggestion that the latter acted out of self-defence instead of the plaintiff. Hence, the quoted (and commented) text-fragments are the conditional building-blocks for a narrative transformation which devitalises the attribution of individual criminal responsibility (section 10.6).

The first quoted quotation (N.B.!) concerns the stage in the plead, where the defence counsel re-evaluates the succession of events, in particular the "conifer-episode", which took place early in the course of events (see also section 9.7 for an analysis of courtroom references to the narratives about this episode).

The fragment from Bertinus's testimony which corresponds to the defence-counsel's quotation is:

"I did this out of self-defence because Piet shouted: 'Come here then I will stab you to pieces!' Because I threw that conifer Piet closed the front-door again. The conifer then flew through the bottom pane of the front-door. Subsequently I immediately jumped on my bike and cycled (away). I saw that Piet came running after me. I saw that he still kept the knife in his lifted right-hand. I then heard that Piet screamed: 'Come here!' or words to that effect. I also heard that he screamed: 'Come here then I will break you in pieces!'"

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349 A mijn
349 C my

350 A cliënt die zou dan moeten geroepen hebben "Kom hier, dan
350 C client he is supposed to have shouted "Come here, then

351 A steek ik je kapot" of woorden van gelijke strekking (.)/
351 C I'll stab you to pieces" or words to that effect (.)/

Significant is the rhetorical introduction which the defence counsel performs when weaving a quotation from Bertinus's witness-testimony into his plead. In the phrase "my client he is supposed to have shouted" (349/350), the counsel demonstrates his disbelief in the true nature of that testimony. The counsel establishes narrative coherence with the statement of his client, who stated to the police that the pocket-knife only appeared in a much later stage. Another noticeable feature of the quotation above, is that one can speak of a recombination of textual elements. The sequence "or words to that effect" appears in the quoted text (Bertinus's witness-testimony) immediately after the sequence "Come here!" and not after the sequence "Come here then I will stab you to pieces!". Therefore, the quotation appears as a contraction of a text-fragment, which contains elements of summary.

The implicit character of the counsel's disbelief in Bertinus's statement is gradually transformed into explicit doubt. Except for emphasising the importance of Bertinus's claim of self-defence in the succession of events (400-402) by means of another discursive introduction, the lawyer rounds off the most dominant argumentative pillar of his plead (with the aim to have the suspect acquitted on grounds of self-defence) by 'putting some notes of interrogation' to Bertinus's claim of self-defence (408/409). In any case, while relinquishing the plaintiff's testimony, the lawyer again establishes narrative coherence, not only with Jansen's statement, but also with
the narrative message of his own plead, which is to throw a light of excuse on Jansen's wielding of the pocket-knife:

"I then grabbed Piet's bike and held it in between us to defend myself. I also thrust that bike forward, in Piet's direction when he came toward me. This was only to defend myself."

("Ik greep vervolgens de fiets van Piet en hield die tussen ons in om me te verdedigen. Ik heb die fiets ook naar voren, in de richting van Piet gestoten toen hij op mij afkwam. Dit was alleen om mij te verdedigen").

The corresponding fragment of the trial is:

Summarising the notes made in this section about quotations, we can say - even although we have used a very small sample - that quotations are invariably woven into their new discursive context by means of a discursive introduction, which itself may contain rhetoric-argumentative elements, depending on the purpose or message of the interlocutor. Another invariable factor in the activity of quoting is that, once a textual fragment is transposed from the written to the oral discourse, the fragment gains liveliness and emphasis due to the addition of vocal stress (when the discursive transposition is reversed, that is, from oral to written discourse, the fragments to
which one refers naturally lose these features). Variable factors in the activity of quoting are due to the specific nature of the context, which is responsible for the criteria which underlie processes of selection and (re-)combination, and which defines the illocutionary transformation of the quoted text-fragment.

Quoting from the police record has a function which resembles the activity of paraphrasing (see 7.3): both quotations and paraphrases are employed as contrastive statements in the reconstruction of the crime. Judges confront defendants (and witnesses, as we have seen above) with quoted fragments to check the reliability of the dossier or to press the defendant to revoke apparent discrepancies with testimonies. The latter theme will be discussed in chapter 9.

7.3 Paraphrasing or Rephrasing?

Generally, paraphrases are conceived as linguistic reproductions of a pre-existing sentence, text-sequence or text. The most fundamental precondition of the paraphrase is that although phonetic, morphological, syntactical or lexical elements may be changed, the semantic content (i.e. the locution) must be kept constant (see section 5.2.2). That means that the original text or discourse and its reproduction are semantically identical or each other's synonyms. It has been established previously that in order to find this semantic identity, one must necessarily abstract from situational, communicative, discursive, interpretative, subjective or pragmatic aspects. Paraphrases can therefore be paraphrases only in a strictly isolated context. But even when expressions are isolated, it has proven to be difficult to define a criterion for synonymy (i.e. Nolan 1970: 15). In contrast, our pragmatically oriented analysis embraces the view that although paraphrases create an ostensible identity between "original" and "reported" text, they owe the ability to transform the meaning of the "original" to their employment in another discursive context. Examples taken from the literature about paraphrases can perhaps illustrate this pragmatic position.

Nolan (1970: 49ff) has looked at paraphrases from a structural-logical point of view. For the following examples, she finds that "a" and "b" are each other's paraphrase, because the abstraction of their structure and content are sufficiently similar:
1a. it is true that it is raining  
   b. it happens that it is raining  

2a. it is false that it is raining  
   b. it is not the case that it is raining  

3a. it is true that it is raining  
   b. it is a fact that it is raining  

When we abstract from the surface-structure of these phrases, they appear as:

1a. it is true that SI  
   b. it happens that SI  

2a. it is false that SI  
   b. it is not the case that SI  

3a. it is true that SI  
   b. it is a fact that SI  

From the abstract notation, it may be generalised that at least a part of the original phrase (the sub-clause) is kept identical or constant; however the clause has been changed. One may argue that in some contexts the paraphrased clauses in the examples above are a synonymous translation of their paraphrastic reproductions. For instance, "it is true" is synonymous with "it happens" in the dictionary as well as in everyday language. However, in some other discourses, such as the philosophical discourse, these 'synonyms' may give rise to controversy. A logical positivist would agree with Nolan that "truth" is identical to (sensing that) something "happens", or that "false" is identical to (sensing that) it "is not the case". A positivist like Auguste Comte would probably agree with the paraphrastic definition of a "fact" as a "truth" and vice versa.

It should be made explicit that these remarks operate in the context of a moderate Gedanken-Experiment, merely with the purpose to make clear that in the discursive context of the paraphrase, professional agreement (or rather: the suspension of open disagreement) determines whether this semantic identity is acceptable or not.

In the quoted examples above, the relation from "a" to "b" is one of a transformation of the attribution of truth to the establishment of proof through observation. It is perhaps quite a jump to raise the claim that paraphrases with an apparent semantic identity conceal the occurrence of such (often subtle) illocutionary transformations (see...
In the legal discourse, transformations from narrative statement to a note of caution or even an admonition through paraphrase are frequent. In the next fragment, the judge "paraphrases" a fragment of defendant Jansen's statement to the police, and then continues to warn Jansen that he should quit the habit of carrying a knife in his pocket:

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(phase: motivation of decision by the judge):

585 R Want u schreef toen "ik heb altijd een
J Because you then wrote "I always carry

586 R zakmes bij me."
J a pocketknife with me."
V Regelmatig heb ik er één bij me ja.//
D I frequently carry one with me yes.//

The corresponding statement of suspect to the police sounds:

//I carried this knife in my pocket as usual.//
(//ik had dit mes in mijn zak zoals gebruikelijk.//)

In the fragment above, the judge paraphrases the "usual" in Jansen's statement into a strong "always" (585), which is corrected by Jansen into "frequently" (586). The judge's aim is, since she is relatively mild in her decision, to send the defendant home with a warning which will prevent a second stabbing-event from happening. She reckons that the presence of a pocket-knife on a nervous and labile man provokes danger, and therefore wants to increase the defendant's feeling of responsibility for possible recklessness. Furthermore, although in the course of the trial she has become convinced of Jansen's self-imposed guilt-feeling, she takes the opportunity to give Jansen a last moral lesson before he leaves the courtroom. Not knowing whether the judge performs the transformative paraphrase deliberately, it may be suggested that if the lexical shift is deliberate, it certainly supports the transformation from narrative statement of fact into a educative reprimand (Pander Maat & Sauer 1989: 149). This illocutionary transformation aims at the accomplishment of a perlocutionary effect, namely the defendant's demonstration of remorse.

When this expected reaction is suspended, in this case because the defendant corrects the judge, the judge will continue to clarify the point of her admonition:

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(phase: motivation of decision by judge)

587 R Voor de zekerheid moet u dat maar niet doen.
V Nee
587 J To be on the safe side you'd better not do that.
D No

588 V inderdaad.
R Hè? Want de één/ bij de hand van de één slipt het
588 D indeed.
J Shouldn't you? Because the one/from the hand of the one

589 R er wat eerder uit/gauwer uit dan de hand van de ander en
589 J it slips out somewhat earlier/quicker than the hand of the

590 R eh hh u moet gewoon eh ( ). Nee? Goed.//
V Nee.
590 J other and ah hh you just ought eh ( ). No? Well.//
D No.

To 'test' the successful effect of her admonition, the judge elicits two reactions from the defendant (588/589, 590) before she conducts the remaining procedures of the trial.

When consequently using the criterion of semantic identity or synonymy, it must be concluded that strict paraphrases in that sense are relatively seldom in trials. Hence we prefer to use the term "pseudo-paraphrastic reproduction", which describes a discursive transposition which entails elements of paraphrase.

Pseudo-paraphrastic reproduction is significant for the interaction in at least two stages of the 'politierechter'-trial, namely the reading over of the summons by the public prosecutor. The public prosecutor 'opens' the case with a description of the contents of the summons. In doing so, s/he is constrained by minimally two conditions: accuracy, which is a function of the summons itself, and comprehensibility, which is a function of the immediacy of the oral discourse (in particular, the prosecutor -when addressing the defendant- has to take into consideration that the defendant possibly lacks detailed technical-legal knowledge).

When the summons is transposed to the oral discourse of the trial, its specific character needs to be preserved, which forms the only legitimate and 'functionalist' reason to call it a paraphrase. We will assume that it is the prosecutor's aim to accurately represent the text
of summons A in a paraphrase B. But the text of the summons and its oral paraphrase are not each other's synonym.

The contents of the summons must be recognisably individual and punctual (see section 1.5). That means that at least subject (the accused), date, place and nature of the crime must be mentioned in the paraphrase. It is important to note that one of the transformations entailed by the transposition from written to oral discourse is a frequent substitution of the personal pronoun (from third to second personal pronoun), depending on the choice of the public prosecutor. Sometimes, the prosecutor addresses the court and speaks about "Mister X", whereas in other occasions s/he addresses the defendant, and says "You" (mostly after first mentioning the name of the defendant: "Mister X, you have been charged with/ are suspected of...").

Before presenting an inventory of discursive shifts which take place to a 'translation' of the written summons into its paraphrase during the trial, it should be made clear that the fragment which we have selected for analysis is more complicated and elaborated than other summonses (compare for example with shadow-cases 1 and 2, in respectively Appendix VII and VIII). The summons below owes its complexity to the fact that it charges the suspect with one primary fact and two subsidiary facts. If the primary charge does not amount to proof or conviction, the prosecutor has the opportunity to charge the suspect with the first subsidiary fact. If the latter charge still fails to be proved, the prosecutor may take recourse to the second subsidiary charge.

The structure, style and vocabulary of the summons correspond to the statutes in the Criminal Code of which it is an application. Because the statutes re-appear in the three facts, the summons obtains a strong recursive character.

Finally, two methodological remarks. The starting-point for the segmentation of the summons and its paraphrase is that each fragment in the text of the summons corresponds with an identifiable fragment (or the apparent omission thereof) in its oral paraphrase. This method, as it is manifested below, has occasionally been problematic due to structural and lexical changes caused by the translation of Dutch into English. Sometimes paraphrases are recognisable in the Dutch language, while they are not in English. When the text-elements or fragments in the original and the paraphrased text fail to correspond due to the translation, they are placed between square brackets: [xxxx]. The
complete Dutch text of the summons and a transcript of its paraphrase by the Prosecutor can be found in Appendix V.

PARAPHRASE OF THE SUMMONS BY THE PUBLIC PROSECUTOR
Case: (JaBe/mishandeling/politierechter/24b/stramdb101189)

SUMMONS (WRITTEN) : TRIAL (ORAL)

1. Third singular pronoun changes into second singular pronoun; personification of the narrator (prosecutor); passive verb changes into an active; "suspecting" is the illocutionary paraphrase of "charging with".

The suspect is being charged : It amounts to this that I suspect in any case that you
[with the fact] that the suspect

2. Partial identity; omission of wide date-description.

on or towards : on 6 March 1985
6 March 1985

3. Identity.
in the town of Turp : in the town (of) Turp

4. Identity with addition of vocal stress (implicit evaluation and allocation of hearer's attention).

intentionally. : intentionally

5. Substitution of legal vocabulary by common language; change of factual accusation into presumptive accusation.
in order to execute the plan : would have tried [to]

6. Local omission due to inversion (see 8 below).

intentionally : ( )

7. Partial omission of name-specification; addition of vocal stress (implicit evaluation + allocation of hearer's attention).

[J.H.M. Bertinus] : to deprive a certain
deprive of his life, Bertinus of his life

8. Omission due to inversion (see 6 above).

( ) : by intentionally


with a knife, : with a knife,

10. Paraphrase in Dutch original ('elk' becomes 'ieder')
[in any case,] : [in any case]
("in elk geval") (*in ieder geval")

11. Partial omission ('hard and/or'), but also addition of lexical items ('another dangerous') and stress which contain an evaluation.

with a hard and/or sharp : with another (dangerous) or
object sharp object
12. An anaphoric reference in the written text ('deze') is substituted by a noun, which is itself a repetition within the oral text. Him ('deze' in Dutch) : Bertinus.

13. Reference in oral text is first a partial identity, and then a complete identity.
   once or more than once : more than once, once or more than once.

14. Temporal change of verbs which is a result of consistency with the syntactic structure of the introductions.
   [has] stabbed : to stab.

15. Omission of precise description.
   and/or
   ( )

16. Temporal change of verbs; see 14 above.
   thrust : to thrust

17. Addition of inner-monologue reference with an anaphoric aspect (in 'that').
   ( ) : with that knife

18. As under 17 above.
   ( ) : or with that knife

   and/or
   ( )

20. Temporal change of verbs; as under 14.
   cut : have cut

   and/or
   ( ) : or

22. Temporal change of verbs; as under 14.
   struck, : have struck.

23. Change of lexicon due change of discursive environment; both formulas have a communicative function, namely to "bridge" text-paragraphs.
   in any case : well

   hit, : ( )

25. Paraphrase which entails a shift from legal-dogmatic vocabulary to the vocabulary of the trial (immediacy); anaphora in the written original disappears; personification; substitution of presumptive style by factual style. Addition of stress.
   being the execution of mister Bertinus did not dy,
   that intended crime not completed,
26. Partial lexical identity ("circumstance"); the remainder is a paraphrase which involves f.e. substitution of noun ('suspect') by a second singular pronoun ('you') and simplification of the syntactic structure.

only as a result of the circumstance independent of suspect's will

27. Reduction of wide description to a singular (from 'injury/injuries' in the summons to 'injuries' in the oral text). Change of structure, namely from presumptive to factual.

that the injury (ies) was/were not fatal, inflicted by the suspect injuries which were not fatal

28. Omission due to the redundancy of a high rate of precision in the oral discourse.

in any case only as a result of one or more circumstances independent of suspect's will;

29. Oral paraphrase of a written formula; this formula has in the text the function to structure it and to interconnect subsequent paragraphs; in the monologue it has the function to do the same, but also to draw the hearer's attention on the narrator's shift to the presentation of the first subsidiary charge.

at any rate, well,

30. Change from inner-textual reference ("the afore-mentioned") into an inner-monologue reference ("the same story") due to change of discursive environment. The paraphrase (conviction = proof) is interesting; the paraphrase omits the superlative character of the notion of 'conviction': [conviction = proof].

if the afore-mentioned does not lead to a conviction: the same story is also true if this is not proven

31. Summary by means of contraction of recursive elements of the written text. The oral situation of the trial forces the prosecutor to save time by summarising or 'skipping' these recursive elements.

that the suspect on or towards 6 March 1985 in the town of Turp

32. Because of the immediacy of the oral situation and the activation of the hearer's attention, the prosecutor requires a formula which contrasts or disjoins his previous statements with/from the next ones.

( ) : but then

33. Paraphrase which entails a shift from legal-dogmatic vocabulary to common language.

intentionally with the intention

34. Addition or insertion, again with the communicative function to structure the account and to draw the hearer's attention on the existing contrast between the first two charges.

( ) : not to kill him,
35. Addition or insertion, as in 32.
( ) : but to

36. These have a slightly different position in the original Dutch version, but "J.H.M. Bertinus" is substituted by "'m" ("on him"; see 38), which is a result of the shift from written to oral language. The oral reference is less precise, because speaker and hearer now share a mutual knowledge, since the victim has already been introduced in the narrative account.
[J.H.M. Bertinus] : [inflict]

37. Identity, only addition of stress (with the purpose to invite the court to join the Prosecutor's evaluation of the weight of the crime).
grievous bodily harm : grievous bodily harm

38. "Has inflicted" is substituted by "inflict" (36), which indicates a transformation from factual statement into presumptive statement (see 14 above).
[has inflicted] : on him

consisting of : and that in a way

40. Innermonologue reference which prevents the narrator/prosecutor from repeating recursive elements, which are superfluous in the oral situation.
( ) : like I already told

41. Omission of precise description.
(that suspect that : ( )
Bertinus)

42. The tag-question in the translation is misleading, because it does not have the same meaning as the Dutch "hè?". An indefinite article is changed into an anaphora. This is obviously because the "object" of the knife has been mentioned before (9, 17/18 above).
with a knife, : with that knife, (didn't you?)

43. Omission (included in summary; esp. 31 and 40 above).
in any case : ( )

44. Omission (included in summary; as under 43).
with a hard and/or sharp : ( )
object

45. Omission (included in summary; as under 43).
 once or more than once : ( )

46. Change of auxiliary verb, due to a previously introduced change of personal pronoun ("he" or "suspect" /3d person pronoun into "you"/2nd person pronoun).
has stabbed : have stabbed

47. Partial omission, due to lesser degree of precision in oral language.
and/or : or
48. Omission of "thrusted".

49. Omission of "and/or".

50. Identity of "cut".

51. Omission of "and/or".

52. Omission of "struck".

53. Omission of "in any case".

54. Omission of "hit".

55. Contraction; in written text this part is succeeded by subclauses; these subclauses are left empty in the oral text because it has been summarised previous to the narration/paraphrase of the text itself. (In the Dutch text, "bekwam" follows much later than "overgehouden"). As a result of which this:

56. Identity. Just a change of the preposition ("aan" changes in "in"); and the addition of stress, again to call attention for the qualification of the seriousness of the crime.

57. Omission of "and".

58. Nearly identical, but with addition of stress and the omission of an indefinite article.

59. Paraphrase in the Dutch original (from "elk" in "ieder").

60. Addition of explanation/motivation and evaluative commentary.

61. As under 60.

62. Identity, but with addition of stress, again to draw the hearer's attention on the gravity of the crime (implicit evaluative commentary).
63. Substitution of formula.

at any rate, : And

64. Paraphrase. Both formulas connect the formulation of the first subsidiary charge with that of the second subsidiary charge.

if the afore-mentioned does not lead to a conviction, then the third thing which is written here,

65. Introduction of a summary with an anaphoric item; circumnavigation of recursivity.

( ) : and that still concerns

66. Omission; lack of precise indication.

that suspect

67. Anaphora with an aspect of summary and innermonologue reference at the same time, all to do with the recursive character of the written narrative. Addition of stress.

on or towards 6 March 1985 : the same day

68. Omission

in the town of Turp

69. Introduction of summary which indicates the recursive character of the written narrative.

( ) : and the same things that you did

70. Addition of structural organiser.

( ) : either

71. Change of legal-dogmatic vocabulary into common language as it is used in the courtroom. Double teleological aspect (intentionally + plan) of the second subsidiary charge is reduced to a singular (attempted). Accusation in the third-person-singular is transformed into second-person-singular accusatory style. Addition of stress.

in order to execute the plan

72. Change of structural order due to translation. Presumptive verb-use remains unchanged in both versions.

[inflict] : to inflict

73. Change of structural order due to translation. Identity. Addition of stress in order the emphasise the gravity of the crime.

[grievous bodily harm] : grievous bodily harm

74. Partial omission of name-indication.

[on J.H.M. Bertinus] : on Bertinus

75. Partial omission: detailed description is now made redundant, because the prosecutor has established a summary (64-69 above) at the initiation of the third "narrative" (about the second subsidiary fact).

with a knife, in any case with a : by means of using the knife

hard and/or sharp object him once or more than once has stabbed and/or thrusted and/or cut and/or stroke, in any case hit,
76. The oral is effectively not a paraphrase of the written. The narrator/prosecutor refers to the introduction of the second subsidiary fact in the summons ("if the afore-mentioned does not lead to a conviction"), and inserts that in "if it doesn't produce", and subsequently employs it as a bridge to summarise the last charge. 

77. Substitution of personal pronoun ("he"/"suspect" into "you"); simplification of legal-dogmatic formula.

78. The "did not" has been introduced earlier in the oral version (last fragment). Division of the written clause in its parallel oral paraphrase and the previous oral clause "was left with those two injuries". Paraphrase of "X resulted in Y" into "X caused Y". Addition of stress.

79. Omission.

80. Omission. Contraction of this clause with its twin-clause (in 77).

The paraphrase of the summons is performed by the employment of a complicated and varied set of text-processing-devices. A first question which needs to be asked is: in what respect are the written summons and its oral paraphrase still 'the same'? Structurally, the paraphrase does not profoundly modify the linear sequential order of its written origin (which at the same time forms the reason why we have been able to juxtapose the two texts; see for a similar finding: Hak 1985: 5), because the text is not paraphrased on the basis of memory: the prosecutor has the text in front of him/her when s/he conducts the summons during trial.

Furthermore, the lexicon of the summons is kept fully or partially (e.g. only one item) identical in a fair number of occasions, namely in 2, 3, 4, (7), 9, (11), 13, (26), (27), 37, 50, 56, 58, 62, 72, 73, (74) and (78) (shadow-case 1 (Appendix VII): (2), (3), (4); shadow-case 2 (Appendix VIII): (6), 7, (8), (10), (14), (15), (21), (22)), which
demonstrates that there are elements of quotation in the paraphrastic reproduction of the summons, in the majority of occasions in the case above when the prosecutor refers to legal-normative formulations in the summons. Synonyms or paraphrases were found in 10, 26, 29, 33, 39, (42), (47), 59, (64) and 78 (shadow-case 1: φ shadow-case 2: 11). Paraphrases with the special aim to 'translate' obscure or difficult legal terms or formulations into more comprehensible common language were further found in 5, 23, 25, (33), 63, 64, 71, 77 (shadow-case 1: 5/6; shadow-case 2: 9, 18). These paraphrases have a communicative function, in the sense that more priority is given to addressing the layperson (the defendant) than to the conservation or literal reproduction of legal expressions, which makes clear that the prosecutor fulfils a mediating function between the abstractness of the law and the actuality of the courtroom-interaction. A similar function, namely the increase of comprehensibility, is performed by a simplification of the syntactical structure in (25), 26, 76 and 78 (shadow-case 1: φ; shadow-case 2: 10, 22). The temporal change of verbs is more a consequence of the choice of syntactic structure at the beginning of the paraphrase (14, 16, 20, 22; shadow-cases 1 + 2: φ).

The paraphrase of the summons above is significant for its omissions. It seems to be the case that the more recursive the sequences of the summons are, the more the paraphrase contains elements of summary and contraction: (24), 31, 43, 44, 45, (48), (49), (51), (52), (53), (54), 55, (57), 65, 67, 68, 69, 75, 76, 78, 79, 80. In shadow-case 1 we see none of these omissions, which can be explained from the fact that there is only one charge, and no further subsidiary charges. In shadow-case 2, which does not contain subsidiary charges, but two separate facts which are identical with respect to their reference to the norm, and similar with respect to the circumstances, there are two omissions resulting from textual recursivity, namely in 18 and 19. There are also a few examples of omissions which are not related to the tendency to contract repetitive elements, but which are a natural result of textual reorganisation, such as inversion, namely in 6 and 8 (shadow-case 1: φ; shadow-case 2: 2, 8, 15, 21, 22). Far more significant are the omissions which are caused by a redundancy of elaboration in the oral discourse. Omission of precise, wary, wide, detailed or technical descriptions can be found in 2, 7, 11, 15, 19, 21, 24, (27), 28, 41, (47), (48), (49), (51), (52), (53), (54), (57), 66, (67), 71, 74, 75, 79 (shadow-case 1: 3, 4, 7, 8; shadow-case 2: 6,
The solemnity of the summons is forced to be no match for its comprehensibility; the prosecutor merely conserves what s/he considers to be relevant for a sound and sufficient basis for further interrogation. These omissions therefore have a communicative and practical, time-saving function. The avoidance of verbiage also reflects the prosecutor's assumed share of background-knowledge with the defendant and his/her colleagues about the details of the event. The defendant is supposed to know from experience, and the judge and counsel are supposed to know from the documents.

The addition of innermonologue references in 17, 18, (30), (36), 40, 42, 67 and 69 (shadow-case 1: φ; shadow-case 2: 9, 12, 15, (16), 22) relates to the sharing of background-knowledge as well, with the difference that this knowledge was not (assumed to be) present before the trial started. Instead, this knowledge is (assumed to be) made available in the course of the foregoing presentation of the summons. Sometimes, these innermonologue references run ahead, and anticipate what the prosecutor is going to mention. These anaphora, as they can also be called are in this context specific for the oral situation; they cannot be found in the written text - except for one or two exceptions - because the elements in the written text are repeated. It is therefore not the case that in a linear paraphrase the insertion of innermonologue references substitute the innertextual references. The omission of innertextual references is quite detached from the use of anaphora in the oral situation: 25, (30) (shadow-cases 1 + 2: φ).

A combination between a communicative function and a rhetorical-argumentative function is established by means of the use or addition of vocal stress in 4, 7, 9, 11, 25, 37, 55, 56, 58, 60, 63, 71, 78 (shadow-case 1: 5; shadow-case 2: 2, 8, 15, 21, 22) and the insertion or addition of lexical items in 11, 32, 34, 35, 60, 61, 65, 69, 70, 76 (shadow-case 1: φ; shadow-case 2: 1, 5, 16). The communicative function serves to allocate the attention of the hearer(s) whereas the rhetorical-argumentative function serves to express the prosecutor's normative evaluation of the accusation which s/he brings forward. Vocal emphasis is the twin-brother of underlinings, bold prints or exclamation marks in a written context. Both vocal stress and the addition of commentary by means of the addition of lexical items fix attention on elements the prosecutor considers to be important. The communicative function and the rhetorical-argumentative function do not always coincide, because sometimes the addition of commentary or vocal
stress merely serves to direct the attention of his audience to the transitions between the different phases in the charge for example. Furthermore, the addition of commentary is a far more explicit evaluation than the addition of vocal stress.

These are thus the devices which support the structural reorganisation of text, which are inherent to the oralisation of text, which emphasise the normative-accusatory function of the summons and which adapt the text to a lay-audience. In the fragment analysed above, we also find a substitution of impersonal style of the accusation in the summons (X is being charged with Y) into a more personal accusation (I suspect you (X) of (Y)): 1, 26, (46), (77). This substitution differs however in both shadow-cases. Although in the first shadow-case (Appendix VII) the prosecutor addresses the defendant directly ("Ah mister Sint"), he maintains the abstractness of the accusation ("it is written in the accusation that"). In the second shadow-case (Appendix VIII), the prosecutor does not address the defendant, but the judge, with the consequence that the performance of the illocutionary transformation (see below) differs from the substitution mentioned above. Instead, the prosecutor in shadow-case 2 transforms the institutional performative "X is charged because Y" into its formal consequence, namely "X stands trial because Y".

The institutional performative "charging with" is mentioned at the beginning of the summons and its paraphrase, and thus generates the illocutionary force of the message to come. The finding of an illocutionary shift in the case above (1) is not mirrored in the other two cases. Where we found in the case above that I [X is charged with [pY]] \rightarrow I [X is suspected of [pY]] (or alternatively: I [X is accused of [pY]], the prosecutor in shadow-case 1 only paraphrases the illocutionary message of the summons (1), whereas the prosecutor in shadow-case 2 transforms a performative in its result. The illocutionary force ("accusing of") is identical in the three cases.

Finally, the occasions in which a 'factual' accusation is substituted by a 'presumptive' accusation (5, 38; shadow-cases 1 + 2: \( \phi \)) and vice-versa (25, 27; shadow-cases 1 + 2: \( \phi \)) are rare, but they seem to indicate a play between an emphasis on a conviction that Y was committed by X and an emphasis on the provisional character of these convictions. The question whether provisional or presumptive accusations are related to the demonstration of a euphemistic attitude toward the defendant should be looked at in due course.
7.4 Summary and Reference

In the previous section we have found that when the recursivity of the text is high, the more omissions and contractions are performed in its 'oralisation'. The 'paraphrase' which we spoke of thus strongly resembles the category of the summary, which is to be discussed in this section. Two reasons prevail in the explanation of the occurrence of summaries in the course of the trial proceedings. A first reason is laid down in the Dutch Code of Criminal Procedure, Article 297-4 and 5, namely that proof can be nullified if documents are not read out or summarised during the trial. The second, more practical reason is related to the process-economy of the proceedings, namely that a full citation of each document is laborious and time-absorbing.

Unlike Van Dijk (1979) we will not discuss the activity of summarising as an attempt to recall a text (is also irrelevant in the legal context, because legal agents have the texts at their immediate disposal when summarising), but as a text-processing activity which has to meet criteria of institutional relevancy. In spite of this difference, we will take Van Dijk's three text-processing strategies which support the activity of summarising as a useful point of departure. The three strategies are (Van Dijk 1979: 59):

(MR1) Deletion: \{pi, pj\} --> pi
(MR2) Generalization: pi --> qi
(MR3) Construction: <pi, pj, ...> --> pk

(MR1) Peter saw a blue ball
(= Peter saw a ball. The ball was blue) --> Peter saw a ball.
(MR2) (i) Peter saw a hawk. --> Peter saw a bird.
(ii) Peter saw a hawk. Peter saw a vulture. --> Peter saw birds.
(MR3) <Peter laid foundations, built walls, built a roof..> --> Peter built a house.

In the MR1 a "general attributive detail can be omitted in a macro-structure", but the "deleted proposition is not a necessary presupposition of some following macro-proposition." What is deleted or omitted is then considered to be irrelevant in the sequence of narrative propositions (Van Dijk 1979: 59). In the MR2 there is an "abstraction of 'necessary' properties", which means that the property ('hawkness') is substituted by conceptually higher ordered properties (id: 59). In the MR3 the micro-propositions form a joint sequence: the
details of an action or event are transformed into a general concept entailing the details (Van Dijk 1979: 60).

Deletion, generalisation and construction are thus rules which operate on the macro-structure, which is a hierarchical structure of macropropositions which are stored in memory, and which determines "retrieval processes" (id: 58). The assumptions are that micropropositions are semantically implied or entailed by the macroproposition and that this sequence has a coherent structure (id: 59).

We will assume that Van Dijk's 'macro-rules' can also operate in a different set of circumstances, namely in a framework where the summary is not artificially invoked as a test, but where it is a more or less spontaneous happening in the course of the trial-proceedings. "More or less spontaneous", because the content of the summary has to be coherent with the subject of the ongoing interaction. Furthermore, we will assume that the macrostructure which Van Dijk speaks about can be substituted by the concept of the "master narrative" unfolded in chapter 4.5. The idea is that the content of the summary is not only coherent with the ongoing interaction, but also with the narrative plan which lingers on the background. That master narrative, which is a projection, has a generating force in the sense that the summarised fragments are coherently entailed by its superordinate proposition or sequence. In contrast with other publications which focus on the activity of summarising (e.g. Lehnert 1981: 313ff; Rumelhart 1975: 226ff; Rumelhart 1977; Trabasso & Van den Broek 1985: 615; Trabasso, Secco & Van den Broek 1984: 83; Trabasso & Sperry 1985), we will not take the coherence (f.e. causal relatedness, narrative structure of intentions and goals, superordination versus subordination) within the original summarised text as a criterion, but its mapping with the master narrative. The summary as such may thus appear as 'incoherent', but the shared background-knowledge (see section 4.2.2) which remains implicit is the actual support of that coherence. This again purports to be a different position from Kintsch & Van Dijk (1978: 363), who defined a set of operations resulting in a coherent summary. Finally, there is a shift from macro-rules made operational in the context of a monologue to their operationalisation in the context of an interaction. It will become clear from the analysed fragments below that summarised sequences are employed as statements of evidence with which one (i.e. the judge) seeks confirmation from the defendant, or as arguments with
which the speaker seeks to persuade or dissuade his/her (professional) audience.

Summaries in courtroom are instances of goal-oriented, evaluative interpretation, which appears from the drawing of inferences and the addition of commentary. Inferences are the result of interpretations performed on the original text and which go beyond the "literal" meaning of that text (i.e. Clark 1978: 295). Grice’s conversational implicatures (1989: 26) aim at the rightness of these inferences on the basis of meaning which has not been made explicit during the conversation. Conversation maximes generate the content of the expression by reference to background knowledge.

The analyses performed in this section cover various instances of summary in the course of the trial, that is to say: the interlocutor who performs the summary may be the judge, the prosecutor or the counsel; the summary may refer to the police record or social inquiry report and finally, the summary may appear in different stages of the trial. We will start with two fragments of a summary which the judge performs on the narrative substance of the police record:

Fragment 1: Sint/diefstal/politierechter/20b/tramdb151189
(Phase: trial; reconstruction of event)

12 R Eh: ((datum)). Dus ongeveer een jaar geleden.
12 J Ah: ((date)). So that was about a year ago.

13 R Eh: m dus van een meneer die even aan *t bellen was
   (1.3)
13 J Ah: m so from a gentleman who was just phoning
   (1.3)

14 R in een telefooncel, die fiets die had neergezet,
   (.)
14 J in a call-box, seized that bicycle which he had put
   (.)

15 R meegenomen.//
15 J down there.//

The corresponding statement of the denunciator (Mr. K.D. Venis) in the police-record is:

"On ((date)) I was in the centre of Rapenstein and wanted to make a telephone call. I therefore looked for a call-box. I put my lady-bicycle, green, Batavus unlocked opposite to the call-box. When I had phoned and walked out of the call-box I saw that my bicycle had disappeared." (original Dutch text in note)."
The summary, performed immediately after the reading over of the summons by the prosecutor, functions in the context of the interrogation in which the 'facts' are reconstructed (by the judge on the basis of the record) and checked or verified by elicitation of a confirmation from the defendant.

The summary is narratively mediated: "I" becomes "a gentleman". Narratorial commentary about the time-lapse between the event and the trial is indicated in "about a year ago". The narrative mediation also appears from the transformation of narratorial perspective: whereas in the original statement the perspective of the narrator is chronological (i.e. not knowing that his bike was going to be stolen when entering the call-box), the perspective in the summary is scenic (i.e. the narrator did not know that during the phone-call the bicycle disappeared): this implies a shift from "after I had phoned" to "who was just phoning". Entailed by the change of that narratorial perspective is the transformation from passive into active verb-use: the denunciator did not know that his bicycle was stolen, but to him it had disappeared. A further development of the events (interrogation of thief by police; charging the thief; thief stands trial) enables the judge to change the narratorial perspective, and to transform "disappeared" into "seized".

The two items contracted in the summary above are "call-box" (mentioned 3 times in original and once in the summary) and "bicycle" (mentioned twice in original; once in summary). Omitted are the detailed features of the bicycle (lady bike; green; brand "Batavus") and the fact that denunciator did not lock his bike when he went to make a phone-call. Furthermore, the place of the event and some (intentional) states of the denunciator ("wanted"; "looked") are omitted as well.

Also the next summary is performed during the interrogation which deals with the reconstruction of the event. The judge asks the defendant whether he can remember both offences (21; not transcribed). She then moves on to a reconstruction of the first event (22; not transcribed), and says that the defendant was stopped by the police (24; not transcribed), because in their opinion the defendant's car was lurching (25; not transcribed). A silence follows (3.8 secs.; 26), and the judge continues to say that the whole driving-style of the defendant was a motive for the police to stop him (26; not transcribed), and she
moralistically adds that one ought not to lurch on the Spiegelkade (27/28; not transcribed). The defendant then corrects her and says that he got onto the pavement, with which the judge agrees (28; not transcribed). She then picks up the 'red line' of the police record which she summarises as follows:

**Fragment 2:** Van Straaten/drinken/politierechter/25a/tramdb161189  
(Phase: Trial; interrogation of defendant by judge about event)

29 R  | En toen corrigeerde u dat inderdaad maar dat  
29 J  | And then you indeed corrected that but that  

30 R  | ging ook weer met grote zwaaien.//  
30 J  | happened also with big sways.//

The police officers have written in the police record (page 2):

"Immediately after this we saw that the driver made a corrective steering movement to the right, in the event of which he drove rightwards onto the raised edge of the (pavement) and then veered to the left again, (in the event of which he landed in the righthand lane again)." (original Dutch text in note).  

The judge's summary is responded with a long silence (6.3 secs.; 30). The text of the record contains information which the defendant has already put forward himself (28), appearing from the judge's agreement in "indeed" (29). It is unclear to what the "that" in 29 refers. It may refer to the lurching of the car in general (mentioned in 28 of the trial), to the sudden movement to the left which the police describe in their record (immediately preceding the fragment above) or to the defendant's admission that "he got onto the pavement" (28). However, in the occasion where the judge uses this anaphoric reference, she inverses the structure:

**POLICE RECORD:** DRIVER WAS LURCHING $\implies$ WHEN WE WANTED TO PASS THE DRIVER ON TO THE LEFT, THE DRIVER SUDDENLY MADE A MOVEMENT LEFTWARDS $\implies$ DRIVER THEN MADE A CORRECTIVE STEERING-MOVEMENT TO THE RIGHT $\implies$ DRIVER GOT ONTO THE PAVEMENT $\implies$ DRIVER VEERED TO THE LEFT (AGAIN)

**DEFENDANT DURING TRIAL:** $\phi$ $\implies$ GOT ONTO THE PAVEMENT $\implies$ $\phi$

**JUDGE DURING TRIAL:** THEN YOU CORRECTED THAT INDEED $\implies$ BUT THAT ALSO HAPPENED WITH BIG SWAYS
The judge inverses the narrative phases "correction" and the "got onto the pavement". In the police record, the correction *preccedes* the pavement, whereas in the summary, the correction *succeeds* the pavement. Due to the inversion, the judge connects two clauses which were originally *disjoined*. Instead of keeping the "correction", the "pavement" and the "veering to the left" separate, she contracts the "correction" with the "veering". The word "sways" (30) thus runs parallel with the "correction" (causing a *substitution* of "steering-movement" in the original by "sways" in the summary). The judge inserts a *repetition* of the sways, while there is not such a repetition in the original, except for the mentioning of the general "lurching". Finally, the judge *adds* a lexical item not present in the original, namely the "big" in 30.

*Fragment 3: JaBe/mishandeling/politierechter/24b/tramdb151189 (Phase: Trial; judge summarises contents of CAD-report)*

185 R Maar 't is een vrij
185 J But it is a rather

186 R uitgebreid rapport. D'r staat wat in over u in
186 J elaborate report. There is something in it about you in

187 R verhouding tot uw schoonfamilie hè? Dat uw vrouw daar
187 J relation to your in-laws right? That your wife
188 R wel es moeilijk tussen stond eigenlijk tussen haar familie
188 J was sometimes actually squeezed between her family

189 R en u. U heeft ook wel eens moeilijkheden
189 J and you. You have also had difficulties sometimes,
190 R gehad, dat is toen eh ook met die inwoning zijn er
190 J which is then ah also with that living together there have

191 R problemen geweest.
191 J been problems.

We will not here repeat the original text of the CAD-report, because it may contain damaging revelations. The judge's summary of the report contains four different *GENERALISATIONS*: Generalisation 1 is related to an important descriptive function of the CAD-report, which gives a
detailed account of the relation between defendant and his in-laws. The first statement "There is something ....right?" (186/187) is an introduction to the 'oralisation' of the contents of the report. It indicates the judge's second selection out of a massive amount of information. She believes that, apart from Jansen's addiction to tranquillisers, the information about the in-laws is the most relevant subject in the report and also with regard to the possible cause of Jansen's offence. The details of the relation between Jansen and his family are generalised in a euphemistically sounding "something". The judge presupposes that the defendant knows the contents of the report, for which she seeks confirmation in the tag-question "right?". The tag-question also has a communicative function, in that it shifts the attention of the defendant (and the court) onto a change of subject in the interrogation (Jansen's addiction to valium has been discussed just before).

Generalisation 2 is related to the details about Jansen's relationship with his wife and the complications resulting from the negative attitude of Jansen's in-laws. His "Leidensgeschichte" (Rehbein 1980: 67ff) unfolds that a). his wife sides with the family if it comes to that; b). he then feels let down; c). it then seems as if his wife is married with the family; d). they (the in-laws) come and complain about his doings (good-for-nothing, profiteer, unable to be a good father); e). his wife then keeps distance from him; f). he often feels misunderstood. The judge refers also to the 'drifting apart' of Jansen and his wife because of the "far from optimal league" between the client and his in-laws. In "That your wife ... you" (187/188) the judge transforms Jansen's problem, displayed in his "Leidensgeschichte", into a problem for his wife: it is her who is actually squeezed between her family and her husband. The word "actually" indicates the drawing of an inference which was not explicitly mentioned in the original text. Nevertheless, Jansen confirms the judge's interpretation.

Generalisation 3 concerns Jansen's relation with his in-laws in general. The summary of the judge "You have also ... difficulties" (189/190) refers to general statements in the report, namely: a). his wife's family -the in-laws- constitutes the major obstacle; b). the influence which the in-laws exercise remains a ticklish affair, which is cannot be discussed as yet; c). the relation between the client and his in-laws is far from optimal (summary in the report itself). The
"also" in 189 is significant for that it links the summary about the position of Jansen's wife with his own position. But the judge hints at a representation which makes it look like as if Jansen's wife has more problems with the family than Jansen himself, becoming manifest from her use of "sometimes", thereby understating the reported chronological character of Jansen's problems. Implicitly, the judge obscures the textual cause-effect relation, namely by untying Jansen's difficulties with his in-laws as a cause of the alienation between him and his wife.

Generalisation 4 'zooms in' onto an aspect of the difficult relation between Jansen and his in-laws. In "which is then ah ...problems." (190/191) the judge summarises the following textual propositions: a). Jansen and his family received the notice that they should leave the house of father-in-law; b). the forced exchange of houses; c). the reason for this notice, namely that the elder sisters of Jansen's wife had induced the father-in-law to this; c1). the elder sisters had raised question-marks about the nursing by Jansen's wife for her father; c2). Bertinus and his wife (i.e. sister of Jansen's wife) had claimed to exercise the nursing-task better.

In the "Jansen versus Bertinus"-case, the counsel summarises witness-testimonies and contrasts them with each other. He perceives it to be his task to unravel and deconstruct the pretended consistency between the various narratives contained in the police record. We will have a look at the successive summaries in the counsel's plead, each summary relating to a different witness-testimony:

**Fragment 4: JaBe/mishandeling/politierechter/24b/tramdb101189**
(Phase: Trial; plead defence-counsel)

<table>
<thead>
<tr>
<th>389 A</th>
<th>De getuige Van Daalen</th>
</tr>
</thead>
<tbody>
<tr>
<td>389 C</td>
<td>Witness Van Daalen</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>390 A</th>
<th>die zegt bijvoorbeeld dat Bertinus, een forse</th>
</tr>
</thead>
<tbody>
<tr>
<td>390 C</td>
<td>she says for example that Bertinus, a robust</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>391 A</th>
<th>man zoals zij dat noemt eh: de fiets opwierp</th>
</tr>
</thead>
<tbody>
<tr>
<td>391 C</td>
<td>man as she calls him ah: threw the bicycle up towards</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>392 A</th>
<th>naar de andere man, dat is dan Jansen.//</th>
</tr>
</thead>
<tbody>
<tr>
<td>392 C</td>
<td>toward the other man, which is then Jansen.//</td>
</tr>
</tbody>
</table>
The corresponding fragment in the testimony of Van Daalen (page 8 police record) is:

"When I stood there I saw a robust man walking along over the pavement with the bike in his hand coming from the direction of the centre of Turp. (.....). (........). (.........). At the next moment I saw, that the robust man threw a bike up toward the other man." (No underlining; the original Dutch text can be found in note\(^9\)).

A natural consequence of the 'oralisation' of this testimony is that the narratorial perspective displayed in the testimony is *mediated* by the counsel. The counsel does not mention the actual narrator (the police; see section 6.2), but introduces his summary containing a statement from the first-person-singular narrator, also apparent from "as she calls him (392)":

TESTIMONY: [POLICE [WITNESS VAN DAALEN] POLICE]

SUMMARY: OMITTED OMITTED SAYS THAT X

The counsel introduces the summary by saying "for example" (390), suggesting a casual attitude toward the choice of the narrative substance. The summary omits three sentences of the testimony, namely:

- "I saw later that there was also a woman walking just behind that man."
- "I also saw that behind that woman another man with the bike approached on the pavement."
- "When I looked again a moment later I saw that these two men stood close to each other half on the pavement and half on the entrance between the two premises 33 and 35 Wemelaarstraat."

The "woman" in these sentences is not identified, nor is there any essential relation between these phrases and the remainder of the narrative, because they fail to reveal whom of the two men was the initiator of the trouble. The phrases can be omitted because they contain details. Apart from these three phrases, the counsel omits other phrases as well, such as the crucial immediately succeeding phrase "This was probably to defend himself." The counsel thus ignores the phrase(s) which state Bertinus's alleged act of self-defence (see section 10.6 for a more elaborate discussion).
Like the lack of identification of the woman, witness Van Daalen does not give the names of the two men. The counsel names the two 'anonymous' men during the trial, mainly relying on information which has been made available in the meanwhile, namely that it was Bertinus who 'threw the bike up'. The counsel thus concretises the main actors of the event.

The summary can furthermore be characterised by a contraction, which becomes apparent from "a robust man" (390/391). In the original testimony, the term is used twice, in the summary only once. "The" robust man therefore becomes "a" robust man, because in the original text the robust man has already been introduced, whereas the counsel still has to insert a new topic, marked by "a". However, this happens also in the reverse: "a bicycle" becomes "the bicycle". Apparently, the witness did not know which of the bikes present at the scene was being thrown up, and therefore speaks of "a", whereas the counsel employs an innermonologue reference and speaks of "the" (presented in 380/381 of the trial; not transcribed here): the counsel therefore narrates that Bertinus grabbed the bike from his client.

Finally, there is some rhetorical play with the emphasis: The counsel stresses the name of Bertinus (390), before he summarises the witness testimony; the tail of the summary, containing the identification of Jansen (392) is not emphasised.

**Fragment 5: JaBe/mishandeling/politierechter/24b/tramdb101189**
(Phase: trial: defence-counsel's plead; summarises a witness testimony):

392 A  
392 C  

393 A die ziet twee steken geven//  
393 C he sees two stabs being given//

The corresponding fragment to which the counsel refers in the testimony of Paardebloem (police record page 6) is:

"Furthermore I saw, that Jansen brought his raised arm down with the object in his hand in Bertinus's direction. At the same time I saw Jansen making a grab for his left arm and again took one step back. I saw that Jansen's arm went upwards again, I thought again it was his right arm. I saw, that the object which Jansen had in his hand, glistened in the sunshine. Then I saw, that Jansen's arm went forcefully downward and I saw, that Jansen, hit Bertinus in his chest or in the vicinity of his chest." (original Dutch text in note10).

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The counsel's summary is a complex combination of different text-processing strategies, namely of contraction, deletion and construction:

**CONTRACTION:** 6 x "saw" in the original text becomes 1 x "sees" in the summary.

**DELETION**₁: "Jansen", mentioned 6 times in the original, and the corresponding "his", mentioned 5 times in the original, are left out. Similarly, "Bertinus", mentioned twice and the corresponding "his" also mentioned twice are deleted, with the result that the "stabbing" becomes impersonal: no perpetrator, no victim is mentioned, which coheres with the counsel's strategy to remove the emphasis on Jansen as the initiator of the incident.

**DELETION**₂: Detailed descriptions in the account are omitted, note: "Furthermore"; "At the same time"; "Jansen making a grab for his left arm"; "and took one step back"; "I thought again it was his right arm". Other omissions return as tacit elements in the construction.

**CONSTRUCTION:** Note that the words "two" and "stabs" in the summary are not contained in the original text. The construction entails a re-ordering of the propositions, from which more general denominators are inferred:

```
TWO STABS BEING GIVEN

1. Jansen brought raised arm down
2. Jansen's arm went upwards AGAIN

1. Jansen brought (raised) arm down
2. Jansen's arm went forcefully downward

1. with an object in his hand
2. the object which Jansen had in his hand glistened in the sunshine

1. in Bertinus's direction
2. J hit B in chest or vicinity of chest

Inference: Repetition of action
Inference: Resemblance of movement
Inference: object was f.e. made of metal
Inference: Realisation of action

KNIFE
```
A very similar constructivist summary is produced in the following fragment:

**Fragment 6:** JaBe/mishandeling/politierechter/24b/tramdb101189
(Phase: Trial; plead defence-counsel):

397 A //De getuige Hazelnoot die (.) spreekt als
397 C //Witness Hazelnoot he (.) is the only one for
398 A enige bijvoorbeeld van een knokpartij die zou hebben
398 C example who speaks about a fistfight which is supposed
399 A plaatsgevonden.//
399 C to have taken place.//

The corresponding fragment in Hazelnoot's testimony is (page 11 police record):

"I then saw that Joost and Piet gave each other mutually some blows without hitting each other really well." (No underlining; original Dutch text in note ^).

The summary is again introduced with a narratorial-mediatory introduction ("who speaks about"); 398 which identifies the name of the witness (397). The fortuity of the counsel's selection of this witness-statement appears from "for example" (397/398). Before arguing that there is a rather strong divergence between the witness-testimonies (in 399/400; not transcribed; see section 10.6), the counsel makes rhetorically clear that Hazelnoot is the only witness (397) who speaks about a fistfight (398). The counsel's doubt about that statement is expressed in "is supposed to have taken place." (398/399). The construction of Hazelnoot's statement is concentrated in the word "fistfight" (398), which is not mentioned in the original testimony. The summary contracts a wordy description, and omits the detail, namely that Joost and Piet (also omitted in the summary) did not hit each other really well.
Als ik dan nog even de dagvaarding onder de loep neem, dan zien we in alle drie de punten die telaste worden gelegd 't element "opzet."//

The clauses in the summons which are summarised are (translated):

I. "intentionally in execution of the purpose to intentionally deprive J.H.M. Bertinus of his life"
II. "intentionally inflicted grievous physical harm upon J.H.M. Bertinus;"
III. "intentionally, in execution of the purpose to intentionally inflict grievous physical harm upon J.H.M. Bertinus."

The quick consideration or the "glancing over" of the summons is hinted in "just" (427). The counsel further presupposes the existence of a shared knowledge among his colleagues in "we see" (429). The kernel of this summary can be found in the tail of this sequence (429): "intentionally" (appearing 5 times in the original text) is contracted in "intention". That contraction is introduced by a summary of the whole summons, which charges the defendant with three facts (one fact, two subsidiary facts, which are summarised in "all three points which are being charged." (429/430).

Very similar is the summary employed by the counsel in another case:
Consistent with the previous fragment, the contents of the summons are deleted and generalised (or constructed) in "facts": the word "facts" does not appear as such in the summons. After having introduced the general term "facts" the counsel splits and structures his discourse in a fact which is marked with a Roman one (identical to summons) and one which is marked with a Roman two (idem). He thereby also indicates a shift of subject.

Fragment 9: JaBe/mishandeling/politierechter/24b/tramdb101189
(Phase: Trial; plead counsel; summarises CAD-report)

460 A Ik zal
460 C I will not

461 A het rapport hier niet her^alen maar (. ) eh: 't is duidelijk
461 C repeat the report here but ( . ) ah: it is clear

462 A dat mijn cliënt erg veel pech in 't leven heeft gehad
462 C that my client has been very unfortunate during his life

463 A en buitengewoon gedupeerde dingen in zijn leven
463 C and experienced extraordinarily disappointing things in

464 A meegemaakt//
464 C his life/

Similar to fragment 3, the counsel makes explicit that he does not intend to repeat the whole report, but just wants to emphasise a few of its aspects. Again appealing to the background-knowledge and presupposed agreement of his colleagues, he suggests that the message of the report "speaks for itself" in "it is clear that" (461/462). The counsel's appeal for sympathy has to be seen in the narrative context of his plead, namely the "plea in mitigation". He argues that if Jansen will not walk out of this court without a sentence, the judge ought to take account of Jansen's background. The "has been very unfortunate" (462) and "experienced extraordinarily disappointing things in his life" (463) are evaluative generalisations of quite a substantial part of the CAD-report (as in fragment 1, we will fully not cite the report because of possibly damaging consequences, but select the statements to which the summary refers):
Page 1: Jansen comes from a family with twelve children, three of whom died of leukaemia when still young. Brother to whom Jansen was very attached died in a traffic-accident when J. was teenager.

Page 2: Jansen's father temporarily lived separated from his wife.

Page 2: problems with city-council about house resulting in tensions.

Page 2: Jansen and wife had to undergo a forced swap of houses because of father-in-law.

Page 3: Jansen doubled classes because his parents were at odds (resulting in lack of care at home).

Page 3: Jansen could not cope with pressure at work, causing progressive addiction to tranquillisers.

Page 3: overstrained, twice.

Page 4: admission to hospital because of excessive intake of medicines.

Page 4: twice depressed; twice suicide-attempt.

Page 4: again admission to hospital because of excessive intake of medicines.

Page 5: summary of the report itself; mentioned are: Jansen has been confronted with many problems; the relational difficulties between parents of client; the death of a brother with whom he had good contact; the working pressure in the factory and the labour conditions in the X, which were too much a burden; the perils with the lodging in Wormster and the forced removal in Turp; the far from optimal league between client and in-laws and the alienation between Jansen and wife resulting from that; the use of medicines since the client was a teenager, which has developed itself in an addiction.

The summary constitutes the argumentative basis on which the counsel claims that the social and psychological background of the defendant ought to play an important role, and that Bertinus - knowing about Jansen's vulnerability - should have taken this into account.

A counter-example of the evaluative summary above is a generalisation in which the evaluative aspects of the summarised text are suppressed or omitted:

Fragment 10: JaBe/mishandeling/politierechter/24b/tramdb101189
(Phase: Trial: plead defence counsel; refers implicitly to CAD-report):

504 A gegeven de persoonlijkheid
504 C given the personality

505 A van mijn cliënt.//
505 C of my client.//

The summary of the counsel contained in "personality" (504) contracts evaluative statements displayed in the summary and conclusion of the CAD-report, which states that Jansen is a person characterised by the following features: "heavy-handed", "low-frustration-tolerance",
"suppression of tensions", "excessive use of medicines", "unable to adequately with set-backs", "afraid to meet himself", "not able to cope with reality", "chooses in favour of a change of consciousness". The neutrality of the counsel's summary may be due to a euphemistic attitude toward the present defendant. It suggests again a shared background knowledge among those who have taken note of the CAD-report, by which it becomes superfluous to elaborate on the details of Jansen's "personality". The counsel is therefore *selective in the emphasis or suppression* of judgement about the defendant.

The following fragments stand in relation to a recommendation of the consultation centre for alcohol and drugs ("Jansen versus Bertinus"-case). The officers of that centre say in the report that they advice psychiatric assessment, and therefore do not give a sentence-recommendation. This advice is discussed during the trial, when the judge asks the prosecutor what his proposal is. The prosecutor says that he would like to pay attention to the CAD-report (236; not transcribed) and adds that it is unusual not to receive advice from a rehabilitation-centre (237-240). He then parphrases and summarises the advice of the CAD:

**Fragment 11: JaBe/mishandeling/politierechter/24b/tramdb101189:**

<table>
<thead>
<tr>
<th>CAD-Report (page 6)</th>
<th>Prosecutor during trial (240-241)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Considering the related and complicated character-structure of the client we would like to advise a psychiatric assessment.</td>
<td>The reporter of the CAD says ah we can at this moment not yet exactly indicate what should happen, but they propose that ah [this] gentleman should be ah re-examined by a psychiatrist.</td>
</tr>
<tr>
<td>Pending a settlement we want to refrain from a sentence-recommendation.</td>
<td></td>
</tr>
</tbody>
</table>

The prosecutor begins his summary with a narratorial-mediatory introduction ("The reporter of the CAD says ah"). The summary is a combination of *omission* and *generalisation*. Disjoined and omitted is the *reason* why the CAD refrains from a sentence-recommendation: the prosecutor does not mention that this is because of the "related and complicated character-structure of the client". The conditional
structure of the advice brought about by the CAD ("pending a settlement") is thus transformed into a coordinating structure ("at this moment"). The "refrain from a sentence-advice" is euphemistically generalised in "not yet exactly indicate what should happen": a statement of certainty (CAD) is thus transformed into a tentative statement. Other transformations are:

- "advise" (CAD) transformed into "propose" (prosecutor);
- "the client" (CAD) transformed into "mister" (prosecutor);
- "a psychiatric assessment" (CAD) transformed into "re-examined by a psychiatrist" (prosecutor);
- "a sentence-recommendation" (CAD) transformed into "what should happen" (prosecutor).

The prosecutor then continues to refer to a discourse which took place earlier in the trial, concerning Jansen's account about a psychiatric treatment received previously, thereby arguing to settle the case now rather than relegating it back to a psychiatrist (244-252; not transcribed). The judge then concretises the shift (252) in the prosecutor's monologue by referring to a footnote (which is a brief appendix in the CAD-report), in which the "client" makes clear that he prefers the case to be settled now.

**Fragment 12: JaBe/mishandeling/politierechter/24b tramdb101189**
(Phase: Trial; discussion about proposal prosecutor; finishing proceedings or reference to psychiatrist)

252 R Nee, d'r staat ook een voetnoot
252 J No, there is also a footnote beneath

253 R onder hà? Ja: precies ja.
253 J it is it not? Yes: exactly yes

254 O want eh: hij heeft echt naar deze dag toe eh ge/ ge ( )/
254 P because ah: he really has been looking ah fo/ fo ( )/

255 O geleefd en en/ en daar is de nodige
255 J forward to this day and and/and by

256 O spanning door meegebracht./
256 P which the necessary tension has been entailed.//

The prosecutor thus summarises the text of the footnote in the CAD-report (253-256), which obtains the consent of the judge. In order to
compare the original text of the footnote in the CAD-report with its summary during the trial, we have juxtaposed and contrasted the two sequences:

*Fragment 13: JaBe/mishandeling/politierechter/24b/tramdb101189*

<table>
<thead>
<tr>
<th>INFORMATION REPORT of the Centre for Alcohol and Drugs (CAD):</th>
<th>REFERENCE to this report by public prosecutor during trial (253-256):</th>
</tr>
</thead>
<tbody>
<tr>
<td>When we discussed the contents of the information report with mister Jansen on (( date ))1., he indicated that he would be pleased to know during the future trial which sentence he may expect. A psychiatric assessment could, according to him, hold up the legal proceedings indefinitely, which he experiences as particularly aggravating. The involved client himself expressed in this wish to serve the punishment to be imposed on him within the foreseeable future, which enables him to start with &quot;a clean sheet&quot;.</td>
<td></td>
</tr>
<tr>
<td>That would be very aggravating to mister, because he really has been looking forward to this day and by which the necessary tension has been entailed.</td>
<td></td>
</tr>
</tbody>
</table>

First of all, the summary of the footnote is an instance of "mediated mediation", in the sense that the prosecutor reproduces the interpretation of the CAD-officers of Jansen's concern. What can be observed almost immediately is that the original text is much longer than its summary, and that it fact only one lexical item of the original returns in the summary ("aggravating"), causing an inversion of the textual structure. The remainder of the summary is a combination of omission, contraction or generalisation and inference. The summary starts with "that" (253), which generalises and contracts the clauses.
"a psychiatric assessment could" (..) "hold up the legal proceedings indefinitely." The "psychiatric assessment" has been omitted here because it has been referred to earlier in the trial. The "that" is however also a reference to what has been discussed during the trial, in particular to "going to an expert" (251/252; not transcribed). Inferences are drawn from "aggravating" and "a clean sheet" (become "by which a necessary tension has been entailed). The endorsed settlement of the case is inferred from statements which express the urge of the matter: "during the future trial" and "within the foreseeable future." Subjective statements expressing the will or wish of the defendant ("he would be pleased to know"; "according to him"; "which he experiences", "the involved client himself"; "expressed this wish", "which enables him to start with a "clean sheet" ") are intensified and generalised in "because he really has been looking forward to this day" (254/255).

A summary of the footnote returns in the counsel's plead. He says that the things of which "we" say that they are relatively gullible (486/487; not transcribed), that his client is unable to live with them (488/489; not transcribed). The counsel then argues that he is glad, or at least he hopes that it is decided that the case is going to be settled (489-492; not transcribed), again by reference at the footnote:

Fragment 14: JaBe/mishandeling/politierechter/24b/trimdb101189
(Phase: Trial; plead defence counsel; summarises footnote of CAD-report):
494 A Hij wil
494 C He wants

495 A nu weten waar ie aan toe is, dat blijkt ook uit de
495 C to know now where he stands, which also appears from the

496 A voetnoot.
496 C footnote.

However, the counsel summarises a smaller part of the footnote: "he indicated that he would be pleased to know during the future trial which sentence he may expect." The most important shift is that from indirect, polite style ("indicated"; "would be pleased"; "may") into direct, demanding style ("wants").
7.5 Conclusions

Oral references in the courtroom to written documents have a much more complicated character than the categories "quotation", "paraphrase" and "summary" are able to capture. This complication is caused by the coincidence of three processes which are entailed by the conversion of "dead" paper-material into a "living" courtroom-situation. Firstly, oralisation implies the reorganisation of text, in the sense that written language has to be adapted to its new discursive environment. The 'transplantation' of written material becomes apparent from narratorial-mediatory introductions, which often imply a narratorial substitution. Secondly, the oralised written text has to be clarified, explained and occasionally simplified because of the communicative function of the trial: it is important that the defendant is "involved" in the discussion about the evidence. Thirdly, oralisation implies selection and fragmentation of the available narrative material: this process of selective oralisation supports the various argumentative strategies which are performed throughout the trial.

The function of the quotation differs from that of the paraphrase and the summary. Text-fragments are only literally quoted when the interlocutor attempts to establish the existence of a contradiction or other problem in the evidence. Quotations therefore function as contrastive statements which are employed to confront the defendant or the witnesses with the reported facts. The paraphrase and the summary on the other hand serve to economise the trial: because of the recursive or repetitive character of the textual information (for example in the summons) and because of the shared background-knowledge about the narrative information, it is unnecessary to quote all the details of the written text.

Despite of the variety of transformations in the oralisation-process, the documentary source of the oral reference is never obscure, and the meaning of the oralised texts does not undergo radical changes. The transformations are of a predominantly functional nature; they operate on a level of tacit criteria which delimit the amount of material to be discussed during the trial. In the next chapter we will examine how much of this selected and screened material makes it way to the trial-record.
1. This is the principle of immediacy, discussed in section 1.5.

2. Parts of the documents which we obtained were underlined, presumably by the judge. These underlinings (or other editing devices) have been preserved (italics) because they indicate the selective interest of the reader of the document.

3. The procedure is that the witness is first questioned by the judge, and then by the prosecutor and the defence counsel respectively (Article 284 Dutch Code of Criminal Procedure).

4. Pander Maat and Sauer (1989: 130f) note that the information-function (the reconstruction of the crime) of the politierechter-trial is not an absolute priority, because it deals with petty crimes which do not result into difficult problems of interpretation. Instead, the authors claim, priority is given to some communicative functions of the trial, among which confrontations and reprimands.

5. The text of this summons will be re-examined in sections 10.5 and 10.6, but then with emphasis on the legal-normative qualification of criminal intention.

6. The original Dutch text is: "Op ((datum)) was ik in de binnenstad van Rapenstein en wilde aldaar een telefoontje plegen. Ik zocht daarom een telefooncel op. Ik zette mijn damesfiets, groen, Batavus niet op slot tegenover de telefooncel. Toen ik getelefoneerd had en uit de telefooncel kwam zag ik dat mijn fiets weg was."

7. The original Dutch text is: "Meteen hierop zagen wij dat de bestuurder een corrigerende stuurbeweging naar rechts maakte, waarbij hij rechts de verhoogde (stoepkant) opreed en vervolgens met een zwaai weer naar links stuurde, waardoor hij weer op de rechterrijstrook terecht kwam."

8. CAD = Consultation Bureau for Alcohol and Drugs

9. The original Dutch text of this fragment is: "Toen ik daar stond zag ik vanuit de richting van het centrum van Turp dat een forse man met de fiets in de hand over het trottoir aan kwam lopen. (...) (...) Het daarop volgende moment zag ik, dat de forse man een fiets opwierp naar de andere man."

10. The original Dutch text of this fragment is: "Voorts zag ik, dat Jansen zijn opgeheven arm met in zijn hand het voorwerp, naar beneden bracht in de richting van Bertinus. Tegelijkertijd zag ik, dat Jansen naar zijn linkersleutelbeen greep en wederom een pas achteruit deed. Ik zag dat de arm van Jansen wederom omhoog ging, ik dacht weer zijn rechterarm. Ik zag, dat het voorwerp hetgeen Jansen in zijn hand had, blok in de zon. Vervolgens zag ik, dat de arm van Jansen met kracht naar beneden ging en ik zag, dat Jansen, Bertinus in zijn borst danwel in de nabijheid van zijn borst raakte."
11. The original Dutch text of this fragment is: "Ik zag toen dat Joost en Piet elkaar over en weer wat vuistslagen gaven zonder elkaar daarbij goed te raken."
CHAPTER 8: WRITTEN RECORDS OF ORAL TRIALS

8.1 Introduction

The chain of the legal whispers is continued in the writing of a trial-record ("proces-verbaal") by the clerk. According to Article 326 of the Dutch Code of Criminal Procedure, the clerk ("griffier"; see section 1.4) of the court - who is responsible for the writing of this document - reports the main events during the trial, comprising matters of evidence (for example witness statements done during trial) as well as of procedure (the judge's cautioning of the defendant for example).

The "proces-verbaal" of the trial has globally three functions: 1) it is a procedural report of the court's obedience of rules, obligations and rights; 2) it is the motivation-basis for the proof of evidence and the final decision; 3) it is the documentary basis for appeal; 4) and it functions as a revision or specification of the contents of previous documents on the basis of the new information which has been acquired in the course of the trial.

However, the "politierechter"-trial is so brief and often uncomplicated that an official trial-record is unnecessary. The "politierechter" is thus an institutional exception to the rule that the "proces-verbaal" must be made up, by virtue of Article 378a of the Dutch Code of Criminal Procedure. This article arranges that the trial-events do not need to be reported, except in cases in which the prosecutor, the defence-counsel or the defendant requests the issue of such a document, or if the decision which follows immediately after the trial is unrecorded. Therefore, in the case where one of the parties appeals against the decision of the judge, an official trial-record is required. The arrangement under article 378a is a direct consequence of the introduction of less-time-absorbing criminal procedures in the early twenties (see Appendix I).

In four of the five cases which we have analysed only the handwritten notes of the clerk have been added to the dossier. Because of the repetitive and referential nature of the topics which are discussed during the trial, the clerk does not record every detail. Instead, s/he records the more salient features of the trial-interrogation. Other matters which are discussed during the trial, but which are not recorded by the clerk, can normally be found in the dossier. Details
about the structures of the analysed trial-records can be found in section 8.2.

In practice, the clerk is confronted with at least two levels of information-processing: on the one hand the clerk balances the information in the trial-record with the information already provided by the trial-dossier, and on the other hand the clerk is bound to distract oral information from the trial which is not included in the dossier. A hypothesis following from this idea is that the selection-strategies of the clerk are conditioned by a process of "economising" the available information (see section 8.3).

The assumption is naturally that the clerk has informed him/herself before the trial starts, namely by reading the dossier. The stock of information in other documents as well as in the trained memory of the clerk explains why this s/he is able to construct an official trial-record on the basis of a few hand-written notes, which can be days, weeks or sometimes months after the trial. The construction of an official trial-record requires the integration of standard-information in a series of handwritten notes. This is the process which will be studied in section 8.4.

The official trial-record which we have analysed is an exception to the normal course of events. Most of the defendants are in agreement with the judge's decision and do therefore not appeal against it, which makes the writing of an official trial-record redundant. But in the case Niehe (see Appendix II), the defendant persistently denies during the trial that he was not involved in damaging the cars with the courting couples: yet the judge convicts him. The defendant and his lawyer appeal against the decision, which explains the reason why this is the only official trial-record in our corpus. In the four remaining cases only one, two or three hand-written pages are added to the dossier of the case.

A comparison of the four files containing the handwritten notes of the clerk shows that a significantly small part of the text is devoted to the reconstruction of the crime; more space is reserved for the private life, the job and the financial circumstances of the defendant, with in the case "Jansen versus Bertinus" particular emphasis on Jansen's remorse. In the case "Van Straaten", the clerk devotes a substantial part of his notes to a procedural controversy raised by the counsel, whereas in the case "Ter Haar" the notes reflect the statements made by the twin-brothers Karel and Kees (see also sections
The handwritten notes in the case Sint/diefstal/politierechter/20b/tramdb151189 were so brief that they have not been analysed.

For the analysis of the trial-records we have disregarded the categories "quotation", "paraphrase" and "summary", because they have demonstrated to be too narrow for the analysis of highly complex text-processing processes, such as oralisation (chapter 7), and in the subsequent case, scripturalisation. Instead of this approach, we have opted for a comparative sequential analysis. All elements in the four trial-records have been retraced to their origin in the oral discourse of the trial, which has enabled us to identify some general aspects of the selection-strategy of the clerk: this method has made it possible to establish what has been left out and has been registered by the clerk (section 8.3). Textual reorganisations mainly come to light in section 8.4, where the deviations in the official trial-record from the chronology of the trial indicate processes of recombination, such as sequential inversions.

8.2 The Structure of the Trial-Record

The chronological sequence of a hand-written trial-record generally runs parallel to that of the trial. Similar to the trial therefore, the clerk divides the notes in "chapters", which each reflect the different stages of the trial. This section contains a general inventory of the ways in which the clerks have structured their notes, which results in a provisional indication of the kind of information which the clerk is likely to include.

The hand-written notes of the clerk in the "Jansen versus Bertinus"-case comprise one page. The notes are divided in three parts (indicated by lines), namely:

1. Statements made by the defendant during the interrogation, relating to the event (3 phrases), follow-up after the event (3 phrases), personal evaluation of the event (1 phrase) and personal circumstances (3 phrases).
2. A summary of the plead: 5 phrases relating to a challenging reconstruction of the events; 3 phrases relating to the sentence.
3. Statements made by the defendant ("final word"): 2 phrases relating to remorse and 1 phrase relating to defence.
The clerk has not registered various other contributions in the trial, namely the presentation of the summons by the public prosecutor (see section 7.3), the prosecutor's proposal regarding the recommendation of the CAD (see 7.4) and his requisitory; nor do the notes mention the judge's motivation or decision. All procedural matters, such as the opening and closure of the trial, the identification of the defendant, and the caution and instructions have been left out.

It is not surprising that procedural matters are not registered, because they are the stable and fixed events which recur in every "politierechter"-trial. The registration of procedural events may be integrated in a later stage, for example when an official trial-record is made up (see 8.4). Neither does it come as a surprise to observe that the clerk omits substantial contributions made by the judge and the prosecutor: most of what they say during the trial can be traced back in the criminal file, which makes a repetition in the trial-record superfluous and uneconomical.

Of crucial importance to the systematisation and retrieval of information is the working sheet ("werkblad van de politierechter"). This is essentially a pre-printed file on which information, mostly of a legal-normative nature, can be inscribed. That working-sheet, which is also added to the other cases except for the Niehe-case (section 8.5), contains the following list of items:

WERKBLAD POLITIERECHTER:

1. number of the case ("parketnummer") and serial number;
2. name of judge;
3. names of prosecutor and clerk;
4. date of verdict;
5. name of defendant
6. contradiction ("tegenspraak");
7. default ("verstek")
8. not appeared yes/no

name of defence-counsel:
name of interpreter: (oath/affirmation)
name of offended party:
name of witness: (oath/affirmation)
"T.A. VERPL."
"VOORDRACHT"
Statement of defendant (see overleaf)
The "paraphrase of the summons" during the trial is therefore reconstructed from the summons itself, and not from its oralisation during the trial. The abstraction of these contributions means that the clerk does not register the structure of the argument or the moralising attitude toward the defendant: the proposal- or decision-making process which leads to the decision is clearly not 'relevant' for the trial-record. This finding suggests that the oral hearing of written information is omitted in the trial-record. Similarly, the requisitory by the prosecutor and the decision of the judge can be retrieved from the systematic registration on the above-mentioned working-sheet (Charge and 11. Decision). The latter finding however suggests that the registration of information is economised: because the oral trial is itself organised on a written basis, most of the information discussed during the trial can be retrieved from the documents.

The clerk in the case Ter Haar (see for an elaborate analysis section 7.2) is the same person as in the "Jansen versus Bertinus"-case. Besides, judge and prosecutor are identical as well. The amount of text which the clerk devotes to the interrogation (including two witnesses) is bigger than in the case discussed above, but that can be explained with the knowledge that the evidence given by the witnesses deviates from their statements to the police, which requires the clerk to make additional notes to the police-record.

The complication for the clerk is not only that the frequently interrupted contributions of the two witnesses (compare with 8.5; three witnesses) need to be reorganised in the form of a smooth textual sequence. An extra complication is established by the witness's continuous reconsideration of the events to be reconstructed and the reformulations resulting from that. The apparent confusion or uncertainty about which statement to regard as definitive is demonstrated by the two crossings out in the trial-record. This

<table>
<thead>
<tr>
<th>Charge:</th>
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<tbody>
<tr>
<td>9. Qualifications: between ( ) legal article articles (clerk circles the options)</td>
</tr>
<tr>
<td>10. Committed on (date):</td>
</tr>
<tr>
<td>11. DECISION: (clerk circles the options and adds information not yet contained in these, relating to the particularity of the decision).</td>
</tr>
</tbody>
</table>

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uncertainty relates to the statements of the witnesses, not of the defendant. The latter remains consistent in his denial that he did not know at the beginning that the radio alarm-clock was stolen, and that he had asked the two witnesses emphatically about the origins of the clock after which it was denied that it was stolen.

Similar to the trial-record above, no mention is made of the identification-episode, the requisitory and the motivation and decision by the judge (details can again be found in the working-sheet). The trial-record is more or less divided in five paragraphs, namely:

A. The statement of the defendant (V/D).
B. The statement of the first witness (G1/W1).
C. The statement of the second witness (G2/W2).
D. A second statement of the defendant (V/D).
E. The plead of the counsel (A/C).

All standard-information about the trial-routine has thus been omitted from the trial-record: possibly essential information can be retrieved from the dossier.

The duration of Van Straaten's trial, under suspicion of exceeding the maximum alcohol limit twice, is similar to that of Jansen's trial, but the trial-record is at least three times its seize (three pages). One explanation for this difference is that the clerk is someone else than the clerk in "Jansen" and "Ter Haar".

This clerk makes notes of various issues discussed during the trial. It must however be said that most of this information does not emerge from the police record. The latter document is to a very high extent standardised, because it concerns a preprinted police record often used in alcohol-cases (Dutch Road Traffic Act Article 26). This document leaves very little room for the description of the "background-circumstances", often relating to the defendant's private life, of the event. The police record thus writes about facts only, and any possible evaluation of these facts by the defendant is absent because he refused to give a statement and to sign the document. So, the fact-related suppression of evaluation in the police record is perhaps the reason why the trial-record in this case compensates for the informational shortcoming, namely by paying more attention the actual private situation of the defendant. Another explanation may be that this kind
of delict is often particularly strongly tied up with the "prognosis-discourse" (see section 1.3).

Unlike the clerk in the "Jansen versus Bertinus" case and the "Ter Haar"-case, the clerk does not formulate grammatical sentences. The style of the record is therefore much more "stenographic". However, although the notes are briefer, much more information about the trial is made available than in the other records.

The trial-record is globally structured as follows (corresponds with the sequential order of the trial-proceedings):

A. The statements of the defendant, made during the interrogation by the judge.
B. The statements of the defendant, made during the interrogation by the prosecutor.
C. Remarks made by defence-counsel.
D. Requisitory by prosecutor.
E. Plead by defence-counsel.
F. Interruption of plead: Discussion between counsel, prosecutor and judge (starts in 355-379).
G. Continuation plead by defence-counsel (379-410).
H. Continuation discussion C, P, J and D.
I. Last word by defendant ("laatste woord").
J. Closure of trial-examination, motivation and decision by the judge.

As in the trial-records discussed above, the trial-record in the case Van Straaten leaves out notes on the identification (a change of the defendant's address is marked on the summons; 1-6), the instruction and caution (6-9), and the presentation of the summons (8-20). One may therefore conclude that hand-written trial-records generally omit standard-information which sprouts from routine-performances during trial. Possibly important information can be retrieved from documents if necessary.

The clerk who is at work in the case "Niehe" is the same person as in case "Jansen versus Bertinus" and the case "Ter Haar" (see above); the judge and public prosecutor differ from those in the previous cases. The trial-record in the case "Niehe" is the only type-written, elaborated and official trial-record in our corpus, and will be analysed separately from the previous cases in section 8.4. The structure of this official trial-record is as follows:
8.3 Selection-Strategies of the Clerk

After having established that the average trial-record omits information which can be retrieved from elsewhere, we should go deeper into the question which information the clerk is likely to select when recording the trial-proceedings. A general observation from a sequential comparison between the trial and the trial-record is that the selective registration of information from the trial is always entangled with the omission or deletion of other information. In other words, each time information is revealed, some other information is simultaneously concealed. This is of course the case only when the clerk selects rather than summarises or constructs.

1. The sequential comparison between trial and trial-record demonstrates first of all that most information which the clerk selects is information which is elicited by the judge. Most of the information which is volunteered by the defendant or the witness (unelicited information) is therefore omitted from the record. In the "Jansen versus Bertinus"-case, the judge asks defendant Jansen whether "it turned out well for Bertinus". The answer to that question is selected and recorded by the clerk:
95  V Ja. Ik heb eh ((kucht)) meteen toen ik eh: van 't
95  D Yes. I have ah ((coughs)) immediately after I ah: was

96  V voorarrest dus eh vrijkwam heb ik meteen eh geïnformeerd
96  D you know ah released from police-custody I immediately ah

97  V hoe het met de heer Bertinus was, maar de heer Bertinus
97  D informed how mister Bertinus was doing, but mister Bertinus

98  V was toen al weer hh thuis en ik (dacht) dat 't dus eh af/
98  D was already hh home by then again and I (thought) that it

99  V goed ging.//
99  D therefore ah went all right.//

TRIAL-RECORD: "Ik heb meteen geïnformeerd naar zijn toestand."
("I immediately informed after his well-being").

The OMISSIONS in the clerk's notes concern the moment at which Jansen
informed after the situation (95/96), the discovery that Bertinus was
remitted from hospital (97/98) and Jansen's assumption that Bertinus
was all right (98/99). The clerk thus only records the phrase which
immediately succeeds the judge's question. Jansen's unelicited
narrative elaboration on the situational context of his inquiries is
omitted. It seems therefore that the questions of the judge establish
an outline of a relevancy-structure upon which the clerk depends for
the selection of information.

The registration of elicited information often has the form of a
CONTRACTION of the question-answer-sequence. Consider the following
fragment:

TRIAL-RECORD: "Wij zien elkaar niet meer"
("We do not see each other any more")
The wording of this selected sequence derives mainly from the judge's formulation of her question; Jansen's attempt to elaborate his negative answer is OMITTED by the clerk (note also the weakening of Jansen's double "no" into "not any more"). The contraction of question-answer-sequences is a weaker form of the narratorial substitution (see 6.2), in which the words of the one interlocutor are tacitly put into the mouth of the other. The effect of a sequential contraction as well as a narratorial substitution is that the words pre-formulated by the judge (or other interrogator) become "I"-statements: the defendant's confirmation or denial of the judge's question thus appears as voluntary, self-formulated information.

A combination of a registration of elicited information and a contraction of the question-answer-sequence can be also be found in the case of Ter Haar:

Ter Haar/heling/politierechter/15b/tramdb1411189

105 G1    Nee, dat weet ik
          Wie d'r over begonnen is, bedoel ik.
105 W1    No, I do not
          Who started about it, I mean.
106 G1    niet. Nee.
          Dat weet u niet meer.
          ((kuch)) (.)
106 W1    know. No.
          You don't know that anymore.
106 J     No.//
          ((kuch)) (.)

TRIAL-RECORD: "Wie erover begonnen is, weet ik niet."
(="Who started about it, I do not know.")

Significant is that the wording in the clerk's trial-record stems partly from the judge ("Who started about it"; 105), and partly from the witness ("do not know"; 105/106). Also significant is that the witness's statement is repeated twice by the judge ("You don't know that anymore" in 106 and "No" in 106) and once by the witness ("No" in 106) before it finds its way to the trial-record. In this case, we can speak of a contraction of repeated or reiterated statements. We will see shortly that the recurrence or repetition of statements during the trial also determines selection.

Another fragment which illustrates the combination of a registration
of elicited information and the contraction of questions and answers has also been lifted out of the case Ter Haar:

Ter Haar/heling/politierechter/15b/tramdb141189

280 O Had u enig idee van de waarde
280 P Did you have any idea of the value

281 O van die klok?
   V Nou, ik had 'm toen ongeveer eh honderd/

281 P of that clock?
   D Well, I then estimated it ah a hundred/

282 V honderdvijftig gulden geschat.//
282 D hundred and fifty guilders.//

TRIAL-RECORD: "Ik schatte de waarde van de klok op ± f1.150,=,"
   ("I estimated the value of the clock at ± Dfl. 150,=.")

This phrase in the penultimate paragraph of the record (in the case Ter Haar) once again shows a CONTRACTION of the wordings of two interlocutors: the "value of the clock" is an almost literal quotation of the prosecutor's "value of that clock" (280/281), and the "I estimated" (281) and "a hundred and fifty guilders" (282) a quotation of the defendant's words.

One can also find exceptions to the rule that "only the information which is elicited by a legal agent is registered by the clerk". In fact, there are examples of the clerk's recording of voluntary information, namely in cases where the enunciated information is neither included in the dossier nor in the trial: when the prosecutor asks Karel (W1 in case Ter Haar) whether Marcel took the radio alarm-clock home in the knowledge that the clock was stolen, Karel denies. The latter then produces a statement, which is not elicited by the prosecutor: "We gave Marcel the alarm-clock, without that he knew that it was stolen. Then afterwards, that is why the police visited him to collect the alarm-clock, and then we told the police that he had the alarm-clock". Despite the absence of a direct elicitation, this is recorded by the clerk as:

TRIAL-RECORD: "Toen Marcel de klok meenam, wist hij niet dat die gestolen was."
   ("When Marcel took the clock with him, he did not know that it was stolen.")

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The recorded statement is again a partial CONTRACTION of the words which the prosecutor employs in one of his previous questions ("taking home"; 173; not transcribed). The non-elicited information is selected and recorded because it is "economical" and contrastive. In spite of this exception however, a vast part of the selective registrations by the clerk rely on a). elicited information, which is b). not yet contained by the document or not yet enunciated during the trial and c). written down in the form of a contraction of question-answer-sequences in which the wording of the question becomes integrated with the wording of the answer. Most of the "new information" concerns the private situation of the defendant, often resulting from a change of circumstances after the first recording of the crime by the police. A registration of details from the defendant's private life is significant in both the "Jansen versus Bertinus"-case and the "Van Straaten"-case: in the first case, the newly acquired information relates to Jansen's addiction to tranquillisers ("Het gebruik van geneesmiddelen is nu aan de betere hand." ("The use of medicines is on the mend now.")), while in the second case, it relates to Van Straaten's professional life as a lorry-driver and the complications resulting from that for the sentence.

The "overleaf" of this selection-strategy (registration of "new" information) is naturally that most quoted information which can be retraced in the documents is omitted from the trial-record: the economisation-constraint suppresses the need for repetition. For example, in the case Van Straaten the clerk omits the judge's oral reference to the defendant's crime-sheet (40-48; not transcribed). Again, the reason for this omission is redundancy, because the quoted information can be retrieved from the document.

2. Also OMITTED from the trial-record are narrative elaborations, resulting in a neglect of "narrative details". The most important reason is again that the clerk has to act "economically". Some of the narrative details can be read from the documentation, but not all of them. For example, in the "Jansen-verse Bertinus"-case the clerk omits the discussion about Jansen's difficulties with the family (54), the ownership of the tools (56) and the financial compensation (58/59). We also found that the clerk deletes the trial-reconstruction of narrative codas, such as the discussion about Bertinus's reception of first aid from by-standers just after he had been stabbed by Jansen (125-132
trial; not transcribed). This theme will return in section 8.4, where we will analyse the clerk's recombination of 'what are essentially disconnected narrative phrases or sentences.

3. The trial-record generally OMITS elements which are specific to the oral discourse, such as repetitions, misunderstandings, repairs, interruptions, topic-shifts, and "communicative steps", such as informal introductions to the reconstruction of the narrative about the crime or explanations to the layperson about the trial-procedure; all these typically "oral" aspects are filtered out. For example, the clerk does not mention the coincidence of the judge's question, explanation and topic-shift when she turns to a discussion about the social inquiry report issued by the CAD: "That was in fact because you have had that problem with medicines haven't you?" (168-170). The judge simultaneously seeks confirmation of Jansen's knowledge about the document, explains the relevancy of the document and changes the topic. Significant is also the clerk's NEGLECT of the moralisations performed by the judge or other interrogator: not recorded is for example the judge's warning addressed at Jansen that he really should be careful with the medicines (196/197).

4. The trial-record generally OMITS or otherwise SUPPRESSES evaluations, culminating in the neutralisation of the various accounts which are enunciated during the trial. The paragraph in the trial-record of the case "Jansen versus Bertinus" which summarises the plead of the defence counsel FOCUSES on two topics, namely the reconstruction of the succession of events, and the verdict- or sentence-recommendation. What is entirely OMITTED in the trial-record is the counsel's challenging evaluation of the events. The clerk does not reflect the somewhat cynical undertone of the counsel in reconstructing the events (342/343; 345; 347/348). The trial-record is therefore considerably neutral in comparison to the plead.

5. Similar to the clerk's omission or suppression of evaluations, entire argumentative contexts and structures are OMITTED. For example, the clerk in the case "Jansen versus Bertinus" makes a note of the narrative core of the counsel's reconstruction of the crime (Bertinus threw a conifer through Jansen's window), but OMITS the argumentative-evaluative embedding of this narrative core, namely that the counsel is
of the opinion that Bertinus made a "severe mistake" (342/343), that Bertinus's explanation of his act on grounds of self-defence is a "mere justification" (345) and that the appeal to self-defence is "meaningless" in a context where Bertinus was free to go (348/349). The paraphrase of the recorded narrative core also shows a few alterations, such as the translation of the counsel's slighting undertone in "he then says" into a far more neutral "as he says". The effect of this neutralisation is that the recording of this passage lacks economical necessity: an almost identical account could be read from Bertinus's testimony.

The clerk is in general not selective with regard to the omission of the argumentative issues brought forward during the trial: also omitted are the argumentative contributions of the prosecutor (requisitory) and the judge (motivation of decision). Only the results of their arguments (charge, plead and verdict) are registered if not made superfluous by the fact that a recording is also facilitated by the available working-sheet. In the "Jansen versus Bertinus" case, the clerk mentions the backbone of the counsel's argument ("DID NOT HAVE INTENTION" \rightarrow ACQUITTAL"), but deletes all the underpinning reasons which justify this argument.

6. An important effect of the clerk's selection of statements is that the original narrative sequentialisation disappears. Very often, the clerk omits narrative bridges for example (such as disjunctions and contrastive sets), or narrative contexts (such as background-circumstances), which establishes a disconnection of narrative elements (for example: a disconnection of narrative cause and effect). For example, even although the clerk in the case "Jansen versus Bertinus" almost literally records the information with regard to Jansen's financial situation, he omits the reason why Jansen has not received a full disability-allowance; the result is that Jansen's income remains unclear, which complicates the possible settlement of a fine.

7. The clerk often records or registers information which is repeated during the trial: the information becomes salient, and can hardly escape the attention of the clerk. The trial-record in the dossier of the case "Jansen versus Bertinus" mentions a segment which is emphatically repeated during the trial: "before this event" has been
added post-hoc, and is derived from the discussion which the prosecutor invokes somewhat later in the trial (228-233):

**JaBe/mishandeling/politierechter/24b/tramdb101189**

<table>
<thead>
<tr>
<th>228 O</th>
<th>Eh:m sinds wanneer/</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>(. )</td>
</tr>
<tr>
<td>228 P</td>
<td>Ah:m since when/</td>
</tr>
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</tr>
</tbody>
</table>

229 O was het nog voor dit gebeurde of na dit geval?

V Dat was

229 P was it still before this happened or after this event?

D That

230 V voor dit gebeuren. Voor d/dat dit gebeurd

O Voor dit gebeuren.

230 D was before this event. Before th/that this

P Before this event.

231 V is ja. Ja. Ja. En niet zo heel erg lang v/voor dit

O Ja.

231 D happened yes. Yes. Yes. And not that long b/before

P Yes.

232 V gebeurde. Niet zo heel erg lang d'r voor.

O Mm? (Niet zo

232 D this happened. Not that long before it.

P Mm? (Not that

233 O lang). Goed.//

233 P long). Right.//

**TRIAL-RECORD:** "Ik heb onder psychiatrische behandeling gestaan. (vóór dit gebeuren)"

("I have received psychiatric treatment. (before this event")

This sequence has clearly caught the attention of the clerk, because it is emphatically and repetitively stated. Without being explicit about it, the prosecutor wants to know whether the psychiatric treatment had any effect on Jansen's alleged aggressive and violent behaviour. The fact that Jansen received treatment before he stabbed Bertinus stands in a sharp contrast with his own positive evaluation of the treatment (he previously stated: "in my opinion it went well"). However, Jansen is unaware of this contrast, and further specifies that he received the treatment not very long before the stabbing (which makes the prosecutor's assessment more negative). This specification is not
recorded by the clerk, nor is it initially 'heard' by the prosecutor: the latter is apparently satisfied with the global "before".

8. Also RECORDED is the demonstration of remorse: if we compare this with the omission of moralising moves (see under 3), the demonstration of remorse itself often the result of moralisation appears on paper "detached" from its moralising context.

The following is an example of a demonstration of remorse which is not preceded by a moralisation by the interrogator. In fact, Jansen's regret about what has happened is voluntarily stated and is literally recorded in the clerk's notes:

JaBe/mishandeling/politierechter/24b/tramdb101189
(Phase: Trial: Interrogation of defendant by judge)

106 V en ja hh/ dus ja eh
106 D and yes hh/so yes ah

107 V ((zucht)) ik eh ja betreur 't heel erg en
   R Hm//
107 D ((sighs)) I ah yes deeply regret it and
   J Hm//

TRIAL-RECORD: "Ik betreur het heel erg."
("I deeply regret it")

Due to the change of oral to written discourse the interjections and repairs are not registered, but the content of Jansen's statement remains IDENTICAL.

Similar to the registration of remorseful reactions, the clerk makes note of the defendant's "final word" (in which the defendant often repeats the expression of guilt):

JaBe/mishandeling/politierechter/24b/tramdb101189

518 V Ja, ik vind 't heel erg eh:
518 D Yes, I find it very very ah:

519 V verschrikkelijk wat 'r dus ehm gebeurd is. Hh en
   - (.)
519 D terrible what ahm happened. Hh and
   - (.)

520 V eh (.) dat ik dus echt niet de bedoeling had om (.)
520 D ah (.) that I really did not have the intention to (.)

521 V de heer Bertinus letsel of wat dan ook toe te brengen.
521 D inflict injury or whatever to mister Bertinus.

- 300 -
In the "Jansen versus Bertinus" trial we find that the clerk registers information evolving around the issue of criminal intention: during the trial defendant Jansen casts his mind back to the moment at which he

TRIAL-RECORD:

"Ik vind het heel erg wat gebeurd is."  
("I find it very terrible what has happened.")

"Ik heb geen opzet gehad."  
("I did not have the intention.")

"Het spijt me zeer."  
("I am very sorry.")

The clerk's notes are accurate because they cover the three main messages in Jansen's last word. The difference is however that the showing of remorse has been somewhat skimmed off, due to the OMISSION of adverbs and repetitions:

- Although it perhaps escapes the attention due to a translation, "heel erg verschrikkelijk" (translated as "very very terrible"; 518/519) becomes "heel erg" (provisionally translated as "very terrible").

- Again due to translation, the common term "bedoeling" ("intention"; 520) becomes a legal term, namely "opzet" ("intention"). Omitted is the referent of this intention, namely to "inflict injury or whatever to mister Bertinus."

- Omitted is "that I regret it very much" (524), which is probably because of its strong semantic resemblance with the recorded "I am very sorry" (524) and therefore left out because of its seemingly repetitive character.

9. A SELECTIVE RECORDING generally takes place when the enunciated information is thought to be relevant for the reconstruction of the crime:
was threatened by Bertinus with his own bicycle (107/108), and says that if he would have had a pocket-comb in his pocket he probably would have used that instead of the knife: he did not realise he had the knife with him (111/112) which is almost literally recorded by the clerk's:

JaBe/mishandeling/politierechter/24b/tramdb101189
(Phase: Trial: Interrogation of defendant by judge).

111 V Ik was me d'r eigenlijk/ik was me d'r
111 D I actually/ I didn't realise

112 V niet van bewust op dat moment dat ik een mes bij me had,;//
112 D at that moment that I had a knife with me,;//

TRIAL-RECORD: "Ik was me niet bewust dat ik een mes bij me had."
("I didn't realise I had a pocketknife with me.")

Jansen then protests his non-preconceived acting, which is again recorded by the clerk:

JaBe/mishandeling/politierechter/24b/tramdb101189
(Phase: Trial: Interrogation of defendant by judge).

123 V 't Was dus absoluut NIET de bedoeling laat
123 D It was therefore absolutely not the intention so to

124 V ik zeggen om hem/ laat ik zeggen eh: een/op een
124 D say to him/ so to say ah: an/to injure him in

125 V dergelijke manier te verwonden.

R Mm. Mm.;//
125 D that way.
J Mm. Mm.;//

TRIAL-RECORD: "Het was niet de bedoeling om hem op een dergelijke manier te verwonden."
("It was not the intention to injure him in that way.")

The clerk's recording of this statement is nearly literal (IDENTITY), except for the omission of the reinforcing "absolutely" (124), the careful introductions ("so to say" (123/124, 124)) and the repairs (124, 124). It is unnecessary to say that this fragment was also recorded by the clerk because of the emphasis which the defendant put on his introspective reconstruction.

- 302 -
In the case Ter Haar, we find a registration of enunciated information which contrasts with the information in the documents, such as the defendant's refutation of the charge at the very beginning of the trial (14-17; not transcribed), and the information provided by the two witnesses which makes the suspicion against defendant Marcel increasingly controversial.

10. In this section we have reviewed some of the most prominent selection-strategies of the clerk. Due to lack of space, we have had to limit a presentation of all the selective operations. It is perhaps unnecessary to say that the registration and omission of information is surrounded by various transformations, such as the paraphrase and the narratorial substitution. Also due to lack of space we have had to abstract from the clerk's performance of narrative transformations.

8.4 The Construction of an Official Trial-Record

A formal "proces-verbaal" of a trial is largely structured according to a prefixed written protocol. Particularly the registration of the performance of procedural steps is a documentary formality. Informal, chaotic or unexpected events or turns which may occur during the trial, and which may have been recorded in the hand-written notes, can either be 'squeezed' into this prefixed documentary structure, or otherwise translated or omitted. Whereas the hand-written notes hardly make any mention of the performance of procedural steps, the official trial-record will have to compensate for this shortcoming by means of an ex post integration of formalities: the official trial-record contains formulae which are normally not inserted in the hand-written trial-record, such as the title (name of the court; title document) and the case-number.

The shift from handwritten notes to an official trial-record requires a thorough textual reorganisation. A major difference between hand-written notes and an official trial-record is that the hand-written notes run sequentially parallel to the order of the trial, while the trial-record shows flaws between its textual sequence and the trial-sequence: this means that inversions, reversals or other flaws are exceptions in hand-written notes. The discursive phenomenon of "flaws" will be discussed in this section, as well as the formalisation
of the handwritten notes due to the integration of a legislative terminology in the record.

A restriction on the case-study presented in this section is that it has taken into account only one official trial-record (the only one in our corpus), which makes a comparison with other records impossible: the record stems from the case Niehe (see also sections 8.1 and 8.2). Furthermore, we have had to limit ourselves to a reconstruction of the clerk's construction of the trial-sequence, without the "bypass" reconstruction of the intermediate handwritten notes (not in our corpus). Finally, we will only examine the clerk's textual representation of "factual" matters as discussed during the trial: central are the references in the official trial-record to the interrogation of the defendant and the three witnesses. It should be added that a part of the interaction between the first witness (the police officer who was involved in the initial inquiries into the case) and the judge was extremely difficult to understand and transcribe, which has meant that we had to exclude this material from our analysis.

First of all, it was found that the official trial-record is a SELECTION of the various performances during the trial, naturally implying OMITTING, but also SUMMARY and CONTRACTION. This finding is similar to that for the hand-written notes (see section 8.3).

1. All "informal" discourse, that means discourse not relating to the reconstruction of the fact or the procedure, but for example to the installation of cooperativity or greetings, is OMITTED in the official trial-record. In the context of this particular trial, the following items or sequences have been left out in the record:

a. the welcoming of the defendant and the witnesses at the beginning of the trial (2); the re-welcoming of the second witness (296; and 299-300); and the greeting of the third witness (610-612).

b. the cooperativity-discourse which takes place at the beginning of the trial: the judge asks the defendant whether he has been tried before here, and whether he is nervous, followed by the defendant's denial (9-11); also omitted is the judge's question addressed at the defendant what his profession is (15-19).
c. the "codas" of the trial-proceedings; in this case the clerk omits the interaction between the judge and the defendant (1213-1215) after the judge has pronounced his decision and a non-elicited reaction from a woman in the audience and the interaction between her and the judge (1215-1237).

2. All communicative remarks relating to the structuration of the order of the trial and procedural or communicative explanations addressed at laypersons are OMITTED in the trial-record, such as:
   a. the procedural announcement by the judge (following the prosecutor's presentation of the charge and the defendant's denial of the charge) that first the witnesses will be interrogated (20/21); the announcement of the judge that one is waiting for the third witness (607).
   b. the judge's explanation addressed at the first witness, but also at the court, why he has been called (communicative explanation; 42-48); the judge's explanation to W2 why has been kept separate from the first witness (297-298) and an explication of why he has been called as witness (300-301); the judge's explanation of the witness's rights directed at the third witness (616-618).
   c. the closure of the trial: 1237-1239.

3. All interrogative or interactional aspects which diverge from the official sequence of the trial-protocol are OMITTED, such as:
   a. interruptions of interrogations of witnesses (for example by interrogating the defendant about what the witness just stated) are not mentioned, or otherwise the content resulting from that interrupted interrogation is interwoven with the ongoing sequence about the witness-interrogation in the text of the trial-record (147-160; 258-260; 597-607; 608-610).
   b. repetition of interrogation ("giving a second chance"), in this case when the judge re-interrogates the third witness after the prosecutor has announced that he will commence a perjury-procedure against this witness (686-722); the judge turns to the counsel and asks him what the reason for this perjury may be (723-733); a discussion about the perjury-procedure between judge, prosecutor and counsel (734-741) and talk between the counsel and the third witness, who is the father of the defendant (742).
c. interrogations occurring in phases after the official interrogation has been concluded: in this trial, the judge turns to the first witness after cancellation of the perjury-procedure against the third witness: 768-777. A provocation of the defendant by the judge is also ignored by the clerk (802-806); but it must be added that although this sequence has been omitted by the clerk, a denial by the defendant following from the judge's provocation is registered. One can therefore not claim that all interrogations occurring beyond the protocol are omitted in the trial-record.

d. unelicited reactions: in this trial, the defendant becomes agitated about an answer provided by the first witness): 777-801; this category is in many ways comparable to "informal talk", such as the unelicited reaction of the woman in the audience mentioned under 1. above.

e. repetitions of statements, such as (repetitive or corroborative) confirmations or negations of previous statements (762-763 and 765, in which the father of the defendant confirms not to change his revised testimony; the defendant's repeated denial of the charge (1045, 1046, 1047, 1049/50, 1051, 1053, 1060/61, 1062, 1069, 1070, 1073, 1076). These may be omitted or contracted.

This inventory does not include the clerk's omission of the judge's moralising reminder of a previous conviction for a similar crime (827-833; see also section 8.3 for the omission of moralisations), and the interaction about the Niehe's income (833-838). The omissions which we have mentioned do not represent all omissions: a substantial part of the deleted elements are narrative omissions, such as 'details' and evaluations (see also section 8.3). The finding that there are quite a few omissions from the interaction during the trial is not surprising: on the one hand it reflects the economisation of information-processing, and on the other hand we know from the analysis of the handwritten notes (see 8.3) that the available information is pre-selected and pre-screened before it makes its way to the official trial-record.

In contrast to the hand-written notes, the official trial-record is not a chronological representation of the order of the trial, but a textual construction in which new information (mostly formal terminology) is integrated. The effect is that the hand-written notes are 'dressed' with an extra veil of information. Below we will present
an inventory of ADDITIONS and INSERTIONS which the trial-record contains in comparison with the trial:

1. As suggested before, the INSERTION of the title and case-number in the top of the document is a consequence of a transposition of the oral discourse of the trial to the written discourse or context of the official judicial decision. The function of the official trial-record also implies ADDITION of:
   a. the introduction of the document, providing information about the kind of trial and the name of the court;
   b. the names of the "politierechter", the public prosecutor and the clerk;
   c. the name of the defence-counsel.

2. The trial-record INSERTS the registration of a few procedural steps which may have been 'undertaken', but which were not explicitly and verbally performed during the trial:
   a. the insertion of the prosecutor's presentation of a list of goods which have been seized by the Home Office;
   b. the brief presentation by the judge of the contents of the police record, written by the police officer who is the first witness and stated by the victim, who is the second witness; in this case, the judge has actually not 'presented' the contents of the police record, but combined the checking of the contents of the record with the interrogation of the first witness; the clerk thus "creates" the judge's brief oral presentation of the dossier (the police record) on the basis of his own, direct reading of the available documents. Later in the document, this allows for the employment of innertextual references, such as W2's "I refer to what is written in the police-record." (compare with section 8.3: economisation of information-processing).

The bulk of the textual-structural transformations consists of DISPLACEMENTS, which are removals of discursive elements or sequences to places where they had not been before. Displacements therefore "break" the original sequential order of the trial. The effect is that the text of the official trial-record shows 'flaws' in comparison with the sequence of the trial. For example, the author achieves structural inversion by first splitting and then recombining the textual elements:
a. One of the more common displacements is the SUMMARY which contracts a repetition of (procedural) steps into one. The trial-record for example speaks of the following: "The politierechter gives, after each of the witnesses has given his testimony, the opportunity to the public prosecutor to ask the witnesses questions and to make remarks with regard to the testimony given by each of them." The position of this procedural step in the sequence of the trial-record suggests that the judge postponed the granting of a speech turn to the public prosecutor and counsel until after the termination of the interrogation of the second witness. However, during the trial, the judge performs the same procedural step twice, namely in 290 (after the interrogation of the first witness) and in 452 (after the interrogation of the second witness). The clerk thus contracts two identical procedural steps, and gives the contracted sequence a new place in the newly constructed textual structure of the trial-record by means of the addition of "after".

The procedural granting of a speech turn to the defence-counsel and the defendant is summarised in the same way: "The opportunity is given to counsel and defendant to ask the witnesses questions and to confront the witnesses and their statements with that which may serve/support the defence." This phrase summarises trial-sequences 291 and 490.

b. A SUMMARY also appears with regard to other repeated procedural steps, namely in the occasion where the clerk reports the identification of the first two witnesses ("This witness then states, like later witness Vijzel, each called independently, each for himself to the questions of the politierechter name, christian names, age, profession, address as is written below, certifies not to be a relative or related by marriage."

Many of the textual-structural DISPLACEMENTS are either ADVANCEMENTS or DELAYS. "Advancements" relate to the registration of information in a
sequential position in the trial-record which differs from its sequential position in the order of the trial: the information has been given an advanced position. Naturally, the "delays" establish the opposite category, and relates to the registration of information in a sequential position which follows later than its sequential position in the trial.

1. The DELAYS occur with respect to the following trial-sequences:
   a. In 19 of the trial the judge asks the defendant to confirm or deny the contents of the charge (following the presentation of the charge by the prosecutor in 11-15, and an informal exchange between judge and defendant in 15-19). However, in the trial-record, the denial of the charge by the defendant succeeds after the recording of other elements, namely the presentation of the charge, a list of seized goods and witnesses by the prosecutor, the addition of a third witness, a brief announcement by the judge of the documents following the judicial inquiry (crime-sheet and systematic overview of police-record). The registration of the defendant's denial of the charge succeeds the series of formally registered procedural steps.
   b. Delayed in the text is also the registration of the calling of the first witness: in the trial it succeeds defendant Niehe's denial of the charge (20) and the official addition of a third witness (21-26), but in the trial-record it succeeds the registration of the presentation of victim/witness Vijzel as offended party, the defendant's resistance against the financial claim on grounds of his denial and the procedural steps preceding the interrogation of the (first two) witnesses. Consequently, also the recording of the separation of the witnesses is delayed in comparison with the sequence of the trial (28-30). The sequence in the trial-record about the witnesses also contains an INVERSION of phrases with regard to those performed in the trial: in the trial-record, the calling of the first witness precedes the separation of witnesses, as in the trial-record it is the other way around.

2. The structural ADVANCEMENTS occur with respect to:
   a. The judge's question addressed at the prosecutor whether he has any other witness to present (21-22; answer 22-25) is inscribed in a sequential position which precedes the denial of the charge by
the defendant, whereas during the trial it is performed after that; this runs parallel to the delay of the calling of the first witness.

b. The interaction surrounding second witness/victim Vijzel's performance as offended party, and the estimation of the damage are inscribed in a sequential position which precedes the interrogation of the first witness, whereas during the trial it occurs after the judge has concluded the interrogation of the second witness (the same Mr. Vijzel) (451) and granted the speech turn to the prosecutor, who turns the possibility of damage-compensation into an issue (452-489). Naturally, this delay runs parallel to the delay of the written registration of the calling of the first witness.

Advancements and delays are thus each other's complements and constitute a textual inversion. The "remoteness" of the inverse relation between oral (trial) and written (trial-record) sequences varies. "Long-distance" inversions are for example the textual displacements which we just discussed, namely when an interactional sequence is lifted out of the middle of the trial sequence and positioned somewhere at the beginning of the document. "Short-distance" inversions are inversions of phrases belonging to the same sequence in the original (con-) text. Two of these "short-distance" inversions occur in between the trial and the trial-record, namely:

a. After the third witness has revised his testimony under threat of a perjury-procedure (742-765), the judge asks the defendant whether he would like to ask his father questions about that (766/767). No answer follows, after which the judge decides not to execute the perjury-procedure (767/768), 'conform the decision of the prosecutor (760/761). However, in the trial-record the opportunity for the prosecutor, defendant and counsel to ask the (third) witness questions succeeds the decision to cancel the perjury-procedure.

b. An angry, agitated discussion between the defendant and the third witness results in the seizure of an opportunity by the judge to continue the interrogation of the defendant about his personal, possibly psychological motives to damage cars with courting couples. The judge asks the defendant whether he objects to courting behaviour in cars, which is denied by the defendant.
Related to that subject, the judge asks the defendant whether he often sets out on his own (implying the suggestion that if the defendant is the perpetrator, his wife is probably ignorant of his crimes; 824/825) and what the age of their child is (825/826). In the trial-record however, the trial-sequence 824-826 is reversed with sequence 807-822: "I hardly ever set out on my own. My child is almost two years old. (<--- > I don't object to courting in cars."

"Ik ga bijna nooit alleen op stap. Mijn kind is bijna twee jaar oud. (<--- > Ik heb niets tegen vrijen in auto's.")

All the other speech acts performed in the course of the trial maintain their sequential position within the textual order of the trial-record. However, stable sequential positions do not exclude discursive transformations, such as the selection of the more "significant" details.

One of the most striking transformations in the "passage" from oral to written discourse is the translation of the performance of procedural steps or requirements during the trial into the language of the law. The legal statutes which prescribe the mode in which the trial ought to be conducted constitute as it were an algorithm for the trial-proceedings and for the recording. In fact, even with a few handwritten notes available the clerk should still be able to write a fairly elaborate trial-record on the basis of these procedural statutes.

This transformation, or the "re-translation" of common into legal-professional language, is visible in the integration of legislative formulae in the text of the trial-record. The procedural statutes (Dutch Code of Criminal Procedure: "Sv") employed by the clerk in this case are:

- Article 278 Sv: the term "uitroepen" ("to announce") is taken from the statute "The chairperson initiates the trial-examination by having the case announced"; the term reappears in the phrase "Announced is the case against the defendant to be mentioned."). The same statute which requires that the chairperson of the trial asks the defendant about name, christian names, age, place of birth, profession and address, the formulation of which (together
with a sub-clause derived from Article 272-2 relating to the presence of the defendant at the trial) is inserted in the phrase (trial-record) which contains the data about the defendant's name, date and place of birth and address. Finally, the statute instructs the chairperson of the trial to warn (admonish or instruct) the defendant to pay attention to what "he will hear"; this phrase is almost entirely ADOPTED by the clerk in his record, except for SUBSTITUTION of "he" (relating to chairperson) with "the politierechter", and "him" (relating to the defendant) with "defendant": "The police-judge admonishes the defendant to pay attention to what he will hear...") is a formal translation of the phrase "Ah:m you just have to pay careful attention in the case, that is clear."; 6/7).

- Article 280 Sv: The presentation of the summons or charge, the list of seized goods and witnesses by the prosecutor has been LITERALLY STATED in the terms of this statute, except for a small ADDITION ("good which has not yet been returned") and a small INVERSION. The clerk also OMITS a fragment from the statute and INVERSES the sentence-order of the statute.

- Article 297-4 Sv: The formulation in the trial-record "The politierechter orally communicates the brief contents of the files of the judicial inquiry, among which ..." contains elements of the statute, which says "The reading of files may, (...), be replaced by an oral communication of the brief content by the chairperson." The integration of the formal definition enshrines: a substitution ("chairperson" becomes "politierechter"); a separation of "oral communication" (becomes "orally communicates"); and a specification of the nature of the files. The transformation which the trial-record constitutes in view of the trial is that this procedural step is CREATED on paper.

- Article 326-2 Sv: Throughout the document of the trial-record, one regularly finds the formulation: "X (....) states - factually represented: ...", which corresponds to a statutory requirement that the trial-record ought to contain "the factual content of the statements of the witnesses, the experts and defendants." The legal formulation appears 9 times throughout the trial-record, of which 5
times to the statements of the defendant, 3 times to the statements of the witnesses, and once to the plead of the counsel. These formalistic introductions of the various narrators are not "translations" of speech acts performed during the trial, but additions which structure and explicate the narratorial shifts (substitution for the visible and audible change during the oral courtroom-situation).

- Article 332 Sv: The formulation of this article is employed for the description of witness Vijzel as the offended party. The wording of the phrase in the trial-record which describes the relevant trial-episode is not a carbon-copy of the wording of the statute, but lexical items have been INTEGRATED in the formulation of the following phrase: "who states to join in this case as offended party with regard to the damage, as a result of that what the defendant has been charged with, suffered damage and to the amount of Dfl. 1500.=." The phrase contains the statutory lexical items: "the offended party" ("de beleedigde partij"; "in this case" ("in dit geding") and "to join" ("voegen"). The transformation of the words employed during the trial is considerable, because there the formalised, statutory terms are absent, except for the term "offended party" (462/463).

- Article 283 Sv: This statute arranges the separation and calling of the witnesses (those who are not first interrogated leave the courtroom temporarily). The clerk exploits the formulation of this procedural statute twice, namely first for the description of the witnesses Waterplas and Vijzel, and later for the calling of witness Niehe senior. The copy is almost LITERAL, with a few exceptions: the word "chairperson" in the statute is REPLACED by "politierechter" in the trial-record; a sub-clause is ADDED, namely the witnesses "who have appeared in the courtroom"; a specification ("the first ones") in the statute is replaced by "the first witness" in the trial-record; the archaic formulation of the law is adapted to the present style of writing. The employment of a statutory formulation for these events again implies a formalisation of the trial-proceedings (26-31).
Article 284 1 and 2 Sv: This procedural statute arranges the identification and registration of all personal data of the witnesses and their taking of the oath. The formulation of this statute is ADOPTS by the clerk, with the following exceptions: the trial-record OMITS the agent who conducts the questioning about the personal data and the administration of the oath ("the chairperson"); it SUBSTITUTES "the chairman" by "politierechter"; it ADDS a textual organiser ("as is written below"); it PARAPHRASES terminology "administers the oath" becomes "takes the oath" since the form has changed from the activity of the chairperson to that of the witness; it ADDS a summary of the rule of the law ("in a manner prescribed by the law"); it ADAPTS archaic statutory language to a more common style. The wording of this statute is employed twice in the record, and one again implies a formalisation of the trial-proceedings (31-42; 301-317).

Article 284 3 Sv: This article arranges the order of witness-interrogation and is integrated by the clerk to describe the divergent sequence of interrogatory options in relation to the third witness (witness of the defendant). The changes taking place via à vis the statutory text of this article: CLAUSE-SEPARATION (the conjunctive clause "and after that interrogated by the chairperson" becomes the main clause in trial-record; "the chairperson" is REPLACED by "the politierechter"); "and his counsel" is ADDED to "the defendant".

Article 285 1 and 2 Sv: This procedural statute arranges the order in which the witnesses may be questioned after they have given their statement. The clerk makes use of the formulation of this statute twice, once in relation to the questioning of witnesses of the prosecution Waterplas and Vijzel (first the prosecutor and then the defendant/ counsel), and once in relation to the questioning of the witness of the defence, Niehe senior (first the defendant/counsel, and then the prosecutor). The formulation employed by the clerk is almost literally the same as the formulation of this procedural statute, except for the ADDITION of "the politierechter gives the opportunity to ..."; a SUBSTITUTION of "the chairperson" by "the politierechter"; the PLURALISATION of the lexical items referring to the witness (the clerk's note refers
simultaneously to the two first witnesses); the RE-COMBINATION of the clauses in the statute (Article 285-1 Sv mentions that the prosecutor is given the opportunity to pose questions, whereas Article 285-2 Sv mentions the opportunity for the prosecutor to make remarks; these subclauses are CONTRACTED in the clerk's notes); and finally, the ADAPTATION of archaic statutory language to common language.

- Article 293 Sv: This procedural statute arranges the option for the court to demand an inquiry into perjury when a witness is suspected of lying to the court. Although the clerk INTEGRATES some vocabulary in the trial-record ("inquiry"; "perjury"; "demand (-ed)") , the formulation in the trial-record is not a replica of the statute.

- Article 311 Sv: This statute arranges that the prosecutor presents his/her requisitory after the interrogations have been concluded. Similar to the employment of vocabulary from Article 293 Sv above, the clerk INTEGRATES lexical items for the recording of the requisitory, such as: "speaks" ("woord voeren"); "reading over"; "charge"; and "puts in to the court". "The court" is SUBSTITUTED by "the politierechter". Article 311-4 which arranges the defendant's "final word" (laatste woord) has also been employed in the record, with the exception of an ADDITION ("and his counsel") and an OMISSION ("on penalty of nullity").

- Article 345 Sv: This is the procedural statute which arranges the termination of the trial-examination by the chairperson and that the court announces its verdict orally and immediately, or that it announces time and day at which the court will give its verdict. The "politierechter" gives a verdict almost without exception immediately after the closure of the trial-examination, which also happens in the case Niehe. Again, the clerk's recording is not a replica of the statutory formulation. Instead, he integrates the lexical items provided by the law, such as "declares the examination to be closed", which is a PARAPHRASE of "is declared to be closed by the chairperson"; "orally", which is kept IDENTICAL; "the chairperson" is SUBSTITUTED with "the politierechter";
"verdict" ("uitspraak") is PARAPHRASED as "verdict" ("vonnis"); and "announced" is PARAPHRASED as "to give" ("te zullen geven").

The official trial-record is therefore penetrated and largely pre-formulated by the wording of various applicable procedural statutes. This begs the question whether there is anything new under the horizon: what does the trial-record add to the initial description of the case in the police-record? Why does the legal institution go through the effort to unravel a secluded legal language when it re-translates it into that same secluded legal language?

In the remainder of this section, we will examine the given-new-structure of the information which is registered in the trial-record in order to know whether the trial fulfils a façade-function or not. Given information is information which is derived from the case-dossier and oralised during the trial. New information is information which cannot be traced back to the documents, but which is for the first time produced during the trial. The proportionalisation of given and new information in the trial-record indicates whether this document adds an information-surplus to the already available knowledge about the crime:

1. The first narrative in the trial-record is based on the interrogation of the first witness, mr. Waterplas, who was one of the police officers involved in the initial inquiries into what has become the "Niehe"-case.

a. The first clause records Waterplas's narrative that his colleagues of the local police-force in Zeligem told him that they had encountered the car of the suspect on ((date)) at around ((time)) with the registration-number 73-UR-55 at his home in Zeligem and that the engine of the car was still warm and that the mud was still dripping from underneath that car (ref. trial: 268-289). This clause records the response of Waterplas to questions of the judge in which given information is integrated. However, the information that not Waterplas, but his colleagues first noticed the suspect's car is new information. In the remainder of the judge's interrogation of witness Waterplas, the judge's questions are consistently based on given information: the information which the judge derives from the police record is confirmed by the
witness. The registration of his answers in the trial-record does therefore in general not add new knowledge about the case.
b. The second paragraph of Waterplas's narrative is partly a summary of an interrogation-sequence; the questions and answers mainly serve to check the information in the police-record. The summary therefore consists of given information.
c. The trial-record continues with a phrase about the the exchange between the judge and the witness about the truncheon in the boot of the car: this is also given information.
d. New information is exchanged and subsequently recorded when Waterplas claims that the colour of the paint which was found on the truncheon (blue) matches the colour of victim Vijzel's car. This information is unelicited. New information is also recorded about the fact that the technical inquiry branch did not want to draw the conclusion that the matching of the colours meant that the owner of the car was the perpetrator of the crime. This information is also unelicited.
e. Given information is exchanged and recorded in relation to the identification of the suspect by witness/ victim Vijzel and his fiancée. The information is pre-empted by the question of the judge.
f. The final phrase of the paragraph which records the interrogation of witness Waterplas is not only ungrammatical but also an improper reconstruction. It wrongly indicates the identifier of Niehe's clothes. The question of the judge addressed at the defendant about the clothes which he wore at the time of the crime operationalises given information.

2. The second narrative in the trial-record is based on the interrogation of the second witness and also victim, Mr. Jos Vijzel.

a. The first paragraph of this narrative registers Vijzel's identification of defendant Niehe during the trial. The basis of the information in that phrase refers to trial sequence 370-325, and consolidates given information (Vijzel's identification of the same man in the police office). The consolidation of the given information becomes apparent from the clerk's use of the word "positively" ("pertinent").
b. The trial-record then 'tells the story' of Vijzel's experience. The majority of phrases in this paragraph is based on storytelling during trial which is not fragmented by the judge's questions. Although the core of Vijzel's narrative account may be known from the dossier, most of the information he provides is not pre-empted by the judge. **Given information** is consolidated only in the first three phrases: "I was at a parking-place with my car. I was with my fiancée. All of a sudden the car was hit.", referring to the trial-sequence 320-326. Vijzel's revised allegation, namely that there were two perpetrators who both hit his car, naturally constitutes **new information**.

c. The remainder of the paragraph is a registration of information which is predominantly volunteered by the witness (elicited by open questions) and which may hence be characterised as **new information**. However, the wording which the clerk employs to describe the narrative of the witness is invariably pre-empted by the wording of the judge's questions.

An obstacle in the "given/new"-distinction is that "new" information becomes "given" in the course of the trial-proceedings. Besides, "new" information may result from inferences drawn from given information. This opaqueness complicates an empirical comparison between structures of pre-knowledge and the subsequent gaining of knowledge, and the recording thereof. The complication increases when the police-record is absent in the dossier, as in the case Niehe: it obstructs a method to compare the initial available information about a case (the police-record) with the "output"-information (the trial-record).

8.5 Conclusions

The trial-records is a summary of the trial, and therefore omits various 'details'. A case-study of three handwritten trial-records has revealed that the clerk economises the registration of the verbal exchange: s/he records the matters which have not (yet) been mentioned in the police-record or other documents contained in the dossier, such as procedural matters, the "up-to-date" personal circumstances of the defendant, and matters which diverge from or contrast with the contents of the police record (such as the denial of the charge or the revision
of testimonial evidence). The contents of the trial-record are therefore complementary to the contents of the dossier, which is integrated in the interrogation during the trial. This reveals simultaneously that the clerk's selection is based on a selection (selective processing of documents during the trial) of a selection (chanelling of information through questions of the police).

The trial-record is furthermore characterised by the uptake and registration of statements which have been elicited by the judge (or other official interrogator), although there are a few exceptions, for example when the defendant spontaneously produces a statement which is considered to be relevant by the clerk. We are aware of the possible lack of distinction between registered statements which were or which were not elicited: indeed, the performance of most statements directly or indirectly follows elicitation. Clerks also tend to record statements which are repeated, or statements which consolidate possibly contested evidence. Furthermore, the clerk supresses the evaluative and argumentative embedding of statements in favour of an emerging factuality. This means in particular that the clerk omits value-statements and underpinning reasons (including the supporting arguments in the Prosecutor's requisitory, the counsel's plead and the judge's motivation of the verdict). The clerk also omits moralisations, although the effect of these, such as the demonstration of remorse, is registered in the trial-record: the performance of the legal agents during the trial is to a high extent concealed in the trial-record, while that of the defendant and possibly witnesses is highlighted.

Significant is the accomplishment of sequential flaws when an official trial-record is constructed. The narrative coherence of the trial, especially established by a question-answer-pattern, is first decomposed because of the clerk's selection-rigour, and then recomposed. The "narrative" in the handwritten trial-record is a linear enchainment of selected narrative statements (parallel to the sequence of the trial), whereas the official trial-record constitutes a hierarchical textual organisation (diverging from the sequence of the trial).

Finally, the analysis of an official trial-record demonstrates that procedural steps are integrated ex post. The clerk also exploits the formulation of procedural statutes (Code of Criminal Procedure) for the recording of the trial-protocol in order to minimise the gap between
the precise wording of the law and the fragmented narrative performed during the trial. In terms of knowledge and information, the official trial record does not add much to the already existent documentation, although unelicited new information is generally registered if it contributes to a technical insight in the crime. This finding is consistent with the function of the "politierechter" trial, which is to check and verify the assembled evidence rather than to find new evidence.
1. This "double" layer of discursive reference becomes apparent from both the trial as well as the trial-record: the clerk decides whether to register a) the information which is quoted during the trial but already mentioned in the dossier and b) the normative evaluation of quoted information during the trial.

2. The prosecutor or counsel must have requested an official trial-record not later than three months after the judge's decision (Article 378 2-b of the Dutch Code of Criminal Procedure).

3. The original Dutch text sounds: "De politierechter geeft, nadat elk van de getuigen zijn verklaring heeft afgelegd aan de officier van justitie tot het stellen van vragen aan die getuigen en tot het maken van opmerkingen ten opzichte van de door elk van de getuigen afgelegde verklaring."

4. The original Dutch text sounds: "Aan de raadsman en de verdachte wordt de gelegenheid gegeven de getuigen vragen te stellen en tegen elk van de getuigen en hun verklaringen in te brengen wat tot verdediging kan dienen."

5. The original Dutch text sounds: "Deze getuige doet daarop, evenals later getuige Vijzel, ieder afzonderlijk opgeroepen, ieder voor zich op de vragen van de politierechter opgave omtrent naam, voornamen, leeftijd, beroep, woon- of verblijfplaats zoals hieronder is vermeld, verklaart geen bloed- of aanverwant van de verdachte te zijn."

6. The original Dutch text sounds: "en legt vervolgens op de bij de wet voorgeschreven wijze in handen van de politierechter de eed de gehele waarheid en niets anders dan de waarheid te zeggen."
CHAPTER 9: GETTING RID OF CONTRADICTIONS

9.1 Introduction

It is an "idée fixe" to presuppose that the series of narrative reports constituting the testimonial evidence in a legal case are mutually corroborative on every account. In particular the "details"—whatever we are prepared to understand by them—of the narratives are seldom required to be identical. Evidence obtains its convincing character as long as an acceptable degree of narrative coherence between the red lines running through the narratives can be demonstrated and justified. However, the actual decision whether two or more narrative accounts are adequately coherent is a matter of interpretive judgement and of discursive strategy.

Since it is the case that witnesses perceive an event from different perspectives, with different intensities of attention and knowledge, and with divergent prejudices and assumptions, their narrative accounts invariably show discrepancies. In a wider context, Kress and Hodge (1988: 161) claim that a competition of definitions of truth and reality should be the standard for a 'normal' state of affairs: the single inevitable outcome is merely a dream. But in the legal discourse it is a formal requirement that these discrepancies be removed or solved before a legal decision is made. Preferably, as a matter of simplicity, a legal decision should either be based on the arguments supported by the "factual material" which is embedded in one narrative only, or alternatively on the arguments raised by two or more identical or maximally coherent stories. This suggests that the legal decision is based on a selection of a narrative between two or more rival narratives.

As we argued in chapter 4, the mutual coherence between two or more narrative accounts relies on a set of interpretive-pragmatic judgements. Coherence or incoherence are not textually inherent features; instead the interpretive community assumes its presence or absence when confronting texts or conversational contributions.

It is for that reason that we not only regard the "discovery" of coherence and/or incoherence as the result of the active impetus of pragmatic assumptions, but more importantly, that we approach the encounter of a solution for discovered narrative incompatibilities as a
widely moving discursive strategy which ultimately consolidates the emergence of an overall narrative coherence.

This discursive strategy sets out to achieve a general dissolution of established states of ambiguity, discrepancy, contradiction or incompatibility. In practice, this means that the agents in the legal discourse commit themselves to a transformation of established narrative heterogeneity of sense into a homogeneity, and that in that process of "depluralisation" legal agents employ various strategies to accomplish that goal. The employment of these discursive strategies does not coincide with any particular moment or phase within the legal procedure. The "recherche á la cohérence perdue" is a continuous discursive effort to restore the narrative imbalance caused by the multiple registration of narratives about the crime.

Ideas about the establishment of a narrative coherence in testimonial evidence - albeit defined in different terms - have been put forward by Caesar-Wolf (1984): she reviews a civil procedure about a car-accident and mentions the theoretical pre-structuration of proof ("Beweiserhebung"). The author claims that the assumption or presupposition has an important role to play: matters which are supposed not to be attacked or criticised in between the parties are silently validated, that is, without devoting an explicit discussion to these matters. In contrast, the contested aspects of the evidence often form the lacunaes in the thematics of the fact, enforcing the devotion of an explicit discussion during the reconstruction of the fact. Caesar-Wolf continues with the claim that the contrasting assertions of the parties function as hypotheses, which are later to be confirmed or refuted (see also Hoffmann 1989: 171).

Indeed, this finding seems highly plausible. But can the limitation of the devotion of priceless court-time to anticipated disagreement not also be explained by the constraints of the legal-institutional process-economy? In other words, is it perhaps a self-evidentiality to claim that the argument in court centers around the issues which one expects to be problematic? We would cautiously endorse Caesar-Wolf's suggestion that all seemingly compatible narrative statements of the parties are passed without too much argumentative amuck. But on the other hand we are reluctant to accept a), the predictable certainty with which all incompatible or contestable narrative statements indeed become the subject of legal argument (i.e. perhaps not all conflicting narrative statements are voluntarily turned into a topic of (public)
legal discussion, unless there exists considerable pressure from one of the parties); b). the predictable certainty with which all compatible, so-called non-conflicting narrative statements are indeed tacitly validated or justified (i.e. perhaps some narrative statements which do not establish an immediate danger to the construction of a global narrative coherence are believed to be problematic by one or more parties).

Therefore, our presupposition is that potential narrative incompatibilities (discrepancies, ambiguities, or any comparison which results in the lack of complete identity) are "dissolved" in the expectation that no party will bother about it. The presumption of narrative relevancy and the anticipated acceptance of that are thus crucial criteria for the decision whether one should or should not explicitly discuss the narrative details of the testimony which fails to corroborate or support the narrative details of the other testimony. The imaginable or hypothetical "master-narrative" about which we spoke in section 4.5 thus forms a kind of "bottom-line" for the tuning of narrative relevancy.

In other words, unlike Caesar-Wolf (but nevertheless in a similar line of thought), who holds that evidential or narrative statements each become an equally important hypothesis within the argumentative domain, we will hold that there is a basic hypothesis which underlies the selection-process which accompanies the process of narrative crime-reconstruction. The process in which the judge (or any other legal agent) attempts to "get rid of contradictions" does therefore rely on a (binary) choice between different interpretation-alternatives, as Ivainer (1988: 85; 138) seems to suggest, but on an argumentative exploitation of plausible elements across the various competing narratives. The basic narrative hypothesis or master narrative which forms the reflective drive in that exploitation is kept latent¹.

However, this basic narrative hypothesis cannot be an arbitrary amalgamation of narrative elements. The hypothesis, or narrative presumption, is constituted on the basis of a preknowledge about the various elements which form the crime-story. In general, this may lead to a choice in favour of one of the narrative accounts which present themselves in the criminal dossier. The favourite narrative will be taken as a starting-point for further reconstruction and argument, after which the elements of the other narrative accounts can be "folded in".
Caesar-Wolf (1984: 52) claims that the narrative produced by the defendant is generally taken as a point of departure for further elaboration. Nevertheless, we would like to tone down the importance of the defendant's narrative as an interpretative nexus for narrative reconstruction. From our corpus it may be cautiously demonstrated that when defendants deny their involvement in the crime of which they are accused, or when they display a considerable loss of memory about it, the judge employs testimonies as the narrative which is "more reliable" or "more detailed". Hence, the cases in our corpus do not bespeak a specific preference among judges to cling to the defendant's narrative as a point of departure for the reconstruction of the crime. Testimonial evidence produced by police and witnesses seems to be taken quite seriously, although in some cases it is ignored (see section 9.7). A comparison of cases seems to indicate that the more elaborated the defendant's narrative is (and the stronger the coherence between the statements of the defendant during the trial and his/her statements to the police), the less need there is to take recourse to statements produced by police and witnesses.

Whilst abstracting from potential preferences for the one or the other narrative, we believe that the discursive contribution of particularly the judge sets out to harmonise the conflicting narrative versions. The judge will simplify the making of a decision by reducing possibly antagonistic interpretations of the event under the same denominator:

\[
\begin{array}{c}
I_1 \\
I_2 \\
I_3 \\
* \\
I_n \\
\end{array} \rightarrow IG
\]

A process in which the plurality of sense is made homogeneous, is prepared and supported by the other legal agents operative at some stage in the procedure: they are responsible for screening, filtering and ordering the available textual material. The judge will seldom go back to the origins which lie behind that textual organisation, but will nevertheless actively contribute in the harmonisation of testimonial evidence by means of his/her leading part in the interrogation.

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The task of the judge, whose influence is most dominant at "the end of the discursive line" may well be compared with that of the "fitter" or "assembler" of cinematographic material. The montage of any film involves a transformation. Kress and Hodge (1988: 175) claim:

"Such a montage of shots is a transformational sequence of the same kind as the sequence of utterances in spoken discourse, invoking semiosic transformations in the same way."

In the remainder of this chapter we will examine the kind of discursive strategies employed by the legal agents in different stages of the trial to "get rid of contradictions". For each of the six cases which we have selected for analysis, we will ask the following questions:

1. What is the identity or discrepancy between the different statements? Prior attention will be paid to the assembled narratives in the criminal dossier. A methodological problem which we should acknowledge is the neutrality with which we establish discrepancies: most of these only become visible when explicitly brought forward during the trial itself. Besides: the establishment of (in-)coherence is said to rely on the interpreter's judgement; therefore, the discrepancies found by us may not be agreed upon by others.

2. What is the strategy of the judge with regard to the reconstruction of the narrative statements? Does the judge explicitly face established discrepancies, or does s/he ignore these? Is the judge able to compromise discrepancies, or does s/he more or less favour one of the narratives whilst backshadowing others? The trial-transcript will be the basis for the reconstruction of these strategies.

3. What are the interventions of the remaining agents in attempting to dissolve established discrepancies? Do they assist the judge in the formulation of a homogeneous narrative perspective or do they consolidate their own competing narratives by arguing an interpretation of reality which is consistent with their role-definition? If the defendant sees through the lack of identity between the narrative statements, does s/he receive a chance to exercise influence on the (re-) formulation of his/her personal view?

The final problem, which will only be dealt with in the conclusion, sets out to close the gap between our empirical reconstruction of strategic discourse for the dissolution of evidential discrepancies and the idea of the basic narrative hypothesis enunciated above.
9.2 Drink and Driving

Probably the least problematic of all cases is Van Straaten/drinken/politierechter/25a/tramdb161189 (see Appendix II). The reason seems to be that the conviction of any driver of a motorised vehicle who is charged with the excessive consumption of alcohol often proceeds without the presentation of an actual narrative in the criminal evidence. The mistake by the defendant is "measured" rather than "narrated". The weighing of prejudice and subjectivity in the reconstruction of this offence is therefore largely superfluous, although there may arise disagreement concerning the reconstruction of procedural steps (which happens in this case). The only faint disagreement with the allegations made by the police is expressed by the defendant during the trial. We discussed this disagreement in 7.3; the nature of this disagreement does not amount to a real challenge of the proof of the first charge. The defendant remains fairly silent during the reconstruction of "the facts" and makes no further attempt to refute the judge's presentation of the evidence.

The 'simplicity' of the narrative reconstruction of this case may furthermore be explained by the fact that competing interpretations are absent. The only available narrative (in both charges) is the police report, containing a brief reconstruction by the police officers of Van Straaten's apprehension; they are the only witnesses in both occasions. A narrative elaboration also lacks because the suspect (this is the case in the first charge; in the second charge the suspect only says something about the amount of alcohol he consumed). The consequence is that there is no opportunity for us to 'compare' narratives in this case.

The only discrepancy in the case is caused by a conflicting interpretation and explanation of Article 54-3 Dutch Code of Criminal Procedure. The problem is raised by the defence counsel, who has noticed that the responsible police officers have not crossed the compartment indicating the presence of an deputy-prosecutor, which is a formal requirement when a suspect is arrested against his/her will (with the idea that the interests of the suspect are monitored and protected). However, during the trial the judge and public prosecutor dedicate themselves to undermining this objection, because the suspect was -according to them- not involuntarily arrested, but voluntarily apprehended (in the latter definition of the situation, the presence of
a deputy-prosecutor is not required). The discursive transformation of "arresting" into "apprehending" has also been discussed in chapter 7. The judge concludes the trial by establishing a "consensus" with regard to the adequacy of the judicial inquiry (539/540; not transcribed). No controversy with regard to the reconstruction of the event is raised in this case.

9.3 Stolen Bicycle

The criminal dossier in the case Sint/diefstal/politierechter/20b/ tramdb151189 (see Appendix II) consists of five statements, namely two of the suspect (one in which he denies the accusation, and another in which he admits to the accusation), the aggrieved party (the owner of the bike), and two witnesses (who were working in the street when the bicycle was seized). One of the most obvious discrepancies is that the statement of Mr. Venis (the aggrieved) lacks the information about details implied by the other statements. But that discrepancy can be simply explained by the variety of perspectives on the scene. The statements corroborate each other on the following issues:

- The suspect's second statement and Venis's statement are identical in their reference to a), the fact that the bike was not locked; b). the bike had a pannier-bag.

- The references in the statement of W1 (first witness) to time and action run parallel to references used by the suspect (in second statement) and Mr. Venis.

- The suspect (2d statement) and the witnesses each talk about the involvement of three men, albeit the character of the involvement is differently reconstructed (see below under discrepancies).

- The suspect (2d statement) and W1 both allege that of the three men, two were sitting on a bike and one was walking; they both mention the telephone-box; they both mention the fact that S (suspect) put his shopping in the pannier-bag of the bicycle and then cycled away with it.

- The suspect (2d statement) and W2 (2d witness) each refer to the drinking of alcohol; S speaks about a visit to a pub just before the event; W2 observes that the three men were "red-coloured" and that they were "clamorous", which attracted his attention in the first place.

- Mr. Venis and W2 both mention that Venis approached W1 and W2 to ask whether they had seen something; they also mention that "at that moment you (the police/mdb) arrived".
The statements mutually show the following dissimilarities:

- \(S\) (2d statement) and \(W2\) speak about the involvement of three men, but \(S\) (and \(W1\)) reconstruct the event as two men sitting on a bike each and a third walking, while \(W2\) says that the two men were both sitting on one bike.

- The statement of \(W2\) contains details not mentioned by any of the other narrators: he describes the colour of hair and the clothes of the three men; \(W2\) also narrates that he saw that when \(S\) tried to jump onto the bike of one of the men who was cycling, \(S\) failed and was almost hit by another bike at the time of the event.

Apparently, the mutual support between the statements is found to be strong enough to prove that \(S\) indeed stole Venis's bicycle. During the trial, there is no discussion about the discrepancies. The strategy of the judge is to rely on \(S\)'s admission that he indeed stole the bicycle, and to ignore the varying narrative details which do not immediately refer to the major action (\(S\) steals bicycle).

A possible state of narrative incoherence is caused by factors other than the statements of the four mentioned above, namely:

- during the trial (in 57/58), the judge explains to defendant Mr. \(S\) that the police was able to trace him and the bike thanks to the fact that \(W1\) and \(W2\) saw that \(S\) seized the bicycle. However, in their statements contained in the police record, \(W1\) and \(W2\) both express a lack of certainty when they are asked to identify \(S\) as the perpetrator. The judge thus closes a causational narrative gap by inserting her own explanatory presumption.

- because of the narrative gap between the arrival of the police at the spot of the seizure and the apprehension of the suspect; it remains obscure which indications were used to trace the suspect in his flat. The judge closes this narrative gap by postulating a self-evidentiality: "then later the police found a bike close to the front door of the flat" (64-66) and "with a lot of effort then/fo/fortunately the bicycle was recovered" (200/201). The repair in (200/201) could be an indication that the recovery of the bicycle was not as unproblematic as it is presented during the trial.

During the trial, the remaining agents (the defendant; the prosecutor; no defence counsel) do not exercise influence on the way in which the event is reconstructed. Like the judge, the public prosecutor ignores the existence of narrative inconsistencies. The defendant is not invited to challenge the judge's reconstruction of the event, neither does he take any initiative to do so. In fact, the defendant acquires
new information about the order of events: he did not know that the two road-workers were responsible for nailing him.

9.4 Broken Beerglass

Despite of the lack of documentation in this case, it is possible to reconstruct the contesting narratives on the basis of the judge's reconstruction during the trial. Exceptionally, the judge devotes a lot of attention to the discrepancies between the statements contained in the police record. The reason for doing so is fuelled by the defendant's failure to recall the details of the major action, namely his attack of a man with a broken beerglass. The event occurs in a crowded pub after the defendant has allegedly consumed 20 or more glasses of beer.

The judge establishes in 57 (not transcribed) of the trial that there is a lack of uniformity between the testimonies. To start with, the victim of this attack himself alleges that when the defendant struck him, the glass was still intact, but it was smashed to pieces against his right lower jaw (82-84; not transcribed). One of the established discrepancies hence centers around the question whether the glass was broken when the defendant hit the man with it (this is the allegation by two witnesses; paraphrased by the judge in 59-65 and 62-72) or whether it was still intact (allegation made by other witnesses, and paraphrased by the judge in 72-74). It is this dichotomy on which the judge will concentrate his reconstructive efforts, thereby narrowing down the scope of problematic questions which could have arisen.

Other discrepancies are mentioned, but not subjected to an argumentative discussion. Although the two witnesses who allege that the defendant struck the victim with a beerglass which was already broken agree on a). the observation that the defendant kept the glass in his right hand; and b). that the defendant smashed the glass against the edge of the table, they disagree on what part of the glass the defendant struck with and on exactly where the defendant hit his victim. W1 claims that D used the sharp splinters; W2 claims that D used the smashed beerglass. Furthermore, W1 claims that D hit the right side of V's throat (with the glass splinter), whereas W2 claims that D hit V in his face (with the broken beerglass). The remaining witnesses
who allege that the glass was not yet broken, claim that the glass was smashed to bits when D hit V against the right side of his head (85-87).

Obviously, the defendant makes no attempt to revise or refute any of these allegations, because he has previously stated that he has forgotten all details of what happened. The public prosecutor thinks there is no problem in proving that the defendant was the perpetrator and that his act may be qualified as an attempt to inflict grievous physical harm (176-178). Nevertheless, despite of the "uncomplicated character" of the argumentation, the prosecutor reminds the court of the established discrepancy between the four testimonies: he concentrates on whether the glass was broken or not before it was used in the attack. The other discrepancy, evolving around the question on whether the victim was hit in either his face or his neck (throat), is overshadowed by the concentration on the previous discrepancy. The result is the transformation of a disjunction (hit in either face or neck/throat) in a conjunction (hit in face and neck/throat) (183-187; not transcribed). The prosecutor then resumes and says that it is not so surprising that there are differences between the witnesses, "because when the witnesses, when they saw that, among which a couple of girls, a little bit panic-stricken, and then you always get these differences." (187-192). He thus suggests that it is a rule of experience (and does not forget to sinuate that female witnesses are more likely to be impressed with violence than men) that testimonies are divergent and hence minimises the complications resulting from that. The prosecutor's reconstruction of the main action decisively incorporates all the discrepancies discussed above, by either taking recourse to the use of euphemistic expressions ("with some force" ("met enige kracht"; 192/193); "somewhere in between ("er zo ongeveer tussenin"; 193/194) and again "some force" ("enige kracht"; 204), or to the conjunction ("which was broken or which broke" ("wat stuk was of stuk ging"; 194/195) and "a broken glass or a glass which is going to pieces" ("een kapot glas of een glas dat kapot gaat"; 203). The only real certainty in the evidence is the establishment of the victim's injury, namely "a deep incised wound" (195).

The judge demonstrates explicit doubt with regard to the question of whether the glass was broken or not broken before the attack. His disagreement with the prosecutor's minimalisation of that discrepancy becomes visible from a verdict of "not proven", but only for the part
concerning that one discrepancy. The judge adds that of the two competing interpretations, he prefers the version in which the witnesses allege that the glass was not yet broken when the defendant hit the victim (256-260). The other doubt or discrepancy is however dissolved by transforming a disjunction in a conjunction: the judge finds it proven that the defendant hit the victim in both his face and his neck/throat. This testimonial differences do therefore not reverberate in the final decision.

9.5 Alarm-Clock

The mootpoint of the case Ter Haar/heling/politierechter/15b/tramdhl41189 (see Appendix II) is the established contradiction between the statements of the defendant and two witnesses as made to the police (see for an elaborate analysis: section 7.2). In Dutch law, a suspect may never be convicted on his/her own confession only, neither may s/he be convicted on the basis of only one incriminating testimony (see section 2.4). Because suspect Marcel ter Haar denies having had the intention to illegally receive a stolen alarm-clock, two witnesses—in fact the thieves of the alarm-clock—are called to appear in court. It depends on the consistency of their incriminating testimonies whether the defendant shall be convicted or not.

Although Marcel’s denies illegal receiving of the clockradio, his statement and those of the twin brothers Karel and Kees also corroborate each other on at least a few points:

<table>
<thead>
<tr>
<th>W1 (Karel)</th>
<th>W2 (Kees)</th>
<th>D (Marcel)</th>
</tr>
</thead>
<tbody>
<tr>
<td>alarm-clock was given to Marcel</td>
<td>alarm-clock was given to Marcel</td>
<td>was given the alarm-clock</td>
</tr>
<tr>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>in exchange for a packet of tobacco</td>
<td>in exchange for a packet of tobacco</td>
<td>in exchange for a packet of tobacco</td>
</tr>
<tr>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>have not yet received the tobacco</td>
<td>have not yet received the tobacco</td>
<td>was going to give a packet of tobacco, but haven't given it yet</td>
</tr>
<tr>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>
The consistency between these narrative elements, or more precisely, the knowledge about them, is frequently 'tested' by the judge during the trial. This method is unique among the trials in our corpus, and presumably aims at checking whether those who are interrogated are accountable for what happened ("speaking the truth"). To see whether the accounts do not run parallel on paper only, the judge, assisted by the public prosecutor, asks a number of swift questions about names (20/21), the object of the 'transaction' (tobacco; 37/38; 97/98; 247/248), the realisation of the intention to offer tobacco in exchange for the alarm-clock (39/40; 245/246), the character of the transaction (96; 102/103; 163-166; 209/210), the initiative (105), the reason why Marcel asked for the alarm-clock (107; 109), the location of the conversation they had about the alarm-clock (205/206).

The discrepancies form the dominant theme of the argument in this trial. The discussion is centered around two issues, namely: a), was Marcel aware that the alarm-clock was a stolen one; and b), what was the moment at which Marcel knew that the radio alarm-clock was stolen? Although the testimonies of the two twin brothers are mutually consistent, they differ fundamentally from Marcel's:

<table>
<thead>
<tr>
<th>W1 (Kees)</th>
<th>W2 (Karel)</th>
<th>D (Marcel)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marcel knew that the clockradio was stolen</td>
<td>Marcel knew that the clockradio was stolen</td>
<td>At that moment I did not know that this clockradio was stolen</td>
</tr>
<tr>
<td>+</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>We told him</td>
<td>That was told to him</td>
<td>Later I heard from this lad (W1) that the radio was stolen</td>
</tr>
<tr>
<td>+</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

As we have already seen in section 7.2, the judge frequently intervenes to settle the contradictions, namely in: 64-66; 119-120; 131-137; 144-146; 150-151; 153-154; 156-161; 211-213; 217-220; 224-227; 240-243 (not transcribed here).

The public prosecutor admits that during the trial it has appeared that the accusation against suspect Ter Haar is difficult to maintain. At least the strongest incriminating evidence has lost its convincing
force, while it has become clear that Marcel did not know about the origins of the alarm-clock. Marcel's statements, who during the trial has insisted on his innocence, have not been opposed or refuted by the two witnesses, the public prosecutor argues. This latter argumentative strategy enshrines a transformation: although W1 has made it patently clear during the trial that Marcel was not informed about the origins of the clock, W1's refutation of his own previous testimony and clear substitution with a new one is now explained by the prosecutor as W1's "lack of opposition" to Marcel's statements. The prosecutor further argues that also the proof for the subsidiary fact cannot be given, because of the "half-hearted" statements made by the witnesses. Our view is that also in this case, the prosecutor minimises the meaning of an actual revision and subsequent replacement of a previous statement. The result of the prosecutor's argument is however desirable, namely that the evidence against Marcel is withdrawn, leading to acquittal. The defence counsel and the judge make no further attempts to "go through" the evidence once more, but comply with the prosecutor's argumentation.

9.6 Courting Couples

Also in this case we cannot compare the various statements assembled in the police record, because we have access to the post-trial documents only (similar to "broken beerglass" in section 9.4). This circumstance restricts us to the making of a comparison between the "quoted" written statements and their oral statements during the trial. Another comparison is possible between the statements made by the defendant and those made by the three witnesses (during the trial). The latter juxtaposition of statements results in the following picture:
We will not here discuss the anger which W1 (the police officer, Mr. Waterplas) arouses in D (defendant Niehe junior) with his allegation that D asked W1 to bring him back to his sister, because D said his car was there; D becomes angry because it has been clearly established during the trial that the car was in Zeligem (which is not where his sister lives). The defendant is apparently worried that his credibility suffers from that allegation.

The problem in general is that the collected evidence offers a rather convincing indication that defendant Niehe jr. was involved in the destruction of a few cars with courting couples. Niehe jr. denies any knowledge of the crime, let alone his involvement in it. Consequently, Niehe jr. does not produce a narrative, because there is nothing to tell about. The judge's strategies to obtain some form of narrative result in little or nothing: the first strategy sets out to move away from the charge discussed during the trial to a previous and similar conviction (with the aim to make a comparison: 575-607; 827-833); the second strategy sets out to clarify the defendant's motives (the judge posits the defendant's intolerance toward courting couples; 807-823). Both attempts remain unsuccessful, because the defendant refers the judge to his lawyer or otherwise denies his involvement. His mistake is that he does not produce a sound alibi either: he remains silent about his whereabouts during the evening of the attack. However, the immediate consequence of Niehe's attitude during the trial is that an actual "contradiction" between narratives is absent, or at least can only be imagined. The "discrepancy" which we have consistently put forward in the previous sections must therefore remain fictitious in this case.
The strength of the evidence against Niehe jr. can be demonstrated from the inventory below:

<table>
<thead>
<tr>
<th>CONTRA NIEHE JR.</th>
<th>PRO NIEHE JR.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. There was only one car key available; Niehe Sr. was at home; the car was seen somewhere; so it must have been Niehe Jr. who was on the road (157).</td>
<td>1. Niehe Jr. was at home (634; 639; 642/643)</td>
</tr>
<tr>
<td>2. The registration-number of Niehe's car (a red BMW) was written down by a witness (141; 430/431).</td>
<td>3. (it was muddy anyway; 662/663)</td>
</tr>
<tr>
<td>3. When the red BMW was found, the mud was still dripping off it (286).</td>
<td>4. (one cannot claim that if one only looks in the boot; 655/656; 657; 666/667); engine must have been cold because my son came home at 9.30 p.m. (658/659)</td>
</tr>
<tr>
<td>4. When the red BMW was found, the bonnet was still warm (275; 285).</td>
<td></td>
</tr>
<tr>
<td>5. A truncheon was found in the car (174/175; 267; 608/609); the colour of the paint on the truncheon strongly resembled the colour of the paint of W2's car (197-201); furthermore, the shape of the damage on W2's car indicated the shape of a truncheon (170/171; 177-190; 201-210).</td>
<td></td>
</tr>
<tr>
<td>6. Suspect Niehe jr. was identified by W2 and his fiancée (at the police station); during the trial without doubt identified by W2 (240; 370-377).</td>
<td></td>
</tr>
<tr>
<td>7. Suspect Niehe jr. may not have been home at the night of the crime (753/754; 759).</td>
<td></td>
</tr>
</tbody>
</table>

The evidence produced by W3 which is supposed to be favourable to the defendant, is partly ignored, partly transformed. W3's minimalisation of the finding that mud was still dripping off the red BMW when the
police checked it is put aside and not taken very seriously. The same happens with W3's ridiculisation of the police's finding that the engine was still warm (or the bonnet), while they were - according to W3 - only looking in the boot of the red BMW: according to W3, the police tells "a lie". Neither of W3's two objections are explicitly ignored by the judge and public prosecutor, but "silently ruled out". The focus of the court is therefore on W3's remaining statement (no. 1 above), which implies the claim that the defendant was at home at the night of the crime. According to W3, his son arrived home at 9.30 p.m. that night and never left after that. His argument is that he was home himself, and that the two live so close to each other (neighbours at a caravan camp) that he must have seen his son leaving with the red BMW. If it were true that the defendant never left the camp, the burden of proof on the incriminating allegations - argued by the prosecution - becomes obviously much heavier. Consequently, the mission of the judge is to remove this knotty point, in order to restore the previous consistency between the narratives of the two other witnesses (and the observations made by others).

After confirming that Niehe sr. sticks to his position, the prosecutor posits the convincing character of the remaining evidence, thereby arguing that W3 must be lying to the court (682/683). He suggests that the witness shall be accused of perjury (684) and that the perjury procedure will be realised (685). But his functions as a threat in the first instance. The judge then decides to act on the prosecutor's proposed tack, and elaborates the testimonies to which the prosecutor has referred (686ff). The judge predominantly relies on the identification of the BMW's registration number by a witness not present in court; this is - according to him - the strongest indication that not only the car, but also Niehe jr. were on the road, and not at home. The subsequent interrogation is pregnant with argumentative pressure from the side of the judge and muttering objections from the witness. A sequential reconstruction of that part of the interrogation results in the following picture:

Judge employs ARGUMENTATIVE PRESSURE by concluding that one of the witnesses, whether it is the corroborative couple W1/W2 or W3 himself, must be lying, and adds that the prosecutor's conclusion is that the only witness who is lying is W3 (690-692);
- Judge WARNS W3 that he can now withdraw his previous statement (equals the offer of a last chance and is an attempt to manipulate W3's position under the threat of a perjury procedure) (692);

- Judge INSINUATES that W3 is prejudiced, because only his son may profit from his falsehood (694/695)

- Judge SUGGESTS that W3 has seen that D left the caravan-camp after D has first come home (697)

- Judge REFUTES the relevance of W3's answer: the issue is not whether D came home at 9.30 p.m. that night, but whether D did or did not leave the camp again (699)

- Judge REPEATS his previous refutation of the relevance to reveal details about the time the defendant came home (9.30 p.m.) (699-701)

- Judge pronounces ULTIMATE WARNING: there has been a witness who wrote down the registration-number of the red BMW (701-703)

- Judge attempts to CONSOLIDATE his argument by asking W2 whether he has seen the registration number of the car as well; the judge SUGGESTS a part of the registration-number (MX), presumably while knowing has not seen the total registration-number; this may lead to the effect that W3 will get an uncomfortable feeling (e.g. loneliness) (707); the judge intensifies his effort to ISOLATE W3 by referring to the identification of D and the clothes he was wearing (708).

- The judge has failed in his attempt to press W3 to revise his statement and CONCLUDES that W3 lies (710-711).

- The judge WARNS W3 that the consequences (arrest for perjury) are for W3 to bear (711-714)

- The judge REPEATS the consequences and CONCRETISES them (717-719). This threat leaves W3 unimpressed (719).

- The judge DECIDES to take up the perjury-procedure (720-721); J also reminds W3 that it "is not the first time".

While waiting for officers to arrest W3, the judge asks the defence-counsel what the reason for W3's perjury may be. The defence-counsel does not want to be accountable for W3's statements (he very precisely confronted W3 with "the facts" before the trial started) (724-726). The conversation between the judge and the defence counsel runs at a professional level, at which the counsel seeks to foster understanding for his position (729-733). In the meantime, the judge and the prosecutor discuss the follow-up of the perjury-procedure: the prosecutor thinks there is enough evidence against Niehe jr., by which a return to a new judicial inquiry becomes superfluous (734-741). The
defence-counsel newly discusses the matter with W3 (741-749); W3 states that as far as he knows, his son did not leave; the counsel makes clear that there is a difference in saying that "X did not leave" and "according to me, X did not leave". Although this part of the conversation between the counsel and W3 forms a prelude to the transformation of W3's statement (see first diagram in this section), W3 sticks to his initial guns in 746/747 and 749, and maintains to do so after the judge INTERVENES in the conversation between the counsel and W3 (751/752; 753/754).

The judge's INTERVENTIONS in 750 and 752/753 are crucial, because they "feed" W3's reformulation of his statement ("I think so, yes").

The immediate follow-up of this cautious answer is the judge's CONCLUSION that W3 has now changed his statement: the judge calls his performance an act of "backing off" (754).

W3 refuses to accept the judge's definition of his performance: he is not "backing off", because he has seen his son coming home with his wife and kid (755-756).

Although this answer could potentially send the court back to square one, the judge RESUMES and CONFRONTS W3 with a CHOICE: can it be that his son left: yes or no (757/758).

W3 switches and says that he does not know: his son may have left or may not have left the camp (758/759).

This answer SATISFIES the judge, who REPEATS the latest allegation provided by W3 (761/762).

W3 then threatens to return to his original tack, by claiming that he can see his son leaving from a distance of ten metres (762/763).

The judge saves this change of tack by REPEATING W3's revised statement and again CONFRONTING with a CHOICE: do you stick to that statement, yes or no? (763-765).

The judge abruptly CONCLUDES this interrogation and announces the withdrawal of the perjury-procedure.

The transformation of a favourable allegation into an incriminating allegation is thus performed in a brief sequence of two major steps, namely a first step in which the judge makes sure that the witness sticks to the (new) formulation of his statement, and a second step in which the judge seeks confirmation of the witness's responsibility for that revised statement. Semantically, the transformation of W3's statement implies a shift from a strong denial (my son did not leave
after 9.30 p.m.) into a lack of certainty (my son may or may not have left the house after 9.30 p.m.). The consequence of this transformation is that now all the evidence turns itself against the defendant: a state of global narrative coherence has been accomplished.

Furthermore, mention should be made of an observation, namely that through the selective concentration on the solution of the question whether Niehe sr. had seen his son coming home or not, prevents this witness from elaborating a plausible alternative narrative (or at least, a narrative which is well-developed enough to compete with the narrative containing the incriminating evidence against his son). The witnesses who contribute to the narrative which consolidates the suspicion are given more chance to elaborate their version of the story (although W1 is somewhat guided by the judge's questions): unlike the interrogation of W3, there is far less rigid concentration on one (controversial) issue only.

But Niehe sr.'s statement does not produce the only argumentative difficulty in this trial. Another cardinal question evolves around the fact that Jos Vijzel, the second witness (W2), revises the original statement which he made to the police. Initially, he stated that he had seen two men, one of whom had certainly hit the car. During the trial, Vijzel alleges that he had not only seen the two men, but that both had been responsible for the creation of damage as well. This revision thus produces another discrepancy in the evidence. Although the judge wants to make very sure whether Vijzel "is telling the truth" (mention attempts and interventions by the judge), the revision of the statement itself does not necessarily constitute a danger to the hypothesis that Niehe jr. was one of the perpetrators.

The defence-counsel however attempts to challenge that lack of danger by pointing out the inconsistence and possibly resulting unreliability of the statements (491-516). The truth behind it is that Vijzel's new statement constitutes an obstruction to the defence-strategy which the counsel has in mind. The counsel plans to argue in his plead that Niehe's involvement in the actual infliction of the damage cannot be proved, since there were two men, one of whom -and Vijzel has not made clear which one- hit the car. Vijzel's revision paralyses that defence-strategy: the only conclusion which can be drawn from his revised allegation that both men hit the car is that Niehe must have been one of them. Perhaps contrary to our expectations, the judge gives the defence-counsel active support in questioning the
witness about this particular aspect (518-529): his opinion resembles that of the counsel, namely that Vijzel's revised statement is considerably different. However, this is the moment at which the prosecutor intervenes and proposes to render an alternative interpretation to Vijzel's inconsistency: it could be the case that what is written in the police record does not include all observations made by the witness (529-538). But the counsel interrupts to prevent the prosecutor from minimalising the meaning of Vijzel's shift (536-538). The judge proposes to examine this hurdle from another angle by asking the first witness (one of the police officers involved in the initial inquiries) what he knows about the interview in which witness Vijzel made his previous statement (538-540). Police officer Waterplas then suggests that the witnesses were very impressed by the event and therefore emotional at the time of the interview (540-545). The defence counsel is sympathetic to this ("I experienced something like this as well"; 550/551), but stresses the legal importance of his interjection (554-561). In his plead, the counsel brings forward that Vijzel's statement to the police should be preferred to his statement during the trial (1094-1102). According to him, sufficient proof of Niehe jr.'s involvement in the crime is absent: unresolved is the question whom of the two performed which action (1116-1117). The performance of this defence strategy has exhausted virtually all of the counsel's possible alternatives: unfortunately he cannot provide the court with a plausible counter-narrative.

The discrepancy resulting from Vijzel's change of statement is minimalised by both prosecutor and judge, albeit in different ways. The prosecutor, who employs a selection strategy to support his argument (requisitory) by limiting the domain of evidential issues to the place, time and character of the damage on the one hand and the involvement of the defendant on the other hand, plays down the counsel's critical note with regard to Vijzel's change of tack. "Sometimes there are impressions which are only invoked by questions: Mr. Vijzel was shocked at the time of the attack, which does not amount to telling an untruth, but to not telling the whole truth." In his motivation, the judge undermines the counsel's attempt to challenge Vijzel's statement: the judge pronounces his conviction of Niehe's involvement in the infliction of damage. His argument is that the two perpetrators have shared a responsibility, and the two are to blame for keeping
themselves anonymous. However, the judge admits that "this is the most difficult element of the argument."

9.7 Jansen versus Bertinus

The "Jansen versus Bertinus"-case (JaBe/mishandeling/politierechter/24b/tramdb101189) is undoubtedly the most well-documented case in our corpus (see Appendix II). The statements made by respectively suspect Jansen and victim Bertinus constitute the backbone of the criminal file. But the testimonies of six other people cushion the consistency of their statements. Ideally, we would compare the six testimonies with the statements of the major agents in the event. However, such a comparison would have to confined to a search for identical narrative fragments, of which there are only a few. Although the testimonies overlap, their major difference with the statements of the two major agents is that the former narratives only cover a part of the latter narratives (the majority of the six narratives relates to the end of the event). In other words, while the narratives of Jansen and Bertinus open with a "backgroundstory" and end with what happened after the ordeal, the testimonial narratives are restricted to observations made just before, during and just after the stabbing-event. Moreover, except for the difference in chronological "width", the testimonies of the witnesses mutually differ because of their divergent perspectives. Three of the six witnesses observed the event while they were waiting to cross the road either by bicycle or by car: the physical distance between them and the two men varies from 15 to 30 metres. Two witnesses, namely Bertinus's wife and Bertinus's neighbour Hazelnoot, observed the event from somewhat closer by; however, Bertinus's wife walked away just before the climax of the event, and came back when her husband was lying on the street with two bleeding wounds. Finally, the sixth witness -Jansen's mother- has not seen anything of the event itself, but took care of her son after he had come to his parents' home and she also saw the blood-stained knife. Therefore, another important reason for the incomparability of these testimonies is their varying presence at the scene of the event.

Of the six witnesses, only two actually observed the performance of the stabbing (although three of them saw that Jansen kept the knife in his right hand when he (was about to) hit Bertinus): two were not
present, and the two others just did not identify the movements they observed as stabbing-movements. The two witnesses who registered that Jansen stabbed Bertinus do not say exactly the same about the number of the stabbing-movements which were made (we will later discuss that Jansen is convinced that he caused two injuries by making one such movement, while Bertinus alleges that Jansen made two movements): car-driver Paardebloem who witnessed the event from a distance of 15 metres saw that Jansen stabbed twice, whereas neighbour Hazelnoot who witnessed it from a distance of 10-12 metres did not see that Jansen stabbed Bertinus twice.

The testimonies are fairly consistent with regard to the end-result of the event, namely that Bertinus was lying on the pavement with bleeding injuries. Three witnesses speak about two injuries, one about one injury (witnessed the event from a distance of 25-30 metres and never came closer than that), one does not mention any particular number and another has not been there. There seems to be a consensus among the three first witnesses that Bertinus sustained injuries in the left underarm (close to wrist) and in the left shoulder (the vicinity of the neck or chest). As we will see shortly, Jansen thought he had actually hit Bertinus in the left upperarm instead of in the left shoulder.

In the remainder of this section we will focus on the differences between Jansen's and Bertinus's accounts. Central to the comparison of the two accounts will be the narrative phrases concerning the major actions and their direct agency context. Contrary to the testimonies discussed above, the drawing of a parallel between the two narratives is facilitated by their significantly similar chronological ordering of events (although some events are temporally reversed in the narratives). The collation of the sequential organisation of the two narratives will raise structural as well as semantic identities and discrepancies.
<table>
<thead>
<tr>
<th>Narrative account Jansen (Appendix No. IV)</th>
<th>Narrative account Bertinus (Appendix No. V)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1.</strong> S41 Goal Bertinus is described as “He wanted to collect the tools of my father-in-law”; in other words, Bertinus did not come to talk, but to perform an action (collecting tools)</td>
<td>S27 Goal Bertinus is described “I wanted to talk this over with Piet”; this is a summary of S18-S26, in which the background problems are described; the goal is to discuss these problems with Piet</td>
</tr>
<tr>
<td><strong>2.</strong> Not mentioned</td>
<td>S29-S34 B. rings the doorbell, J opens, J. shows B. in his house, nobody was present in the house, B. and J. started to talk</td>
</tr>
<tr>
<td><strong>3.</strong> S42/S43 B. shows aggressive behaviour</td>
<td>S34 J. becomes angry</td>
</tr>
<tr>
<td><strong>4.</strong> Not mentioned</td>
<td>S33-S37 J. tells B. that he will get the tools back after compensation; denied by B., promise B. to J.</td>
</tr>
<tr>
<td><strong>5.</strong> S44 J. forbids B. to enter his house; (as if B. has not yet entered; contradicts S31, S32, S33; Appendix No. V)</td>
<td>S41/S42 J. tells B. to leave J’s house</td>
</tr>
<tr>
<td><strong>6.</strong> S45 B. grumbingly leaves the house</td>
<td>S43 B. goes outside</td>
</tr>
<tr>
<td><strong>7.</strong> S46/S47 J. calls names at B.</td>
<td>S44/S45 Jansen calls names at Bertinus and starts to threaten him</td>
</tr>
</tbody>
</table>
8. Jansen says 'fatty bastard' to Bertinus

S47 J. says to B. "I hope that father-in-law drops dead immediately, and if I meet you, I will stab you down", and further, "I will eradicate the complete family Van Reeswijk!"

9. Not mentioned

S51, S52, S53, B. becomes angry, walks back in the direction of the front door, which is then closed by J.

10. Not mentioned

S58, S59, B. walks back to the pavement and takes his bicycle

11. Not mentioned

S60, S61 Jansen opens the front door again and stays with a knife in his lifted right hand.

12. Not mentioned

S62 Bertinus drops his bike

13. S49, S50, S51, B. told J.: "I dare to pull your conifer out of the soil and to throw it through your window pane"

Not mentioned

S49, S50, S51, B. told J.: "I dare to pull your conifer out of the soil and to throw it through your window pane"

14. Not mentioned

S65, S66, S67, S68, Bertinus throws the conifer, because J. screams: "Come here then I'll stab you to pieces!" (self defence)

15. S56 Jansen (also) takes bicycle

S74 J. comes running after B.

16. Not mentioned

S76 J. still keeps the knife in his lifted right hand

17. Not mentioned

S79-S84 J. screams "Come here" (or words to that effect), and: "Come here then I'll stab you to pieces!"
<table>
<thead>
<tr>
<th>Line</th>
<th>Event</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>18.</td>
<td>S57 Jansen takes a bit of concrete</td>
<td>Not mentioned (although not in this stage; later in the narrative he mentions a &quot;brick&quot;)</td>
</tr>
<tr>
<td>19.</td>
<td>Not mentioned</td>
<td>S93 J. <em>still</em> has the knife in his hand (S94, S95, S96, S98)</td>
</tr>
<tr>
<td>20.</td>
<td>Not mentioned</td>
<td>Jansen walks in the direction of Bertinus and his wife</td>
</tr>
<tr>
<td>21.</td>
<td>S64, S65 B. ignores the pacifying action of his wife</td>
<td>S104 J. ignores the pacifying action of B.'s wife</td>
</tr>
<tr>
<td>22.</td>
<td>Not mentioned; in S69 J. that he dropped the bit of concrete after B. grasped a hayfork</td>
<td>S106 J. throws brick in states B's direction</td>
</tr>
<tr>
<td>23.</td>
<td>S110 B. grasps fork after J. has thrown brick in his direction (ref. S106): Note the REVERSE OF TEMPORAL ORDER</td>
<td></td>
</tr>
<tr>
<td>24.</td>
<td>Not mentioned; rather, J. states that it was Hazelnoot (neighbour, S76, S77) who tries to pacify, after which B. puts the hayfork away (so did Jansen with the spade).</td>
<td>S111 B's wife takes fork away from B.; B. does not mention the pacifying action of Hazelnoot at all</td>
</tr>
<tr>
<td>25.</td>
<td>S70–S74 J. walks to neighbour Hazelnoot, grasps a spade and threatens with it in the direction of B.</td>
<td>Not mentioned</td>
</tr>
<tr>
<td>26.</td>
<td>Not mentioned</td>
<td>S112–S119, J. stands close to Hazelnoot, Bertinus does not see what J. does there, and tells J. to put away &quot;that&quot; knife and to come on the street &quot;then we can talk it over with bare hands&quot;)</td>
</tr>
<tr>
<td>27.</td>
<td>S79 J. states that B. grasps the bicycle after they had both put away the fork and the spade</td>
<td>S120/S121 Grasping the bicycle follows after an intermediary step (see above)</td>
</tr>
<tr>
<td>28.</td>
<td>S84 J. walks in B's direction</td>
<td>S126 J. walks to Bertinus with considerable speed</td>
</tr>
<tr>
<td>29.</td>
<td>S85/S86 J. tells B. to leave his bicycle alone</td>
<td>Not mentioned</td>
</tr>
<tr>
<td>30.</td>
<td>S96 J. denies that he had something in his hands</td>
<td>S128 Jansen keeps the knife in his lifted right hand</td>
</tr>
<tr>
<td>31.</td>
<td>S89 B. lifts up J.'s bike after J. tells B. to leave his bicycle alone</td>
<td>S130 B. grasps J.'s bike after he sees that J. keeps the knife in his lifted right hand (S128)</td>
</tr>
<tr>
<td>32.</td>
<td>S90-S92 B. makes a pushing movement with the bike in J.'s direction about three four times; B. is angry</td>
<td>S131, S132 B. holds the bike in between them and thrusts it forward in J.'s direction; or this was to defend himself (S131,S133)</td>
</tr>
<tr>
<td>33.</td>
<td>S101, S105, S106 J. grasps the knife out of his tail-pocket, opens it and takes it in his right hand (in order to be an antagonist against B. (S103))</td>
<td>Not mentioned</td>
</tr>
<tr>
<td>34.</td>
<td>After B. again makes a pushing movement with the bike in J.'s direction (S108), J. lifts the knife (S109) and stabs B. (S110)</td>
<td>B. does not mention that he pushes the bike forward again</td>
</tr>
<tr>
<td>35.</td>
<td>S110 Jansen pushes the bike away with his right hand</td>
<td>Not mentioned</td>
</tr>
<tr>
<td>36.</td>
<td>S111 J. stabs with the knife which he holds in his left hand</td>
<td>S135 J. stabs with his right hand with the knife inside of it</td>
</tr>
<tr>
<td>37.</td>
<td>S111 J. stabs B. in his left upperarm</td>
<td>S138 J. hits B. in his left wrist</td>
</tr>
</tbody>
</table>

REVERSE WITH 39
<table>
<thead>
<tr>
<th>38. S116 J. withdraws the knife</th>
<th>S148 J. lifted his right hand once more (also the second time, J. stabs intentionally S154)</th>
</tr>
</thead>
<tbody>
<tr>
<td>39. S116 J. cuts B. in the underarm</td>
<td>S152 J. hits B. in his left shoulder REVERSE WITH 37</td>
</tr>
<tr>
<td>40. Not mentioned</td>
<td>S158 B. sees in J.'s eyes and by J.'s way of acting that J. intends to stab once again (S159)</td>
</tr>
<tr>
<td>41. S131 J. wants to offer B. help</td>
<td>Not mentioned</td>
</tr>
<tr>
<td>42. S134 J. leaves the scene after wanted to help B.</td>
<td>S163 J. clears off on his bike after somebody yells (S161)</td>
</tr>
</tbody>
</table>

One of the first rather striking differences is that Bertinus's narrative is not only much longer, but also semantically much more elaborated than Jansen's. A comparison shows that suspect Jansen does not insert information about the event 15 times, while Bertinus does so only 7 times. We may further notice that Bertinus's vocabulary is of a more evaluative and intense nature, thereby triggering an accusatory effect. Consider for example: "leaves" (Jansen in 42) versus "clears off on his bicycle" (Bertinus in 42) and "lifts up" (Jansen in 31) versus "grasps" the bike (Bertinus in 31). Another example may be found in the discrepancy between "fatty bastard" (Jansen in 8) versus "I hope that your father-in-law drops dead immediately" (Bertinus in 8).

The possible cause for the noticeable difference in narrative elaboration may be that the two were interviewed by the police at very different stages. Whereas Jansen was interviewed almost immediately after the event (2 hours), Bertinus spent more than a day (28 hours) to think about his version of the events: at least he has been able to reflect on an acceptable alibi. However, this is a suggestion which we will not further discuss in this context. A more likely explanation for the difference in length and narrative elaboration is that the two genuinely evaluate the events along divergent perspectives. Bertinus pictures himself as the "peacemaker" of the family with a legitimate mission in mind, whereas Jansen pictures himself as the eternal loser who has for once stood up for his rights. At least, the general
overall impression propelled by each of their narratives is that they make an attempt to place their actions and behaviour in a justificationary light.

Putting these speculative thoughts aside for the moment, more insight can be acquired by demonstrating an inventory of the discrepancies between the two narratives (other than contradictions):

- Narrative statements (of the same chronological order), of which one of them carries an evaluatory character while the other does not (6; 15; 38);
- Narrative statements (of the same chronological order), which contain an 'identical' semantic content, however, one narrative statement adds some (extra) semantic content, whereas the other does not (7; 28);
- Narrative statements of which the one is 'filled up' and the other 'empty'; but in a later stage of the narrative the empty statement is 'filled up' (18; 23);
- Narrative statements which are brought forward by the one narrator, but denied by the other (30);
- Narrative statements which are preceded by different steps (22; 23; 27; 31);
- Narrative statements which contain presumptions, presuppositions and ascriptions (f.e. of (malicious) intent) versus 'empty' narrative statements (40; 41; 42).

But a more important outcome of the sequential collation above is that there are quite a few contradictions between the two narratives, which could not simply be played down as "peripheral" discrepancies. On the contrary, we would argue that a few of these contradictions could have farreaching implications for the coherence of the ultimate reconstruction of the crime in court. First of all, it may be concluded that Jansen's and Bertinus's narrative accounts fail to support each other on most of the aspects relating to the "conifer-event" and the "spade and fork-event". But the attention of the court would normally be on the episode which surrounds the major action (the stabbing), and less on the two episodes which precede the main event (although a proper reconstruction may reveal who of the two is most responsible for the provocation and initiation). So, relying on the selective eye of the court, one may discredit the narrative contradictions which appear in the recount of the first two episodes (f.e. 5 in Jansen's account versus 2 in Bertinus's account; 8 in both accounts; 21 in both accounts; 22 in both accounts).
In the narrative cores relating to the major action one finds the following contradictions:

- Jansen alleges that Bertinus grasped his bike after fork and spade had been put away by both of them (27, 30, 31; Jansen), while Bertinus claims that his motive to grasp Jansen's bike was the fact that Jansen was standing there with the knife in his hand (26/27, 30, 31; Bertinus);

- Jansen alleges that Bertinus pushed Jansen's bike forward because he was angry, whereas Bertinus alleges he thrust the bike out of self-defence (32);

- Jansen alleges that after he took his knife out of his pocket, Bertinus pushed the bike forward again, thereby suggesting that this was the final threat and reason for Jansen to wield his knife; Bertinus does not mention this (34);

- Jansen alleges that he stabbed with his left hand; Bertinus (and some of the witnesses; see above) claim he stabbed with his right hand (36);

- Jansen alleges that he withdrew his knife (after having stabbed once), while Bertinus claims that Jansen stabbed twice (38).

These contradictions cause narrative opaqueness: the interpreter cannot be sure who started the provocation; does not know precisely at which moment the knife appeared for the first time; cannot make a decision about the justifiability of self-defensive action because the question of the provocation has not been solved; and is left unable to make a proper technical reconstruction of the exact moves of the two agents. The question is now how the judge in particular deals with this state of narrative opaqueness.

We will thereby assume that the judge produces a reconstruction of the crime by making a summary (see 7.4) of the available narrative information in the police record: the time lacks to discuss every "narrative detail". Significantly, the judge takes Jansen's account as a starting-point of her reconstruction, and thus makes no effort to confront Jansen with Bertinus's allegations. A first observation is therefore that the contradictions between the two narrative accounts are not probed to the bottom: defendant Jansen is never asked to give his reaction to Bertinus's incriminating allegations. An explanation for this way of acting is that Jansen admits having committed the crime, and that therefore his narrative is not controversial: but should that mean that his narrative version should be taken for granted? It engenders the suspicion that the written pre-organisation
of the matter (the police record) determines the outcome of the final reconstruction in the courtroom.

The structure of the judge's reconstruction is as follows:

1. Introduction: an introduction of the "narrative characters" and their mutual relationships (47-50; followed by interruption);
2. Background history: a reconstruction of the family troubles (54-61);
3. Complication: Bertinus meddles in (61-63);
4. Reconstruction of Episode 1: the "conifer" event (63-65);
5. Reconstruction of Jansen's action in between Episodes 1 and 2: Jansen follows Bertinus on his bike with a piece of concrete on the back (65-70);
6. Reconstruction of Episode 2: the "hayfork and spade" event (71-76);
7. Reconstruction of Episode 3: Bertinus's thrusting with the bike and Jansen's stabbing of Bertinus with the knife (76-84);
8. Result of major action performed in Episode 3: Bertinus sustains two injuries (one arterial bleeding) (84-88);

Relevant for an analysis of the judge's handling of the narrative contradictions in court are nos. 4, 5, 6 and 7. Although we previously discredited the importance of a non-contradictory reconstruction of narrative episodes which relate to actions in the periphery of the major action (the crime), we will take 4, 5 and 6 into consideration, because they constitute an agency-context within which the provocative and/or self-defensive action of the major action can be evaluated.

As far as the first episode is concerned, Jansen and Bertinus seem to agree only about the fact that Bertinus threw a conifer through the window of the front-door in Jansen's house: they make different allegations as to the purpose of Bertinus's mission (1 in the comparison of the two accounts above); the presence of Bertinus in Jansen's house (2 and 5); the behaviour of the two (3; 6) and the initiation of verbal and physical provocations (8; 11; 13; 14). During the trial however, the judge IGNORES all the contradictions which we saw emerging from a comparison between the two accounts:

JaBe/mishandeling/politierechter/24b/tramdb101189

63 R zwager dus eigenlijk en is toen op een gegeven moment bij
63 J brother-in-law in fact and then at a certain moment came to

64 R u thuisgekomen en die heeft een conifeer uit de tuin gerukt
64 J your house and he pulled a conifer out of the garden

65 R en eh:m e/door 't raam gegooid//
65 J and ah:m a/throw it through the window//
Except for the vagueness of the time-indication (63; at a certain moment), the judge does not make an attempt to clarify the reason of Bertinus’s visit to Jansen’s house. Furthermore, she rigourously omits the narrative steps which explain Bertinus’s reason for actually throwing the conifer through the window: no mention is made of the alleged verbal and physical provocations.

The judge’s reconstruction of the narrative which connects the first and the second episode (no.5) is consistent with Jansen’s account, and is also fairly complete (no missing clauses). The reconstruction is effectively somewhat more elaborate than Jansen’s: he talks about a bit of concrete without giving precise information about its size (69/70 in transcript). No mention is made of Bertinus’s allegations, who claims that Jansen came running after him with a knife in his hand and while shouting threats at him (15, 16 and 19 in the comparison between the two accounts above). Again, the judge IGNORES the controversy about the events taking place between the “conifer event” and the “hayfork and spade event”:

JaBe/mishandeling/politierechter/24b/tramdb101189

65 R En toen bent u d'r
65 J And then you fol/

66 R achteran/ toen is ie weggegaan en toen bent u d'r achter
66 J then he left and then you followed him on your bicycle

67 R aan gefietst met een blok beton op sjouw
67 J carrying a piece of concrete

V Ja, precies ja.
D Yes, exactly yes.

68 R n/n ik weet niet hoe groot het was want het ging op de
68 J n/n I don't know how big it was because it went on the

69 R fiets dus en maar in ieder geval om dat stuk steen om ehm
69 J bike so and but in any case to throw that piece of stone

V Ja.
D Yes.

70 R bij hem door het raam te gooien.//
70 J through his window.//
As with regard to the second episode (no. 6 above), Jansen's and Bertinus's accounts are contradictory about whether Jansen had a knife in his hand when he approached Bertinus's house (19 in comparison between the two accounts above), whether Jansen ignored a pacifying attempt by Bertinus's wife (21) and whether Jansen actually threw the piece of concrete (Bertinus calls it "brick" into Bertinus's direction (22).

In her reconstruction, the judge is again sympathetic with Jansen's version: she reconstructs Jansen's intention to throw the brick through Bertinus's window as an act of revenge as "nothing came from that" (70 in transcript below). The choice which the judge makes in favour of Jansen's account implies an elimination of Bertinus's justification to grasp the hayfork (23): Bertinus's narrative is therefore disqualified by the judge. Apparently it is her opinion that Bertinus's reconstruction of this episode lacks sufficient credibility. She also relies on Jansen's reconstruction with regard to the suspension of a physical confrontation between the two when they were armoured with respectively a spade and a hayfork. That suspension is caused by neighbour Hazelnoot; however, the judge generalises the pacifying interventions and includes the attempt made by Bertinus's wife (mentioned in 21; reconstructed in 75 ("some people"; see transcript below). Therefore again, the judge ignores the narrative contradictions between the two statements. The cause of the spade-fork confrontation remains unclarified and is reconstructed as if it is entirely unprecedented ("at a certain moment"; see 71/72 in transcript below):

JaBe/mishandeling/politierechter/24b/tramdb101189

70 R En dat is er dan
70 J And nothing came from

71 R ook niet van gekomen en toen stonden jullie op een
    — (.)
71 J that either and then at a certain moment the two of
    — (.)

72 R gegeven moment tegenover elkaar met een hooivork en een
72 J you stood over against each other with a hayfork and a

73 R schop. Klopt dat ook? Toen waren jullie dus
    — (.)
73 V Inderdaad ja.
73 J spade. Is that right as well? You then had
    — (.)
73 D Indeed yes.
74 R bij zijn huis aangekomen hâ? Hh. Maar steeds bemoeiden
74 J arrived at his house hadn't you? Hh. But then all the
(.)
75 R zich d'r wat mensen mee en die susten het dan weer een
75 J time some people meddled in and they then calmed it down
(.)
76 R beetje en dan gebeurde er gelukkig weer niets.//
76 J a little again and then fortunately nothing happened again.//

One would expect a more thorough inspection of contradictions which emerge among the narrative statements which reconstruct the heart of the matter: the stabbing (the third episode). But similar to her reconstruction of the two previous episodes, the judge does not seek to find a narrative cause for the stabbing event. Instead, she employs a narrative device which closes the "time-gap" between the two episodes and talks about "and then at a certain moment" (76 in transcript below). Her reconstructive move enables her to avoid matters of accusation, which again implies a discrediting of Bertinus's narrative. In line with her reconstruction of the previous episodes, the judge clings to Jansen's version of the event. He alleges in 27 (in comparison between the two accounts above) that Bertinus grasped his bike after neighbour Hazelnoot had managed to calm them down; in other words, he claims that there was no particular incentive for Bertinus to grasp the bike, and that therefore his move is difficult to justify. Bertinus however claims that he grasped Jansen's bike because the latter insisted on staying there with a knife despite warnings from Bertinus. He then grasped the bike as a means of exchange for the tools (26 and 27 in comparison). All this is IGNORED by the judge, including his allegation that Jansen came walking in his direction at high speed, with a knife in his lifted right hand and with the intention to stab Bertinus.

By means of ignoring Bertinus's allegations, the judge favours Jansen's narrative. Her solution for the narrative opaqueness resulting from the contradictions between the two narratives is to make a CHOICE for Jansen's version, in which it is claimed that Bertinus started the provocation by lifting the bicycle. The judge's technical reconstruction of the actions in this episode is far from detailed, but stated in very general and unspecified terms (79 in transcript below: "more or less"; 82: "in one or the other way"; 84: "in that way"): 
Maar toen
But then

op een gegeven moment toen heeft Bertinus uw fiets gepakt
at a certain moment then Bertinus grasped your bicycle

en opgeheven is er toen zo mee op min/
and lifted it and then more or/ with

Inderdaad, ja, ja, gaan stoten.
Indeed, yes, yes, went thrusting.

min of meer op u afgekomen of in ieder geval een beweging
more or less came toward you or in any case made a

movement in your direction. And at that moment you

zak een mes getrokken. En eh ja (.) daarmee is het
pulled a knife out of your pocket. And ah yes (.) that

what the accident happened with. In one or the other way

mes ja, door de openingen van die fiets heen hebt u
you yes, through the openings of that bike you have

Bertinus geraakt op die manier.
in that way.

hit Bertinus in that way.

Despite the rather vague reconstruction of the major action, the judge has maintained a certain degree of uniformity by not taking Bertinus's account on board. The strategy of selectively ignoring narrative contradictions has enabled her to find solutions for a few questions which we raised earlier in this section, namely: we know now who started the provocation (Bertinus) and when the knife appeared for the first time (after Bertinus had lifted the bicycle). The answer to the
question about the provocation would justify Jansen's pulling of the knife as an act of self-defence. But can the actual stabbing be qualified as such as well?

Later in the trial it will appear that the judge does not qualify Jansen's dramatic swerve as an act of self-defence. The reason for that seems to be that Bertinus never actually hit Jansen with the bicycle. However, the way in which the court interprets matters of self-defence, provocation and criminal intention will be the subject of the next chapter.

In the case of "Jansen versus Bertinus", the existence of narrative contradiction remains confined to the written narratives which are enclosed in the police record. These contradictions never reach the surface of the trial, until the defence-counsel discusses them in his plead. He exploits the narrative discrepancy between the various statements and testimonies in order to challenge a uniform interpretation of the crime. But the defence-counsel does not actually yield problems of evidence for the court: the fact of the matter is that unsolved narrative-testimonial contradictions do not obstruct the way for a discursive coherence between the judge's reconstruction of the crime and the prosecutor's charge. The text of the summons is drafted in such a wide sense that it will tolerate contradictory interpretations of the same event. For example, the charge accuses Jansen of "once or more than once" stabbing and/or thrusting and/or cutting and/or hitting Bertinus with a knife (..........) (see Appendix VI), which is an undoubtedly a description that covers the description of the major action in both Jansen's as well as Bertinus's account. Taken from this perspective, "proof" seems to equal the elimination of testimonial contradictions by means of a general description in the charge instead of a profound argumentation among the members of court.

9.8 Conclusions

If the evidence in a criminal case is discrepant because of the co-existence of contradictory narratives, the legal agents (in particular the judge) are less likely to make a choice between these rival representations of the crime than to transform the discrepancies into a global coherent narrative. Especially in "unproblematic" cases in which
the defendant admits to the charge and is able to reconstruct the event, narrative discrepancies are suppressed or ignored in favour of a homogeneous narrative representation.

Contradictions or discrepancies between narratives are not always suppressed during the trial: established states of narrative incoherence are brought to light when the defendant denies involvement in the crime, when the discrepancy is positively or negatively decisive for the conviction, when other elements in the narratives do not corroborate each other to a sufficient degree, or when the defendant claims to be unable to recall the events surrounding the crime.

If there is a discussion of the established discrepancies in the courtroom, then there is a selective focus on the discrepancies, which restricts the scope of the contested evidence or the established ambiguity. When the narrative contradictions or discrepancies are brought to the surface (f.e. in the cases "beerglass" and "Niehe") there is a weakening of the discrepancies (f.e. by transforming disjunctions into conjunctions), a use of euphemistic expressions, or employment of argumentative pressure in order to ladle out an answer which coheres with the desired narrative outcome. If an argumentative dissolution of discrepancies is in favour of the defendant, the prosecutor may play down the power of the alleviating evidence.

The judge relies on the narrative of the defendant when the defendant admits to the charge. This strengthens the impression that narrative discrepancies are suppressed or ignored when the hypothesis that X committed Y is not contested. In contrast however, when the hypothesis that X did Y is contested by one of the parties, then the involved legal agents will employ their influence to transform discrepancies into an absence of discrepancies. Both strategies are of a dynamic-discursive nature.

Many narrative discrepancies or contradictions become redundant because the general description in the summons provides a narrative which is able to 'swallow' alternative narrative representations of the same event. Narrative coherence is therefore not a coherence between "event" and "narrative", but between "master narrative" (e.g. provided by the summons) and the testimonial narratives.
NOTES CHAPTER 9

1. This also constitutes a subtle difference with the claim of Caesar-Wolf (1984: 42). She has maintained that the judge keeps the normative relevancy-criteria and the validation-criteria latent for the layperson, while in our framework the relevancy of norms and the validation thereof is implicit to the basic narrative hypothesis: in fact, the narrative which one seeks to bring to the surface is supposed to be defensible and justifiable in the light of the law. Therefore, narrative elements are selected according to anticipated "legality".

2. "Broken beerglass" is a shadow-case for the "Jansen versus Bertinus"-case. The defendant in this case is accused of intentional ill-treatment (see Appendix II). The issue of the reconstruction of criminal intention will return in chapter 10.

CHAPTER 10: "AN EYE FOR AN EYE, A TOOTH FOR A TOOTH": THE CONSTRUCTION OF CRIMINAL INTENTION

10.1 Introduction

"A physical fact is that which manifests itself to the external senses; a psychological fact is that which exists in the mind. The shot of a musket, which kills a man, is a physical fact; the intention of him who fires it, is a psychological fact.

Psychological facts, as they lie concealed in the interior of man, can be ascertained only by physical facts, which are, as it were, the index of the watch. In a question of carcerary, the intention to take and use the thing, and the consciousness of having no right to take it, are psychological facts, which are proved by the language of the individual, by the precautions he has taken to secure his escape or conceal the thing stolen, &c." (Jeremy Bentham 1825: 10)

Intentions, be they criminal or not, would be called "psychological facts" in Bentham's terms. The law, by making intentionality a crucial exponent of crime, confronts itself with problems when it maintains that all crimes ought to be registered by the senses: intentionality cannot, neither is it possible to understand criminal actions which are observed without the work of some kind of rational reflection. Criminal intention is a kind of "fiction", at least if we accept that in order to "reconstruct" it, one ought to stipulate its existence.

From the philosophy of historiography we can learn that the reconstruction of human action requires the understanding and explanation of why the action was performed. A historical or legal reconstruction of an action can look at the causes which brought about the action, but it more frequently weighs the human 'psychological' motivations or intentions which underlie the performance of actions. Causes may have little or nothing to do with the responsibility of the agent (i.e. Sistare 1989: 13). The determination of the cause may function as an objective explanation of action, whereas the determination of the (degree of) intention may function as a subjective explanation. However, this distinction between "subjective" and "objective" is artificial and misleading, for that they can only be determined by hermeneutic interpretive labour. In that sense, a cause is still to be regarded as the extension of our prejudiced understanding of action. Rational explanations of historical actions
are partly supported by a projection from a historian's point of view (Dray 1979: 130); the historian understands actions by re-viving, re-enacting, rethinking and re-experiencing the "hopes, fears, plans, views, intentions, &c." of those he seeks to understand (id: 119).

Von Wright proclaims a model of historical explanation which is quasi-causal: he opts for a teleological model which explains the intentional character of the action. An intentionalistic understanding of action precedes a teleological explanation of action. In Von Wright's model, the description of the intention is the explanans and the result of the action is the explanandum. His model thus functions as a "practical syllogism":

X intends to attain F
X is convinced that he can only attain F if he realises H

X realises F

(in: Lorentz 1987: 88)

According to Von Wright, the motive for this kind of action-explanation lies often in "a wish to evaluate the action or the agent." (Von Wright 1983: 53). The teleological model thus 'fits' the qualification of criminal action within the forensic discourse very well. Criminal actions are intentionally described or explained, because the qualification of criminal intention is inherently linked with the allocation of criminal responsibility. Nevertheless, one may wonder whether a teleological model suffices for the 'explanation' of crimes. In the Dutch criminal justice system, there is a tendency to widen the reconstruction of the fact to the defendant's background-motives (and social circumstances). Even if a teleological model enables an explanation of action which matches "maximally well with the rest of the agent's life story" (Von Wright 1983: 66), the narrative model might be a necessary replenishment to an isolation of the criminal action-context. It should furthermore be noted that a common criticism of the teleological model is that (past) actions are not necessarily preceded by either a rational calculation or an intention, but perhaps simply 'happened' without any clear motive or reason.

But in this chapter we will presuppose that although the defendants may have committed their crime or offence "non-intentionally", the legal agents may still want to apply a teleological interpretation-scheme to the criminal evidence which they seek to prove. From the
seven cases we have looked at (the five cases presented in Appendix II including two shadow-cases; the one concerning ill-treatment involving a man who kicked an older man, and the other concerning intentional ill-treatment involving a man who injured another man with a broken beer-glass), it will appear that the reconstruction of criminal intention is not a priority coûte que coûte. The weighing of the intentional factor is related to the manner in which the summons formulates or qualifies the crime.

"Intention" plays an important part in at least four out of the five cases of our official corpus. Most significant in this context is the Jansen versus Bertinus-case (JaBe/mishandeling/politierechter/24b/tramdb101189), because the charge of intentionally having committed a crime emerges in the primary as well as in the two subsidiary charges. In fact, in the primary and the second subsidiary charge the concept of intention is mentioned twice, namely in relation to both the execution of the plan of action (Article 45 Dutch Criminal Code) and the performance of the action (Articles 287, 302-1 and 301-2 of the Dutch Criminal Code).

The two other cases in which the concept of "intention" appears in the charge are the case Niehe (Niehe/vernieling/politierechter/17ab/tramdb291189; qualification of the destruction of a car according to the formulation of Article 350 Dutch Criminal Code) and Ter Haar (Ter Haar/heling/politierechter/15b/tramdb141189; "intentional" only appears in the primary charge, the formulation of which is based on Article 416-1 of the Dutch Criminal Code). In the fourth case (Sint/diefstal/politierechter/20b/tramdb151189) we see a concept which does not strictly involve the term "intention (-al)", but which is nevertheless strongly related, namely "with a view to misappropriating" ("met het oogmerk op wederrechtelijke toeëigening"; Article 310 Dutch Criminal Code). The summons which accompanies the fifth case (Van Straaten/drinken/politie-rechter/25a/tramdb161189) does not contain the word "intentional"; the qualification of the offence is not based on the Dutch Criminal Code, but on the Dutch Road and Traffic Act (Article 26-2).

In this chapter we will focus on the construction of proof with regard to Jansen's intention to kill or to inflict (grievous) physical harm on Bertinus. In order to reconstruct the legal construction of criminal intention, we will discuss the divergence of definitions which are attributed to the concept of criminal intention (10.3). After
that we will scrutinise how respectively defendant and plaintiff/victim integrate justifications with regard to the intentional nature of their acting in their statements to the police (10.4). Furthermore, we will examine the manner in which the police-record pre-empts the normative qualification of Jansen's crime (10.5). We will finally examine the discursive emergence of the intentional concept during the trial-proceedings: the defendant, the public prosecutor, the judge and the defence-counsel each contribute differently to the discursive production of Jansen's crime (10.6). Jansen's alleged state of wilfulness constitutes the main interpretative focus-point.

10.2 Criminal Intention as a Framework of Interpretation

The 'understanding' or 'explanation' of criminal action is not free from strategic reasoning. In this chapter we will adhere the perhaps somewhat radical notion that the construction ("hypothesization"; "stipulation") of intention precedes the discovery and outline of 'underpinning' reasons and arguments. In other words, a crime can be labeled to be intentional, after which evidence is selectively brought forward to retrospectively prove the presence of an intentional state of mind at the time of the crime. The establishment of the committal of some kind of criminal action thus forms the interpretive antecedent of the establishment of intention. Such should not come as a surprise: it is often written in the newspaper that X murdered Y but that the 'motive' is yet unknown. This reveals a kind of consequentialist reasoning, in the sense that the good- or badness of the outcome is more important than the action or crime itself. Therefore, a legal-pragmatic distinction is made between the means and the end, which enables legal agents to detach the crime from the reasons why it has been committed. It also makes it possible to determine degrees of criminal responsibility on a continuum that stretches from intention in the sense of malice aforethought via intention in the sense of recklessness, negligence or foreseeability to intention in the sense of culpability. This consequentialist reasoning stands as opposed to non-consequentialist reasoning, which qualifies the element of "wilfulness" in the action (f.e. an attack) as "intrinsic evil" (Duff 1989: 91). "Intention" is thus a crucial component in the ascription of criminal responsibility, the determination of which should disclose
information on the knowledge and control of the alleged perpetrator at the time of the crime.

We believe that the legal reconstruction of the perpetrator's intentional state of mind constitutes a standardised guideline, axis or clue (a teleological framework of interpretation as Goffmann (1986) calls it) which gives a sense of direction to legal interpretation and the subsequent construction of the narrative. Or, to turn it around, the discovery of intentional or motivational elements requires a narrative structure (see also Schütze 1976: 28). A similar feature can be seen in the context of causational structures or elements. Both causes and intentions stand in relation with time (not necessarily action\(^1\)), in the sense that they are the antecedents of certain outcomes or effects. Intentions and causes thus always refer to something in the future (i.e. Montefiore 1989: 60), but are nearly always reconstructed in retrospect. Time plays a devilish act with intention, in particular when operative within a narrative structure. A first narrative axis of time concerns for example the reconstruction of the moment at which the alleged perpetrator prepares himself/herself for an action and thereby ensconses himself/herself in a certain mental state of mind. A second narrative axis of time may reconstruct the actual performance of the action, whereas the third narrative time-level may evaluate the mental state of mind and the performance against a moral background. This sketch of the narrative levels is artificial, because it is naturally the case that the third level infiltrates in the narrative, thereby obscuring the potential borders between a neutral and evaluative reconstruction of action and intention.

Therefore, the legal-moral ascription of criminal responsibility is definitely supported by the creation of intentional structures within the narrative about the crime. When an action can be linked with an intention (whether this is a "macro-intention" or a "micro-intention\(^2\)), the action is in principle explained. Similarly, signs of illness and deviance do not remain in isolation, but rather make up the semantic brickstones for the construction of narratives when they become contextualised in the etiological or criminological chain. Signs or symptoms are interrelated in the past-future dichotomy and in the axis of causes/intentions and events. Also, "illness episodes" are myths, at least partly consisting of experiences which are stored and labelled in a social-collective memory.
But these explanatory chains run the risk of resulting in infinite regression (see also 3.2), which is an unwanted state of affairs in the context of a legal process-economy. Questions like "Why did the apple fall from the tree?" and "Why did the plane crash?" prompt sheer infinite chains of questions. If the answer to the first question is that a laddie shook the apple down, we may wonder why the laddie did it. Possible answers are: he was hungry, he was angry at the tree, he felt like terrorising the neighbourhood, he wanted to rescue a cat, he wanted to treat his beloved lassie with an apple or he wanted to catch a butterfly. Why was the laddie hungry? Possible answers are: he did not go home for lunch, he ran out of energy, his parents did not give him enough food. Similar question-and answer-alternatives hold for the crash of the aeroplane. The construction of answers to these questions seems to lean entirely on the assumption of plausibility. The answer "The laddie shook the apple tree because his bicycle was stuck in one of its branches" may actually be true, but it simply sounds incredible or implausible.

It seems therefore, that the interpretation of events, or in our case of crimes, does not primarily lean on the observation and verification of the reported reality, but on an operation which gradually deletes unlikely occurrences in a plausible world of events. Naturally, none of the reported events can be interpreted as plausible without its context being taken into account.

Cognitivists hold that communicative actors possess "schemata of interpretation", which can be compared with action-scenarios or pragmatic means-end-plans. Goffman (1986: 21) claims that these "primary frameworks" - as he calls them - are either natural or social schemata of interpretation. Natural schemata are those which "identify occurrences 'purely physical'" and are related to the world of the causes. Social schemata of interpretation "provide background understanding for events that incorporate the will, aim, and controlling effort of an intelligence, a live agency, the chief one being the human being" and are related to the world of manners (id: 22). Interpretive frameworks may thus be packages of possibly related cognitive keys, for example they may be a pair consisting of an object and a physical verb, or a pair consisting of a cause, an event and an effect, but also a hierarchical pattern of keys which belong to a certain action pattern (such as 'shopping' or 'going to a restaurant').
The cognitive keys do not have a semantic content until they are triggered by the pre-understanding of an action pattern. Keys are:

"(...) conventions by which a given activity, one already meaningful in terms of some primary framework, is transformed into something patterned on this activity but seen by the participants to be something quite else." (Goffman 1986: 43).

This leads to the possibility of transformation "across materials already meaningful in accordance with a schema of interpretation, (...)" (id: 45).

We adopt the view that a legal schema of interpretation simultaneously widens and restricts the interpretation of criminal intention. On the one hand, the application of an interpretation-scheme opens the possibility to associate related conceptual structures (it may disclose a motivational history), whereas on the other hand, the application of such a scheme eliminates the implausible, improbable, incredible or remotely related conceptual structures. Garfinkel (1981: 143) regards the avoidance of infinite regression (see also section 3.2) as the work of certain relevancy-structures, which exclude certain possibilities.

This explains why we compared the motivational or intentional structure of a legal narrative with an axis. It constitutes the continuous thread running through the narrative, and as an interpretive device it can be held responsible for the ordering and structuring of narrative elements around its own axis.

"Intention" is thus more than just a component of many crimes, but functions as a means for narrative composition. It actually operates as a dynamic discursive action-concept in that it directs legal interpretation and relates semantic concepts through meaningful association. In that way, we could imagine the clustering of concepts which are semantically linked with intention, such as the cluster "commitment", "responsibility" and "punishability" (i.e. Montefiore 1989: 60) or the cluster "wanting to do X", "deciding to do X", "trying to perform X" and "believing that X may happen" (i.e. Hampshire 1982: 134f). This semantic-narrative clustering consolidates the overall coherence of the "crime-story". Gaps or discrepancies which threaten that coherence ought to be minimalised, suppressed or eliminated.

The most complicated step is that from the moral-discursive establishment of the intentional element in the crime to the
ascription of criminal responsibility. The simplest answer to this problem would be to say that the establishment of criminal intention implies that therefore, X ought to be held responsible for it. However, the establishment of criminal intention cannot remain a "unilateral act": the person who is held responsible has to be placed in the position where s/he can understand and recognise the "wrongness" of his/her acting. Only when this understanding has been acquired, the ascription of criminal responsibility to X may be accepted by X. The acceptance of that status or (pseudo-) consensus about it is one of the preconditions for legitimising the legal-moral ascription of criminal responsibility.

It should be clear that the condition to try and get the defendant involved in the understanding of his/her own responsibility cannot be realised by means of a written document, but only by means of a trial which guarantees and arranges the direct presence of the defendant ("ommiddelijkheidsbeginsel"). That is the moment at which the defendant has to face the voluntary aspect of his/her action, and consequently has to respond to the moralising reprimands or admonishments performed by either judge or prosecutor. Pander Maat & Sauer (1989), who analysed these speech acts in the context of the Dutch "politierechter"-trial, have established that the admonishments are often intended to let the defendant publicly demonstrate remorse or guilt. Judges and prosecutors frequently integrate "better", i.e. non-criminal action-alternatives in their confrontations or admonishments, thereby showing the defendant that s/he could have known better, or that even although he knew that s/he could have avoided his/her action, s/he made a conscious decision to ignore the legitimate, non-criminal action-alternatives. Another, crucial semantic cluster which establishes the concept of criminal intention thus relates concepts such as knowledge, control and awareness.

10.3 Criminal Intention Defined from Divergent Perspectives

The legal view on the world is continuously confronted and contrasted with a heterogeneous set of dissimilar views on the world, writes Gizbert-Studnicki (1987: 361-362): although the professional perspective of the legal agent generally differs from that of the layperson, the legal agent frequently mediates the legal meaning or
perspective in order to prevent an obstruction of the communication (id: 361-362). A problem is often that certain definitions are specific to the legal conceptual apparatus. A 'mediation' is as such not a strict translation (id: 361-362), but the provision of an introduction into the meaning of the language of law and morality.

From many courtroom-interactions it may be noticed that defendants take the concept of (criminal) intention from a 'different' perspective than the representatives of the law. The principal difference is that the law has quite a subtle but farreaching interpretation of (criminal) intention, again, as described above, in the sense of the possibility or opportunity to prevent an unwanted state of affairs. The perpetrator is therefore punishable for criminal intention if s/he decided not to undertake a preventive action. In one of the two shadow-cases (analysed for the purpose of this chapter only), the defendant, who is charged with (ordinary) ill-treatment of an older man who only yelled something at him, is moralistically reminded by the judge that an alternative course of actions would not have resulted in a charge: "You also could have cycled past, couldn't you?" ("U had ook voorbij kunnen fietsen hé?"). Pander Maat & Sauer (1989: 153) call the latter kind of speech acts "advisory reprimands".

Defendants generally associate the (absence of) intention with a state of consciousness or volition ("I was stupid"; "I was crazy" (Van Straaten); "I wanted to put the bike back in it's place, because I've got one of my own" (Sint); "I wasn't really aware of it actually" (Jansen); "It happened in an outburst"; "I was probably slightly crazy"; "I don't remember what exactly happened" (defendant in shadow-case about intentional ill-treatment with beerglass). They also lay bricks between their (non-) intentional state of mind at the time of the event and the circumstances influencing the way they acted. In three of the seven cases (including the two shadow-cases) the defendants explain their intentional state of mind by reference to historical antecedents, in two cases a divorce with implication of emotional and practical troubles (Van Straaten and Sint), and in one (shadow-) case an uneasy relationship between the defendant and the victim ("there is a whole story behind that"; "daar zit een heel verhaal aan vast."). In three other cases the defendants refer to the setting of the crime itself, with complicating turns such as provocation and resulting self-defence (Jansen), the misleading pretentions of other agents (Ter Haar) and again a (mild) provocation
in combination with "historical incongruence" (after two men had left each other in peace for twenty years, the older man suddenly makes a move; this is a combination of historical antecedent and the setting of the crime).

There is a partial overlap between the interests of the defendants and those of the legal agents. Judge, prosecutor and occasionally lawyer have various different standard patterns of intentionality in mind when they interrogate the defendant (and/or witness) about the crime. Like the defendants themselves, legal agents regard the motive or background-circumstances as important, but they often wave these aside as a ground for valid excuse. The "motive" relates to the above-mentioned setting of the crime. Protagonists may undertake actions which do not please the defendant (for example, the protagonist yells something at the defendant or the protagonist causes a complication by interrupting a historical peace-pact; the circumstances at the setting induce the defendant to commit a crime). The "background-circumstances" refer to a long-term "problem" or "situation" in the defendant's private life: in the case "Jansen versus Bertinus" there were problems in the family about equipment; in the case Niehe the judge and prosecutor presume (and know) that the defendant does not tolerate courting couples; in the cases Van Straaten and Sint problems were caused by divorces and in the shadow-case "man kicks old man" the two were having a sensitive relationship from the defendant's childhood onward (the older man is said to have yelled that the defendant's mother was a whore when the defendant was still a child). Although judges and prosecutors are ready to accept these contexts as explanations of the crimes, they are not willing to accept them as excuses or justifications. Their "understanding attitude" during trial-sessions may therefore be characterised as a strategy to stimulate the defendant's cooperation.

Also the defendant's state of consciousness, volition or control at the time of the crime is considered to be important by the legal agents. But again, in the eyes of the judge and prosecutor, states of "craziness" or drunkenness are no justifications. In four out of the seven cases, disproportional consumption of alcohol contributed to a lesser degree of awareness or control. In the shadow-case where the defendant has wounded a pub-client with a broken beer-glass, the defendant is (as he states during the trial) "unable" to recall anything which happened between the moment he was surrounded by a few
"guys" and the moment he was held on the table in the kitchen of the pub. He had consumed twenty-five glasses of lager (half-pints) before the event. In the other shadow-case, which is about the man who kicked an older man, the defendant had consumed fifteen to twenty half-pints of lager; the defendant states it was not the drink that made him aggressive, but the mere sight of his victim sufficed to arouse anger. Sint, who stole the bike, states during the trial that he had a little too much to drink, and that he was in a drunken mood. Large amounts of alcohol were self-evidently consumed by Van Straaten, who was caught for drink and driving. Jansen was not totally accountable at the time of his crime, because he was addicted to tranquillisers. Only in the cases of Niehe (intentional destruction) and Ter Haar (intentional receiving), there is no question of alcohol or any other drug being one of the factors in the crime. Nevertheless, Ter Haar and the witnesses (the twin-brothers Karel and Kees) are extensively interrogated about Ter Haar's state of awareness at the moment when he received the alarm-clock.

Three categories which seem to be decisive to the court for the establishment of criminal intention are: 1) was the action of the defendant an initiative or a reaction; who made it escalate; 2) should the action of the defendant be qualified as an act of self-defence or as an attack; 3) was the defendant in the position to avoid the action(s)?

In the reality of the trial, the checking of these standardised "intentionality-patterns" normally proceeds in a somewhat more complicated way. A major reason for that complication is that the reconstruction of a crime is not about one single action or strike, but about an intricate series of causes, intentions, initiatives and reactions. An extra complication is sometimes constituted by the defendant's unwillingness or vagueness about the course of events: Niehe for example systematically denies his involvement, while the defendant in the shadow-case "man kicks old man" is extremely reluctant to throw more light on the course of events. But because most aspects of the event are normally reconstructed before the trial, unwillingness or reluctance of the defendant does not leave the court powerless.

The reconstruction of the question "who started" (1) should not be primarily regarded as the question whose responsibility it was, but as an attempt of the court to make the defendant talk about his/her crime, to face it and to acknowledge responsibility for it. The discussion
about intentionality in trial is thus not primarily to check the
correctness of the accounts in the dossier (too often taken for granted),
but to demonstrate the defendant ("make him/her feel") that s/he was
wrong. One could therefore certainly hold that the court is
'prejudiced' about the intentionality of the defendant's actions. In
other words, the court knows before even asking the defendant. This
becomes apparent from the paraphrastic questions based on information
provided by the dossier. The accounts of the witnesses (including
police officers) and the statement of the defendant provide the judge
or any other reader of the dossier with an opinion on the case before
it goes to court. According to this view, legal agents elicit
information and reiterate answers which conform the pre-conceived
"intentionality-pilot".

Among the questions asked or (emphasising) reiterations of answers
given by the defendant in order to reconstruct the pattern of
initiatives and reactions we found:

- Shadow-case "Man kicks old man" (ordinary ill-treatment): "And the
first thing that happened is that you heard something which ((name
victim)) said ?" (65/66); "You slowed down." (77); "Okay. You slowed
down. And you s/what do you say to ((name victim))? (86/87); "So you
kicked him" (107); "He came toward you and you were fed up?" (123);
"And did you then say 'A weird guy. I'll get him'?" (135-137); "But you
did say something to that man when that man approached you there?"
(142/143); "You let him know ..." (145); "You did let him know that"
(146/147); "Andah, you couldn't really stand that, could you, you are
aggressive." (150); "You were already aggressive" (152); "And this
witness, that is then the neighbour of the old ((victim)) he says that
it all started when he h/ saw ((victim)) approaching and that he was
then crying of fear" (152-156); "Well you a/have/ ah fairly spoken
stepped off your ah bike, or you slowed down and ah told him something.
(You could also have cycled past, couldn't you?)" (166-169); "And then
this ((witness)) saw that you gave him a punch in the face with your
right fist." (173-175); "And he also saw that you kicked him, kicked
him in the crotch, not against his legs, but in the crotch" (176/177);
"And then he saw and heard that ((victim)) started to even cry louder
and screamed because of the pain." (178/179) "Ah/in/in/hh doubled up in
pain also" (181/182). The judge contrast kinds of initiatives (verbal
versus physical) being taken in the reconstructed action-sequence. She
plays down the importance of a verbal provocation (which the defendant is unable to recall), but emphasises that the reaction of the defendant cannot count as a justifiable reaction to a verbal provocation. She regards the defendant's physical behaviour as an improper response, or at least of another level, and therefore employs a terminology of active initiation to "describe" the defendant's conduct. Her vocabulary is therefore 'on balance' of an incriminating nature.

JaBe/ mishandeling/politierechter/24b/tramdb101189): "And at a certain moment he came to your house and he pulled a conifer out of the garden and ah:m threw it through the window." (63/64); "And then you followed/then he left and you cycled after him carrying a piece of concrete." (65-67); "in any case to throw that piece of stone ahm through his window (69/70); "But then at a certain moment then Bertinus grasped your bike (...) and lifted it and then like this more or less came toward you or in any case made a movement in your direction." (76-80); "And at that moment you pulled a knife out of your pocket. In one or the other way you hit Bertinus with that knife, yes, through the openings of that bike in that manner" (80-83). In this trial, the judge neutralises (see chapter 9) the blame which is to be placed on either Jansen's or Bertinus's shoulders for initiating the various episodes culminating in Bertinus being stabbed: the initiatives and reactions are more or less equally divided over the two protagonists. Also the prosecutor is careful in blaming Jansen for possibly initiative behaviour: he accuses Bertinus of initiating the chain of events because of his conduct (297; 303), but on the other hand, he accuses Jansen for wanting revenge after Bertinus threw the conifer through his window (299). The defence-counsel is naturally prejudiced and mostly blames Bertinus for having initiated most of the steps in the unfortunate course of events: Bertinus pays a visit to Jansen and his mission is of such a nature that it can easily create problems (334-337; initiative); Bertinus makes a severe mistake to throw a conifer through Jansen's window after a verbal dispute and after Jansen yells something at him (338-344; initiative); his client makes a mistake by carrying a stone to the house of Bertinus (365; wrong reaction); it is Bertinus however who first appears with a hayfork (374; initiative); client then tries to borrow a spade from Bertinus's neighbour (376/377; unrealised reaction); Bertinus grasps the bike from Jansen (380/381;
initiative); client makes an attempt to recover his bike (386; reaction).

- Shadow-case "Injury with broken beerglass" (intentional severe ill-treatment): there is no series of questions evolving around the chain of initiatives and reactions in the sequence of actions leading toward the crime, because the defendant claims that he is unable to recall anything that happened.

- In the case Ter Haar/heling/politierechter/15b/tramdb141189 the "initiative versus reaction"-pattern is of less importance, because unlike the cases discussed before, no physical harm is involved. The judge only asks "But who started about it/sta/did they offer it or did/did you see it standing there or how did that go?" (26-28). She thus wonders who started the conversation about the clock, checking whether or not defendant Marcel Ter Haar asked for the alarm-clock with the intention of buying it.

- In the case Sint/diefstal/politierechter/20b/tramdb151189 the reconstruction of "initiative" does not play any role, because there is no protagonist; this is also valid for the case Van Straaten/drinken/politierechter/tramdb161189.

- The reconstruction of the pattern of initiative and reaction is a complicated matter in the case Niehe/vernieling/politierechter/mdb291189. The defendant refuses to cooperate by denying his involvement in the destruction of the cars with the courting couples. The reconstruction of Niehe's initiative therefore runs entirely via the allegations of the witnesses. That the destruction was Niehe's initiative becomes contextually clear from the witness's narratives, namely that the passengers had not provoked the perpetrator (s) and that they found themselves shocked and horrified by the assault. When the judge asks Jos Vijzel (the second witness who experienced the ordeal himself together with his fiancée), whether he and his fiancée were frightened, Vijzel answers positively, and says that the motives of such an initiative were totally unknown to him, although he assumed for a moment that the perpetrators wanted to take personal revenge on him; however, he was not aware of any quarrel. The answer to the question whether Niehe took the initiative is thus given indirectly.
(via allegations made by the witnesses), but also negatively (by the witnesses' denial of their provocation or challenge). A second strategy which the judge undertakes to establish the defendant's initiative is to compare this offence with a previously committed similar offence: the judge tries to establish that at that time, the defendant hit a car, not because he got frightened when it approached him, but because the defendant committed an act of aggression. The strategy is not successful.

In two of the seven cases, another axis for the reconstruction of criminal intention exists in the qualification of the action either as an attack or as an act of self-defence. In the trial of the shadow-case "man kicks older man" (ordinary ill-treatment), the judge asks a very indirect question to assess the "self-defensive" character of the defendant's action: when it turns out that the victim is an older man, a "common sense" reaction to that knowledge is to think that the older man did not have as much chance as the younger, much stronger man. When the judge asks the defendant whether he felt threatened by the older man, the defendant says "Well, not threatened. At a certain moment I was a little angry at that man." (119/121). The judge establishes the offensive character of his action by reiterating those words: "You were angry" (121). In the case "Jansen versus Bertinus", the argument of self-defence becomes particularly fortified in the plead of the defence-counsel: he attempts to undermine Bertinus's self-defence (as he himself alleged in his testimony) by saying that the conifer-event was wholly unnecessary and that he could have cycled away; he also undermines Bertinus's argument of self-defence in relation to his lifting of the bike (Bertinus is much bigger and stronger than the defendant); the defence-counsel reverses the argument and pleads self-defence for Jansen, who perhaps (out of defence) got hold of the pocket-knife (413) and thrust it forward (422-425).

The third main track for the reconstruction of intention is the necessity or possible avoidance of the action (i.e. crime). We already mentioned the judge's remark in the shadow-case "man kicks older man" about the possibility of cycling past the protagonist without paying further attention ("You could also have cycled past, couldn't you?; 168/169). As a variant on the theme, judges and prosecutors refer to the possibility of foreseeing the (grave) consequences of the crime, such as the motivation of the charge by the prosecutor in the case
"Jansen versus Bertinus", which evolves around the potential danger of the means (the knife; 267-279) and the potential fatal consequences of the injuries sustained by Bertinus (299-283).

All the interpretive axes which we have discussed so far support the construction of a narrative coherence. It is clear that not all interpretive cues about intentionality are strictly spoken based on "legal" patterns of rationality; rather, they border upon common sense reasoning. However, throughout many trials the legal agents seek to protect the emergence of the main interpretive pivot, namely: the definition which the law (or legal doctrine) has given to criminal intention. Important is that "criminal intention" is only explicit subject of discussion when there is mention of it in the charge (in our case in 4 of the 7 cases).

In two cases, the judges make an attempt to sketch the difference between the common and the legal interpretation of intention. In the case "Jansen versus Bertinus", the judge says in the motivation of her decision that although she understands that Jansen denies having had the intention to kill Bertinus or to inflict grievous harm on him, the law ("we") still qualify it as intention "when you have done something of which you could have known that it would have a very bad ending", continued with:

JaBe/mishandeling/politierechter/25a/tramdb101189

534 R Eigenlijk iedereen die met een mes
534 J In fact anyone who wields a knife

535 R zwaait in de richting van een ander heeft op die manier
535 J in the direction of another does have in that way,

536 R toch zeggen wij de opzet hè, heeft echt het risico
536 J we say, the intention eh?, really has run the risk/

537 R genomen/ de kans gelopen dat er inderdaad iets
537 J taken the chance that indeed something

538 R afschuwelijks zou gebeuren//
538 J horrible might happen//

The judge explains that whatever excuses the defendant may rely on, there is no possible escape from the legal definition of intention, which takes intention from a point of view which concentrates on the knowledge of action-consequences and the control of action-performance.
In the eye of the legal agent, "intention" is thus equal to *foreseeing* an unwanted state of affairs or to taking the risk of causing this unwanted state of affairs (see also Sistare 1989: 105 for the ordinary usage of the notion of intention).

In one of the shadow-cases (intentional ill-treatment: infliction of grievous physical harm with a broken beerglass), a passage from a conversation between the judge and the defendant may be indicative for the discrepancy between the legal and the common conception of intention:

**Shadow-case: intentional ill-treatment; infliction of grievous physical harm with broken beerglass**

120 R   Nou ja in 't eerste wat/wat de officier u
120 J   Well yes in the first what/what the prosecutor

121 R   verwijt is dat u hh als 't ware de bedoeling zou hebben
121 J   accuses you of is that you hh in fact would have the

122 R   om die ((naam slachtoffer)) opzettelijk eh: zwaar
122 J   intention to intentionally ah: inflict grievous physical

123 R   lichamelijk letsel toe te brengen, daar zegt u eigenlijk
123 J   harm on ((name victim)), there you actually say

124 R   van "ja"/
124 V   Ja. Opzettelijk. Ik/ik/ik bedoel eh: wat is
124 J   well "yes"/
124 D   Yes. Intentionally. I/I/I mean ah: what is

125 V   opzettelijk? Als je zeg (ik zeg maar) "Ik loop naar die
125 D   intentionally? If you say (I just say) "I walk toward that

126 V   jongen toe en ik sla 'm een glas in z'n keel" bijvoorbeeld
126 D   guy and I hit him with a glass in his throat" for example

127 V   als 't zo zou m/dat als dat opzettelijk is nou dan is
127 D   if it is like t/that if that is intentional well then that

128 V   dat niet het geval. 't Is gewoon gebeurd en een
128 D   is not the case. It just happened and a passage of words

129 V   woordenwisseling op een gegeven moment nou ja: ben ik
129 D   at a certain moment well anyway: then I went

130 V   toen blind gegaan.//' 
130 D   blind.//' 

The defendant verbalises what he assumes to be the legal definition of intention, namely that one walks toward someone and hits that person. *That* is the definition with which he disagrees, or at least, he does
not want to be accountable under that definition. Nevertheless, the judge makes patently clear in the motivation of his decision that the sudden, explosive and "blind" character of the defendant's action (discussed a little while after the passage quoted above) does not undermine or contradict the evidence of criminal intention:

Shadow-case: intentional ill-treatment: infliction of grievous physical harm with broken beerglass

262 R Hhh. En (.) ja
262 J Hhh. And (.) yes

263 R (.) dan is altijd de vraag is 't/moet je het nu voor 't
263 J (.) then it is always the question is it/should one then

264 R eerste telastegelegde de ((schaapt keel)) (.) de: poging
264 J sentence for the first charge ((clears throat)) (.) the:

265 R tot zware mishandeling veroordelen of niet. Eh:m voor de
265 J intention to grievous ill-treatment or not. Ah:m for the

266 R straf doet het er niet zo vreselijk veel toe. Eh:m maar
266 J penalty it does not really make that much difference. Ah:m

267 R 't is inderdaad wel zo dat wij dat in het algemeen zo
267 J but it is indeed the case that we generally regard it like

269 R wanneer je iemand met een glas, waarvan iedereen weet dat
269 J that, and why do we regard it like that, because we reason

270 R 't zo kapot kan gaan in z'n gezicht slaat dan/ dan neem
270 J knows that it can go to pieces hits in his face then/ then

271 R je/dan neem je gewoon als 't ware voor lief dat 't
271 J you/then you just take it basically for granted that it

272 R gebeurt, en dan neem je dus ook voor lief dat er ernstige
272 J happens and then you also take it for granted that severe

273 R gevolgen aan verbonden kunnen zijn. ((snuift)) Eh:m dat
273 J consequences may be linked to it. ((sniffs)) Ah:m that you

274 R u dat in een betrekkelijke opwelling hebt gedaan dat is
274 J did that in some kind of impulse that is very well

275 R best wel mogelijk, maar ik vind dat het daar nog niet aan
275 J possible, but I do not think that it detracts anything

276 R kan afdoen.//
277 J from it.//
Similar to the judge in the "Jansen versus Bertinus"-case, the judge points out to the defendant that the legal definition is superior to the common definition (266/267). The explanation of the judge demonstrates that this kind of legal reasoning is supported by a general rule of experience ("everybody knows"; 269) which is to be regarded as an ideal-behavioural expectation (indirectly formulated as: "one should not take for granted the consequences of which everybody knows that they are caused by doing X"; 271, 272).

"Criminal intention" is not explicitly defined in the Dutch Criminal Code. However, in the doctrine of the Dutch Criminal Code, "intention" is defined as the "will of the actor aimed at doing something which incriminates the rules or orders of the (criminal) law". Intention (dolus) is a part of guilt in the wide sense of the word (culpa is the Latin word for guilt in the narrow sense). The charge of criminal intention must hold for all the parts or details of the "fact" which is being charged. In the Dutch Criminal Code a distinction is made between dolus delicts -caused by intention- and culpa delicts -caused by guilt. Dolus delicts are rewarded with a heavier sentence. There are three dogmatic versions of intention:

1. necessity: action A necessarily leads to consequence C;
2. probability: action A probably leads to consequence C;
3. possibility: action A possibly leads to consequence C.

In the "Jansen versus Bertinus"-case, we are dealing with the charge of conditional intention (dolus eventualis), which is brought forward when it can be established that the agent has been aware of the possibility (or probability or necessity) of a certain incriminating consequence of his action, but decided to take the risk into the bargain. In the Dutch Criminal Code, this is always equal to intention.¹

What can be noticed first and foremost is that the evidence for the infliction of physical injury is a 'material' precondition for the establishment of evidence for 'immaterial' criminal intention (see also Sistare 1989: 21). Naturally, persons are not being charged when the consequences of an intention are unknown. For example, a woman who intends an abortion cannot be charged with the infringement of the law.
until evidence can be shown with regard to the performance of an abortion itself. In the criminal law, there is no such a rule as "the mother who has the intention to kill her child will be charged due to wilful incrimination of the law." The intention must have had observable consequences, so the rule is formulated as "the mother, who intentionally kills her child." The observable action, including its outcome and the adverbial state of intention, is decisive for the construction of criminal intention. According to Van Dijk (1976: 294ff) this mode of reasoning incorporates a *practical syllogism*: actions are identified as values of intentional functions.

A second characteristic of the legal definition of criminal intention is that there is no excuse for the perpetrator who claims that s/he had another purpose in mind despite of the incriminating consequences of his/her action, and despite having "foreseen" the consequences. "Foreseeability" is a sufficient requirement for the establishment of criminal intention (Probert 1972: 311; 318 (Exhibit V)).

From the questions asked by the judge and/or prosecutor during the trial one derives some insight about concepts which are generally associated with the weighing of the perpetrator's intention. Sometimes however, even if the defendant is charged with "intention", the interrogators do not even reach a level at which they can interrogate the defendant about his/her state of mind, namely in the situation where the defendant asserts to have nothing to do with the crime, as happens in the case Niehe.9

The legal definition of criminal intention calls for contextual *semantic ambiguity*: for example to intentionally attempt to hit one of the two targets in front of you resembles, but differs from the intention to either hit target 1 or target 2 (Bratman 1987: 118). It is clear that the establishment of criminal intention is fictional, for that it is a construction of a presumed mental state of mind (mens rea). As such, definitional gaps may exist within the legal discourse. In addition, these gaps never appear right at the surface, because the application of existent legal definitions is flexible and triggers a wider interpretation of the definition. In this very respect, legal agents are situated in a discursive space in which the meaning of the norm may eventually be expanded. The legal "terra incognita" may
therefore especially concern the observability of the invisible state of mind.

According to Alf Ross (1979), the concept of the dolus eventualis is ideologically rooted in the idea of the evil will. It stands for a cliché which transforms reality into a determination. Intentionality is always a matter of fictionality or hypothesis (i.e. Reijntjes 1980: 136). Causality in the narrative may come about when intention—after its determination—is taken as a guiding explanation of the crime. Although the fact (the presence of intention when the crime was being committed) has the appearance of an objective matter, it is a subjective category in the sense that the perpetrator has to motivate and explain it.

But the perpetrator is supposed to have acted according to an ideal-type normative expectation. Legal rules are expectations of people who act reasonably and thoughtful in every imaginable situation: mental disease, abnormality and provocation (Fletcher 1978: 369) are the only valid excuses for acting unreasonably.

According to Hart (1968: 150), the legal-normative expectation or behavioural rule is inspired by a certain ancient belief "that possession of knowledge of consequences is a sufficient and necessary condition of the capacity of self-control, so that if the agent knows the consequences of his action we are bound to say 'he could have helped it.' (...)" Such a philosophy of rational action is not unique for the criminal law discourse. When knowing that the consumption of unripe plums may upset my stomach, I am the one to be blamed for a sore stomach, and not the plums. In the testimonies of plaintiff Bertinus and defendant Jansen we will see how everyday-accounts of action also rationalise matters of liability, intention and foreseeability.

10.4 Criminal Intention in Statements Made to the Police

By means of a comparison between two accounts, we should also be able to focus on how victim/plaintiff and defendant themselves evaluate their portion of "criminal intention". In the "Jansen versus Bertinus" case, Bertinus's testimony or narrative in the police record is built around the argument of self-defence, whereas Jansen's is not explicitly so. In other words, Bertinus' post-evaluation is meant to justify his
own actions in the event by reference to motives of self-defence, which is to be seen as the outcome of and a reaction to Jansen's violent initiatives and provocations (Appendix V: S65, S131). Jansen on the other hand fails to mention self-defence as a rationale for his actions until during his appearance in court.

One should raise the question why Jansen avoided the employment of a favourable, "self-defensive" terminology in his statement. Instead of a self-defensive term, Jansen employs "antagonist" in the police-record ("in order to be an antagonist against Bertinus"; Appendix IV: S103), laying emphasis on the offensive character of his action rather than the defensive character thereof. The semantics of the term "antagonist" can be associated with self-incrimination: describing oneself as an antagonist obviously adds to the suspicion that what Jansen did was intentional. The term "antagonist" is also surprising and suspicious in this context, because it is highly unlikely (but not impossible) that somebody deprived of education employs this kind of vocabulary.

Apparently, Jansen was interviewed by the police without a lawyer being present at the time. Indeed, any lawyer would have instigated client Jansen to avoid the use of any self-incriminating terminology. In fact, the lawyer would have assisted Jansen to construct an alibi similar to that of Bertinus: self-defence.

In a much later stage, which is during the trial, the defence counsel tries to compensate for this obvious weakness in Jansen's original statement. His attempt to convince the court that the crime was an act of "self-defence" may be a standard-strategy, but it may prove successful: if the defendant or his/her counsel is able to demonstrate sufficient grounds for self-defence - for example by placing the narrative in a new light or by challenging the court to change its interpretation - the case may be dismissed or the defendant will be sentenced for a subsidiary, non-intentional charge (ref. Article 41.-1 Dutch Criminal Code).

Another difference between Jansen's statement and Bertinus's testimony in the police record is the dramatised character of the account of the latter, which is certainly not advantageous to suspect Jansen. After describing and explaining the major event, victim Bertinus emphasises the severity of the event by referring to the seriousness of his injuries. He elaborates the way in which he suffered from his injuries and underlines his fortune when it appeared that his
wounds would stay closed (Appendix No.4: S169/S170, S171, S172/S173, S176). His evaluative elaboration is the explicit 'Leidensgeschichte' (Rehbein 1980), in which Bertinus throws a favourable light on his actions with the aim to create sympathy. Bertinus highlights his terrible suffering and narrow escape from death in detail.

Besides, Bertinus employs other legal terms which indicate further incriminations with regard to Jansen's behaviour; partly evaluating the event, partly stipulating Jansen's state of mind, Bertinus inserts words such as "purpose" and "intentionally". He decorates his 'Leidensgeschichte' by means of drawing a contrast between his sufferings and Jansen's purpose or intention to make him suffer: a contrast between good and evil is created. The 'Leidensgeschichte' gains considerable force when linked up with a context which explains how and why Bertinus suffered. The employment of terms such as "intention" and "purpose" has undeniable consequences for the legal-normative interpretation of the narrative: the clues are ready to hand.

For the reconstruction of the of the testimonies, we have focused on the major action\(^\text{10}\) of the narrative: the stabbing (see section 6.5). We have also taken the narrative antecedents of that major action into account, namely the 'conifer-event' and the 'hayfork-spade-event', which both lead to the escalation of the events.

Jansen's narrative does not contain a hierarchically superordinated goal, which is a goal explicitly defined by the major agent(s) within the narrative and which generates other actions performed within the narrative. It gradually becomes clear that although Jansen does not explicitly employ the terminology of self-defence, the general message from his narrative is that he repeatedly (re-)acted upon Bertinus's provocative initiatives (Appendix IV).

Returning to the point of hierarchical narrative organisation, it appears that the events within the narrative are not structurally superordinated (or 'dominated') by the major action, or by the major agent's goal, but by the backgroundstory. The narrative in S40-S116 (Appendix IV) contains the climax of problems which previously existed between Jansen and Bertinus.

Therefore, the narrative in S40-S116 has a linear (or: chronological) instead of a hierarchical sequential structure. This narrative linear sequence is interrupted 21 times by the insertion of descriptions, opinions, observations, evaluations, knowledge- or
Some of these interruptions in the narrative sequence actually transpose the narrative into the situation of the police-interview. If we would not know that the narrative was constructed on the basis of interview-questions, some of the sequences might appear as 'irrelevant' or 'redundant' for the course and the logics of the narrative (f.e. Appendix IV: S68: "I do not remember whether Bertinus said something to me"; this is a knowledge-gap, and if it would have been deleted, the narrative would still be coherent and comprehensible; however, the knowledge-gap is relevant for the legal evaluation of the event).

But what can be said more specifically with regard to this narrative linear sequence? At a few places within the narrative, it appears that the suspect presents the order of the narrative sequences in a way which is most favourable to him. The narrative positions where this occurs can be retraced with reasonable precision (full text in Appendix IV):

*S51/S52 contain a warning from Bertinus. As a consequence of Jansen's action (S47/S48: "calling names"), Bertinus warns Jansen without any precondition. In the order of sequences, it appears as if Jansen does not get the chance to react properly to this warning: immediately after Bertinus' warning, Bertinus pulls a conifer out of the soil. Bertinus is being painted as a man who lacks the patience to wait for Jansen's response to his warning.

*S56-S60 therefore seem to be justified in light of the biblical expression "An eye for an eye, a tooth for a tooth"; which is used by the defence-counsel during the trial.

*S61 and even if S56-S60 were justified, the GOAL (S59-S60: "to throw the bit of concrete through Bertinus' window pane") becomes disturbed; in other words, Jansen justifies himself again, by putting forward that he actually did not perform his goal, unlike Bertinus.

*S65 Bertinus ignores the pacifying action of his wife.
*S79 Bertinus ignores the pacifying action of his neighbour (S76)
*S89 Bertinus ignores request/warning Jansen.
*S90/S95 Bertinus provokes Jansen ("pushing movements with bicycle" in Jansen's direction)
*S96 contains again a justification: Jansen had no malicious intent at the moment of Bertinus's provocation.
contains a justification: Jansen explained why he used the knife (self-defence).
*S107 contains a justification: Jansen describes that he was not in a position of assault.
*S108 Bertinus repeats provocation (justifies S109 and S111).
*S116 without intent, Jansen cuts Bertinus again; the presentation of the second major action (stabbing) as if it were an accident, justifies Jansen's state of mind.

To summarise, the sequence of actions is narrated in such a way that Jansen's actions appear to be reactions to Bertinus' actions, thereby justifying Jansen's actions as a reaction rather than an initiative.

When looking at the action sequence based on the narrative which is laid down in the testimony of the plaintiff (Bertinus; Appendix V), it appears again that the action elements of the narrative cannot particularly be related to any action-goal. In non-hierarchically, but chronologically ordered narratives such as these, goals are locally defined. Goals are immediate, that is to say, they appear as reactions to actions of the counter-partner. The narrated actions are not hierarchically oriented, because the succeeding actions are prevented, disturbed or made irrelevant in the context of counter-actions. The narrative thus organises its goalsetting by means of a local (re-) definition of goals, which seems to be particularly characteristic for "natural" narratives (the "and then...and then"-structure). Examples of the local redefinition of action-goals are (Appendix V): S27, S90, S123, S154, (S159). To both the suspect and the victim/plaintiff, the culmination of the sequence of actions into the stabbing-event has an air of an accidental coincidence of circumstances. Although the legal agents appreciate this narrated coincidental succession of events, one is unwilling to discharge the presence of intention in one of the initial stages of the event.

Similar to Jansen's narrative, the chronological time-axis of Bertinus's testimony is frequently interrupted by descriptions, evaluations, observations, explanations, presentations of knowledge, knowledge-gaps, etc. (see Appendix V):
It is quite remarkable that Bertinus' narrative statements are often anticipated by observatory statements (38 times). This could be explained by the fact that Bertinus is a witness, except for being the plaintiff, victim and (only temporarily) suspect. The high amount of descriptions which Bertinus inserts in his narrative are probably due to the accomplishment of intensification, lengthening, and incrimination.

Like Jansen, Bertinus narrates the event in a mode which is self-justificationary and accusatory towards his counter-part Jansen. Bertinus employs the following sequences to attain that effect (Appendix V):

S27 At the very start of the narrative, Bertinus formulates his motive: he wants to solve existing family-problems in a non-violent way (non-intimidating role of mediator).
S34 It was Jansen who became angry first, not Bertinus.
S39 Bertinus denies that he is the source of the dispute between him and Jansen.
S43 Bertinus obeys Jansen's warning.
S45 It was Jansen who - without any valid reason - started to call names at Bertinus (S47-S49).
S61 Jansen holds a knife in his hand, which frightens Bertinus; the latter has therefore a valid reason to throw the conifer through the pane of Jansen's front door (confirmation in S65).
S66-68 Justification of action Bertinus.
S71 Bertinus withdraws from further provocation.
S74 Jansen demonstrates lack of goodwill.
S76-84 Jansen provokes Bertinus.
S85 Bertinus ignores Jansen's provocation.
S90 Bertinus shows goodwill.
S93-101 Attribution of threatening behaviour to Jansen.
S102-103 Pacifying action by Bertinus's wife.
S104 Jansen ignores this pacifying action.
S106 Action-initiative by Jansen.
S107-110 Action Bertinus out of self-defence.
S116-118 Proposal for pacification by Bertinus.
S119 Jansen ignores this proposal.
S120-124 Action undertaken by Bertinus in order to bring the family-problems back into equilibrium.
S125-129 *Action Jansen*, including the ascription of the intention to stab Bertinus.
S130-133 Action of Bertinus out of self-defence.
S134-150 Description of Jansen's malicious intention, major action by Jansen and the description of the consequences.

The linear sequence of Bertinus's narrative is presented as if his actions were all reactions to Jansen's provocative or violent initiatives. The 'picture' which Bertinus has created is that Jansen who had no reason at all to act violently. Furthermore, Bertinus's narrative illustrates and explains Bertinus's surprise and fear, and ultimately justifies Bertinus's own deviant behaviour.

The most important finding of the analysis is that the succession of actions at the time of the crime does not seem to have been concentrated on the realisation of one central goal only (e.g. stabbing Bertinus). In contrast however, the *act of narrating* does have one single argumentative goal, which consists of the continuous insertion of justifications. Jansen's and Bertinus's narrations, which are performed on the discursive level, fold like a veil over the "actual event". The most important shift which takes place in between the police record and the summons, is that this justificationary narrative veil is removed to make place for the naked bones of the event itself. This makes it possible to backshadow the 'coincidental' character of the action-sequence which emerges from Jansen's and Bertinus's account and to re-evaluate the event as a coherent unity, of which the episodes are tied together by the insertion of a generative, non-ambiguous type of goal-setting.

10.5 The Normative Link with the Law

Norms gain meaning when applied onto the sediment of legal interpretation: the narrative. But vice versa, the interpretation of crime is also facilitated by writing the narrative in terms of the norm. In this section, we will have a look at the details of the application of the norms under the Dutch Criminal Code to the "Jansen versus Bertinus" case. The 'prologue' of the police record (Appendix...
III) pre-empt the normative qualification of Jansen's stabbing as an intentional one by reference to applicable norms in S41 and S45:

**NORMATIVE SEQUENCE, POLICE RECORD NO. I: S41, S45**

**ARTICLE 287 (CRIMINAL CODE)**

He who wilfully deprives another of life, is to be guilty of manslaughter, be sentenced to serve a maximum of fifteen years' imprisonment or to pay a fine of the fifth category.

(Hij die opzettelijk een ander van het leven berooft, wordt, als schuldig aan doodslag, gestraft met gevangenisstraf van ten hoogste vijftien jaren of geldboete van de vijfde categorie).

**IN RELATION TO:**

- **ART. 45**
  - 1. Attempt of crime is punishable, if the intention of the offender has manifested itself through a start of the execution and ( ) execution is not completed only as a result of the circumstances independent of his will.
  
  (Poging tot misdrijf is strafbaar, wanneer het voornemen van de dader zich door een begin van uitvoering heeft geopenbaard en de uitvoering alleen ten gevolge van omstandigheden van zijn wil onafhankelijk niet is voltooid).

- **ART. 302**
  - 1. He who wilfully inflicts grievous physical harm to another (person), is, being guilty of severe ill-treatment, to be sentenced to serve a maximum of eight years' imprisonment or to pay a fine of the fifth category.

  (Hij die aan een ander opzettelijk zwaar lichamelijk letsel toebrengt, wordt, als schuldig aan zware mishandeling, gestraft met gevangenisstraf van ten hoogste acht jaren of geldboete van de vijfde categorie).

- **ART. 388**
  - 2. The maximum of the principal punishments for the crime is diminished by a third in case of an attempt.
  
  (Het maximum van de hoofdstraffen op het misdrijf gesteld wordt bij poging met een derde verminderd).
-3. If it holds for a crime for which life imprisonment is imposed, then an imprisonment may be imposed with a maximum of fifteen years.
(Geldt het een misdrijf waarop levenslange gevangenisstraf is gesteld, dan wordt gevangenisstraf opgelegd van ten hoogste vijftien jaren).

-2. If grievous physical harm is the cause of death, the offender is to be sentenced to serve a maximum of ten years' imprisonment or to pay a fine of the fifth category.
(Indien het feit de dood tot gevolge heeft, wordt de schuldige gestraft met gevangenisstraf van ten hoogste tien jaren of geldboete van de vijfde categorie).

-4. The additional punishments are for attempt equal to those for the completed crime.
(De bijkomende straffen zijn voor een poging dezelfde als voor het voltooide misdrijf).

Potential normative-semantic clues for the construction of criminal intention are "wilfully", "manslaughter", "attempt", "intention", "grievous physical harm" and "severe ill-treatment". These are -by and large- the interpretative focus-points for the legal agent, not only because they enable the construction of a narrative (evidence) with help of a legal qualification of the case, but also because the application of the same semantic clues may complicate the interpretation of the case. The construction of criminal intention is a coin with two sides, so to speak.

The law itself arranges reduction of the complexity of a concept like that of intention by taking recourse to the concept of observation. In Article 45.-1 of the Dutch Criminal Code we can read that intention is linked up with a manifestation (which at least means that it is observable through the senses): "attempt" is punishable if the intention manifests itself in the start of the execution of a crime. However, after the establishment of evidence about the material part of the crime, it is still a complicated matter to prove whether the intention of the offender stretches itself to the end of the execution (that which has become manifest), or to the end of the intention of the execution (that which includes the non-manifested). But apparently the latter question is also covered by the law: it defines intention as stretching itself from the beginning (start of execution, realisation or performance) to the end, for that the execution is not completed only as a result independent of his will. So, the will of the offender is supposed to exist also in the he non-execution of his will.
This arrangement is rather curious, especially because it seems to contradict the preconditional requirement that facts ought to be observed in order to be proven. It becomes inevitable for the legal agent to draw conclusions about criminal intention on the basis of presumption.

In case of anticipated controversy with regard to the application of certain norms to the fact, the procedure which is followed by the public prosecutor is to charge the suspect on the grounds of incrimination of more than one norm only. If it is expected that the 'fact' cannot be univocally determined, other applicable norms are being referred to, which may subsequently be considered as 'subsidiary charges'.

This is also what happens in the "Jansen versus Bertinus" case. In the beginning of the police record it is not yet decided how the fact should be determined in terms of its subsumption under a penal norm. The evidence for "attempt" seems to be firmly rooted, but there is no certainty yet about whether the event should be qualified as an attempt of manslaughter or an attempt of ill-treatment.

Jansen was taken into custody because he was suspected of 1) either having attempted (Article 45 Criminal Code) to deprive Bertinus of his life (Article 287 Criminal Code), 2) or of wilfull infliction of physical harm on Bertinus (Article 302 Criminal Code). Jansen did not actually deprive Bertinus of his life, but might have had attempted to do so. He did actually inflict (grievous) physical harm on Bertinus, because arteries were hit which could have been fatal to Bertinus. And just to reconsider the question, did Jansen inflict grievous physical harm, or was this act an act in relation to an attempt to do so?

The answer is given much later in the procedure. It then appears that specific reference to the applicable norms of the Dutch Criminal Code is not a matter of relevance anymore. In the summons the public prosecutor opts for a rather flexible definition of the charge which renders him the opportunity for a wider interpretation than the one enabled by a more restricted fact-definition. The public prosecutor charges defendant Jansen for three differently defined facts (i.e. if the first charge does not lead to irrefutable proof, the public prosecutor moves on to the second subsidiary charge, and so on). The first charge is based on the suspicion that Jansen wilfully executed his intention to wilfully deprive Bertinus of his life (note that the word "wilfully" relates to both the execution of Jansen's intention and
the execution of his action), and that "independent of Jansen's will" the consequences of this execution were not fatal. The second charge (subsidiary and less severe) rests upon the suspicion that Jansen wilfully inflicted grievous physical harm on Bertinus. The third charge (again subsidiary and less severe) is based upon the suspicion that Jansen wilfully executed his intention to wilfully inflict grievous physical harm to Bertinus (also here the reference to "wilfully" occurs twice), and that "independent of Jansen's will" this execution did not result in severe physical harm. In the first charge, the public prosecutor combines Article 287 with Article 45 of the Criminal Code, in the second charge Article 302 of the Criminal Code, and in the last charge he combines Article 302 with Article 45 Criminal Law.

These normative references in the summons are individualised and specified by reference to narrative chunks of information to be used as criminal evidence. The chunks appear as: the name of the suspect (mentioned in the introduction of the summons), the date and the place of the event, the name of the victim (Bertinus) and the knife (at least with a hard and/or sharp object), followed by a series of possible descriptions of the "stabbing-event". The appearance of the multiple description is significant, because the public prosecutor does not automatically choose in favour of the narrative unfolded by the police officers and the informers ("stabbing"). He leaves it open: "stabbing and/or thrusting and/or cutting and/or beating" (see also 7.3). Another significance is the appearance of "one or more times". Apparently, the public prosecutor avoids preference for either of the narratives: the prosecutor's description in the summons tolerates Jansen's narrative version (who states that he stabbed once) as well as Bertinus's narrative (who states that Jansen stabbed twice). The 'true' and final interpretation is yet left somewhere in the middle (see section 9.7).

10.6 Constructing Intentionality in Courtroom

The multiple qualification of Jansen's crime in the summons has provided a firm interpretive basis for the intentional element in the crime. Although yet to be decided by the judge, the reference to the various norms in the charge (discussed in the previous section) has fixed the parameters within which the discussion during the trial is allowed to move.
The description of Jansen's crime in the charge suggests the existence of a choice between three options. But curiously enough, all the professionals present in the courtroom know that they are not really going to discuss the first option, which is the qualification in which defendant Jansen is accused of an attempt to intentionally kill his brother-in-law Bertinus. If this primary charge were to be taken seriously into account, the case would not have been brought before the "politierechter" (an attempt of manslaughter would result into a penalty higher than the 6 months imprisonment which the "politierechter" can maximally inflict). Realistically spoken, the choice is therefore dwindled down to two. Nevertheless, there is talk of Jansen's attempt of manslaughter: the Prosecutor naturally mentions it in his presentation of the charge (18-23; not transcribed); he dismisses the primary charge against Jansen in his requisitory by saying "I think that that is written at the top, that we should disregard that. Taking the circumstances under which this all happened, I will not assume that it was the intention of mister Jansen to deprive Bertinus of his life." (260-265; not transcribed); the defence counsel refers to the primary charge in his plead and agrees with the prosecutor's dismissal of that charge (430-432; transcript later in this section); the judge discusses the definition of criminal intention in relation to either manslaughter or ill-treatment (529/530; transcript later in this section); the judge does not make an attempt to explicate the grounds on which the primary charge against Jansen is withdrawn (which is indeed a task of the prosecutor) and follows the prosecutor's line without further ado. The rhetorical "forces" thus concentrate on the issue of whether Jansen is to be accused of intentional grievous ill-treatment or of the attempt to ill-treat Bertinus.

In this section we will discuss the rhetorical contributions of defendant, prosecutor, defence counsel and judge in the course of Jansen's trial. By contrasting the definitions given to the crime, it soon becomes clear that there is a contrast between the colloquial and the legal definition of intention (see also 10.3).
The defendant verbalises his common conception as follows:

JaBe/mishandeling/politierechter/24b/tramdb101189

Ik was me d'r eigenlijk/ ik was me d'r

niet van bewust op dat moment dat ik een mes bij me had,

maar door machteloosheid/ ik stond dus eigenlijk/ we

dieden alle beiden hh eh onze spullen weggelegd en

of us had put away hh ah our stuff and

waar ik/ waarop ik w/w/wilde weggaan dus met de fiets

after which/after which I w/w/wanted to leave on the bike

maar waarop dus hh Bertinus de fiets pakte hh en eh: hh

so but at that point Bertinus picked up the bicycle hh and

opgeheven van de grond op mijn inkwam ((snuft)) en

ah: hh lifted it off the ground came towards me ((sniffs))

ja gewoon vanuit machteloosheid zeg maar zoals ik

((sniffs)) and yes just because I felt powerless so to

n/net al zei hh, dat wanneer ik een zakkaam op dat

say as I just said hh that if I'd had a pocketcomb maybe

moment misschien in m'n in m'n zak had gehad, had ik

in my/ in my pocket, I would

'm oor ooit, wat moet ik zeggen, dus eh/ nou en op

never have had him, what should I say, so eh/ well and at

'n gegeven moment eh/ die verwondingen/ hij kwam dus

certain moment ah/ those injuries/ so, he came

op me in. 't Was dus absoluut NIET de bedoeling laat

at me. It was absolutely NOT the intention so to say

ik zeggen om hem/ laat ik zeggen eh: een/ op een

to/ so to say ah: to/ to

dergelijke manier te verwonden.//

R

injure him in such a way.//

J

Mm. Mm.//
The common conceptualisation of criminal intention as it is verbalised by the defendant is connotated with a state of consciousness or awareness (111-112), and with contextual actions (e.g. provocation by counter-partner; 116/117; see also 10.3):

- "I was not really aware that I had a knife with me" (111/112): means in this context: I did not have the intention to bring my knife from home when I followed Bertinus.
- "I felt powerless" (113): (the stabbing) was an act of self-defence.
- "We had put our things away, after which I wanted to leave on my bicycle (113-115): goodwill.
- "Bertinus attacked me" (115/116): self-defence.
- "I felt powerless" (119): self-defence.
- "If I would have had a pocketcomb I would never have injured him like that" (119-121): Absurdity of having an intention to wield the knife.
- "Bertinus came in the direction toward me" (122/123): self-defence.
- Conclusion: It was not my intention to injure Bertinus in such a malicious way (123-125).

If silence is to be regarded as language as well, attention should be paid to Jansen's swallowing of a potentially self-incriminating verb, such as "hit", "stab" or "injured" (121).

Jansen establishes coherence in his account by linking the narrated actions through a consistent remorseful evaluation. The narrative is (following the function of the Dutch trial) not of a reconstructive nature, but of an evaluative-emotional nature. The account is therefore not coherent because of the succession of actions, but because of the justificationary angle from which Jansen's actions at the time of the crime are suggested to be perceived. At first sight, Jansen's account during the trial is semantically consistent with his account in the statement to the police, especially evolving around the "story" that "Bertinus started first" (Appendix IV; trial 116/117). Apart from a paraphrase and the addition of one small element ("high"), the reconstruction remains the same. But all the other elements of Jansen's account during the trial shift his original story into a rhetorical plea for excuse. We should of course be aware of the possibility that the wording of Jansen's statement in the police record may not be literally his. A striking difference between the wording in the statement to the police and the statement during the trial concerns the description of the crime in an intentionalist vocabulary. For example, Jansen says during the trial that he was not even aware of the knife in his pocket, whereas in the police record he took the pocketknife out of
his pocket *in order* to cut Bertinus over the hand. Let us, for the sake of clarity, contrast Jansen's account during trial with the one told to the police:

<table>
<thead>
<tr>
<th>TRIAL</th>
<th>POLICE-RECORD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jansen says that he was unaware of the knife in his pocket (111/112)</td>
<td>Jansen accounts that he had the pocketknife in his pocket as usual (Appendix IV: S98) and that he took the knife out of his pocket.</td>
</tr>
<tr>
<td>- Jansen says that he acted because he felt &quot;powerless&quot; (113).</td>
<td>- Jansen took the knife out of his pocket in order to be an antagonist against Bertinus (Appendix IV: S103).</td>
</tr>
<tr>
<td>- Jansen says that he wanted to leave after both had put their stuff (the fork and spade away) (113-115).</td>
<td>- This element <em>does not occur</em> in the record. In this version both had put their stuff away and when Bertinus grasped Jansen's bike, Jansen told him to leave the bike alone (Appendix IV: S86).</td>
</tr>
<tr>
<td>- Repetition of the element of &quot;powerlessness&quot; (118).</td>
<td>- Jansen says in the record that he took the knife out of his pocket because he was looking for an object with which he could offer resistance to Bertinus. He wanted to defend himself against Bertinus who stood threateningly over against him (Appendix IV: S121).</td>
</tr>
<tr>
<td>- Undermining the intention of wanting to wield with the knife (it could have been anything, such as for example a pocketcomb) (119-121).</td>
<td>- This line of thinking does <em>not</em> appear in the police-record.</td>
</tr>
<tr>
<td>- &quot;He came at me&quot; (122/123)</td>
<td>- Corroborated by the police-record, but differently verbalised (Appendix IV S90, S91, S95, S123).</td>
</tr>
<tr>
<td>- Explicit denial of the intention to inflict injuries to Bertinus (123-125).</td>
<td>- In the police-record, Jansen says to have intended to cut Bertinus <em>over</em> the hand, after which he would let go of the bike: &quot;After that I attempted to cut him over the hand, but I failed.&quot; (Appendix IV S126, S137, S138, S139).</td>
</tr>
</tbody>
</table>

All the self-incriminating vocabulary employed in the police record has been filtered out of Jansen's account during the trial: the awareness of the knife is *transformed* into unawareness; being a counter-part is *transformed* into feeling powerless; Jansen's request for his bike is...
transformed into his voluntary departure; offering resistance is transformed into feeling powerless; having the intention to cut Bertinus over the hand is transformed into an absence of intention to injure Bertinus.

There may be three reasons for these drastic evaluative shifts. The first is that the police record does not give us an accurate picture of Jansen's evaluation of the crime just after it happened; the discrepancy between the narratives in the record and the trial may be due to a misrepresentation of the first narrative. It is also important to note that Jansen's account during the trial is not interrupted by questions, and the wording not suggested by his interrogator(s). The second reason may be that Jansen has been instructed by his lawyer to systematically play down every aspect of attempt or intentionality in and before the crime. The third, most likely reason, is that Jansen's reflections on the event have changed during the period which has passed between the crime and the trial; his account has become more consolidated, the justifications of his actions have grown and of course, his recall of the event is bound to be less refined.

As said before, the public prosecutor (officially) accuses defendant Jansen of three subsidiary facts, which all involve an aspect of criminal intention. He reconstructs Jansen's intention to inflict grievous physical harm to Bertinus as follows:

JaBe/mishandeling/politierechter/24b/tramdb10118912

267 O Eh. Aan de andere kant is 't zo als
267 P Ahm. On the other hand it is the case

268 O men naar 't eh middel kijkt dat gebruikt is, kun je zeggen
268 P if you look at the ah tool that is used, you can say

269 O dat (meneer Jansen wel degelijk bekend is)/ dat mes dat
269 P that (it is well known to mister Jansen)/ that knife that

270 O meneer Bertinus/ dat meneer Jansen gebruikt heeft is wel
270 P mister Bertinus/ that mister Jansen used is clearly

271 O duidelijk geschikt om iemand om het leven te brengen. In
271 P capable of taking somebody's life. At any

272 O ieder geval om zwaar lichamelijk letsel te veroorzaken.
272 P rate to cause grievous physical harm.

273 O Hh. Eh: ((kucht)) Ik denk toch wel dat verdachte op dat
273 P Hh. Ah: ((coughs)) I still think that the defendant at
274 O moment begrepen moet hebben, dat als je op deze manier,
274 P that moment should have understood, that if one then in
275 O op zo'n korte afstand, he?, en d'r is een getuige bij die
275 P this way at such a short distance, eh?, and there's a
276 O 't ook zegt hoe verdachte dus dat mes gehanteerd heeft,
276 P witness who says that too how the defendant wielded that
277 O dan is 't niet eh onwaarschijnlijk dat iemand zo geraakt
277 P knife, then it is not ah very unlikely that somebody can
278 O kan worden, dat daardoor eh zwaar lichamelijk letsel
278 P be hit in that way that by that ah grievous physical
279 O ontstaat. En, gebleken is dat eh verdachte/ het
279 P harm is caused. And (. ) there is evidence that ah
280 O slachtoffer Bertinus ook behoorlijk geraakt is. Een
280 P defendant/ ah victim Bertinus was also severely hit. An
281 O slagader van die man is/is/is geraakt en als d'r dus niet
281 P artery of that man was/ was/ was hit and if the right help
282 O tijdig laten we zeggen de juiste hulp was geboden, dan had
282 P wasn't ah let's say offered then he could have bled to
283 O ie kunnen doodbloeden. Ik denk dan ook eh mevrouw de
283 P death. I thus think ah madam politierechter
284 O politierechter dat eh 't eh subsidiaire waarover ik 't
284 P that ah the ah subsidiary that I was talking about just
285 O nu net gehad heb, de bedoeuling gehad hebben om Bertinus
285 P now, the intention to inflict grievous harm to Bertinus,
286 O zwaar lichamelijk letsel toe te brengen, dus Bertinus
286 P that is to hit
287 O zwaar te treffen met dat mes, dat eh die bedoeling
287 P Bertinus hard with that knife, that ah that intention
288 O inderdaad voor 'm gelegen heeft, in ieder geval ehm, moet
288 P must have presented itself to him, in any case ahm, the
289 O verdachte toch wel geweten hebben dat in een dergelijk
289 P defendant should have known that by acting like this one
The *knife* is the prosecutor's central clue for the construction of his argument. One could define his performance as a kind of *narrative argumentation*, which is -in our definition- a mode of arguing in which the proof of narrative chunks of evidence is implicitly put forward as an accepted point of view. In other words, a "self-evident" and "homogeneous" narrative is stipulated and embedded in the prosecutor's argumentation. It is the aim of the prosecutor to demonstrate that the crime was an intentional act, as opposed to a guiltful act (this is not entirely realistic, because whatever option the prosecutor will argue for, they are all intentional "dolus"-acts; the discriminatory sketch between intentional and guiltful acts therefore suggests a symbolic demarcation between two penal domains). Quite confusingly, the prosecutor mixes the argumentation of the three subsidiary charges with the argumentation of the three dogmatic versions of intention (see 10.3). The three dogmatic versions (necessity, probability and possibility) are expressed by means of modal verbs or adverbs: in 274 the use of "should" for necessity, in 277 the adverb "(not) unlikely" for probability and finally "can" for possibility. The prosecutor's attempt to demonstrate the availability of sufficient proof for criminal intention is entangled with his argumentation about which norm he thinks should be applied in the qualification of the event.

The starting-point of his argumentation is -as we said before- the knife: a knife is a suitable means in principle to kill somebody or to inflict grievous physical injury on somebody 267-272. The normative expectation that one should know what the consequences of wielding a knife may be, is expressed in 273-274. The legitimacy of that normative expectation is reinforced by the illustration with details from witness-testimonies (short distance, the way of wielding that knife; 274-276). The evidence has established and shown that Bertinus was severely hit and that he possibly could have died (278-283). The prosecutor's conviction that Jansen indeed intended to inflict grievous physical harm to Bertinus is expressed in 284-288. In 288-291 there is a repetition of the ideal normative expectation that Jansen should have been aware of these potential consequences.
The aim of the *defence-counsel* is to demonstrate the lack of sufficient or persuasive proof for Jansen's intention to kill Bertinus. He proceeds by means of a chronological and narrative *reconstruction* of the event (the following passage is a fragment of the counsel's plead):

JaBe/mishandeling/politierechter/24b/tramdb10118913

387 A en wat d'r dan vervolgens gebeurd is dat is (. .) niet
387 C and what happened afterwards that is (. .) not

388 A helemaal duidelijk. Ehm (3.1) de getuigenverklaringen
388 C fully clear. Ahm (3.1) the testimonies

389 A lopen daarover ook uiteen. De getuige Van Daalen
389 C about it are divergent. Witness Van Daalen

390 A die zegt bijvoorbeeld dat Bertinus, een forse
390 C for example says that Bertinus, a robust

391 A man zoals zij dat noemt eh: de fiets opwierp
391 C man as she calls him ah: threw the bicycle up towards

392 A naar de andere man, dat is dan Jansen. Getuige Paardebloem
392 C the other man, that is then Jansen. Witness Paardebloem

393 A die ziet twee steken geven maar die
393 C sees two stabs being given but he

394 A maakt bijvoorbeeld van de fiets helemaal geen melding
394 C does not for example mention the bicycle at all which

395 A wat ik toch wel (. .) merkwaardig vind en waarom ik die
395 C which I find a bit (. .) curious and why I find that

396 A getuigenverklaring ja (. .) op z'n minst onvolledig
396 C testimony well (. .) at least incomplete.

397 A vind. De getuige Hazelnoot die (. .) spreekt als
397 C Witness Hazelnoot he (. .) is the only one for example

398 A enige bijvoorbeeld van een knokpartij die zou hebben
398 C who speaks about a fistfight which is supposed to have taken

399 A plaatsgevonden. Kortom, de getuigenverklaringen
399 C place. In sum, the testimonies are strongly

400 A lopen nogal sterk uiteen. (. .) Bertinus *zelf* (. .)
400 C divergent. (. .) Bertinus *himself* (. .)

401 A en dat is dan onder deze omstandigheden zeker van
401 C and that is very important under these circumstances,

402 A belang, die verklaart: "Ik greep de fiets van Piet
402 C he states that "I grabbed Piet's bike and held
403 A en hield die tussen ons in om me te
403 C it in between us to

404 A verdedigen. Ik heb die fiets ook naar voren in de
404 C defend myself. I also thrust that bike forward in

405 A richting van Piet gestoten (.) toen hij
405 C Piet's direction (.) when he

406 A op mij afkwam. Dit was alleen om me te verdedigen."
406 C came towards me. This was only to defend myself."

407 A (.) En daar heb ik natuurlijk (.) vraagtekens bij
407 C (.) And there of course (.) I put a note of interrogation

408 A geplaatst onder deze omstandigheden. Die fiets kan je
408 C to this under these circumstances. Of course one can use that

409 A natuurlijk gebruiken als s/verdedigingsmiddel, maar
409 C bike as s/ means of defence, but also as

410 A ook als aanvalsmiddel eh mijn cliënt kan natuurlijk
410 C also as means of offence ah my client may of course

411 R ((kucht))
A zeker omdat eh Bertinus ook eh sterker en
411 J ((coughs))
C certainly because ah Bertinus is also stronger

412 A zwaarder is eh zich bedreigd hebben gevoeld (.)
412 C and hevier ah felt himself threatened (.)

413 A en uit afweer misschien een zakmes heeft gepakt.
413 C and perhaps out of self-defence took out his pocketknife.

414 A Een zakmes, want dat was 't. 't Was niet een mes hh
414 C A pocketknife, because that's what it was. It was not a

415 A eh wat je normaal in de keuken aantreft, maar 't was
415 C knife hh which one would normally see in the kitchen, but

416 A een mes wat je (.) bij je kunt dragen. Hij kan dat eh
416 C it was a knife what you (.) can carry on you. He may have

417 A naar voren hebben gestoken (.) en dan is het ook
417 C thrust it forward (.) and then it is also

418 A denkbaar dat Bertinus die (heeft die zelf verklaard)
418 C imaginable that Bertinus (he said this himself)

419 A met fiets en al (.) op (.) mijn cliënt instormt op
419 C with bike and everything (.) pushed (.) into my client is

420 A die manier geraakt is. Dan heeft ie dus (.)
420 C hit in that way. In that case (.) he has injured

421 A zichzelf (.) verwond. En ook is de verdediging (.)
421 C himself (.). And also is the defence (.)
dat mijn cliënt als ja als afweerhandeling/

that my client as yes as defensive action/

als zelfverdediging dat mes naar voren heeft

as self-defence thrust that knife forward.

gestoten. Eh, en onder die omstandigheden is 't

Eh?, and under these circumstances it is even very much

zelfs zeer de vraag of hij ook überhaupt eh: die

the question if he also at all: deserves

straf (.) verdient. Als ik dan nog even de dagvaarding

that (.) sentence. If I then just examine the summons,

onder de loep neem, dan (.) zien we in alle drie de

then (.) we see the element of "intention" in all three

punten die telaste worden gelegd 't element "opzet".

of the points which are being charged.

De officier heeft al gezegd eh opzet op 't eh doden

The prosecutor has already said ah intention with regard

van Bertinus dat zie ik niet zo zitten. Ik denk dat dat

to ah the killing of Bertinus I don't see the point of

ook eigenlijk wel vrij duidelijk is. Maar ook

that. I actually think that that is also quite clear. But

overigens kun je de vraag stellen of 'r wel een opzet

also furthermore one could ask the question whether there

geweest is om hetzij te doden hetzij Bertinus zwaar

any intention to either kill or to severely injure

te verwonden. En (.) ik denk dat dan belangrijk is

Bertinus. And (.) I think that then the moment at which

't moment dat mijn cliënt op de fiets stapte en bij

the client got onto his bike and took a stone from his

eigen huis een steen mee nam. Die steen is natuurlijk

own house. That stone was of course intended

bedoeld geweest om (.) dat heeft mijn cliënt ook zo

to (.) my client also stated this himself, throw in a

verklaard, een ruit in te gooien bij Bertinus. Oog

window at Bertinus's. An eye for an eye,

om oog, tand om tand. Een adequaat antwoord. Geen

a tooth for a tooth. An adequate answer. Not a right

juist antwoord, maar adequaat. Het is niet aannemelijk

answer, but adequate. It is not likely
The defence counsel employs strategies which are made available by the reconstruction of the crime as a narrative event. The reconstruction is largely performed by means of data which are derived from the various witness testimonies. Bennett and Feldman (1981: 98) state in this context that

"Storytelling operations make it possible to alter the interpretation of a story's central action through challenge, redefinition, or reconstruction of the story itself."

In this case, the reconstruction of the event challenges the prosecutor's interpretation and brings an alternative interpretation of a milder character to the fore. As Bennett and Feldman state (1981: 104):

"A common defense in murder cases, for example, is to show that the defendant acted in self-defense. A plausible story on this theme must reformulate the three triads by showing that the defendant could have been at the scene without intending to kill the victim, that the defendant had no prior reason to kill the victim and that the means of causing death reflected a spontaneous response to serious provocation."

That observation made by Bennett and Feldman is reverberated in our trial: except for the re-interpretation of the event as an act of self-defense from the defendant's point of view, the defence counsel seeks to demonstrate the existence of gaps in the action-sequences in the narrative accounts of the witnesses and the plaintiff (387-408). According to him, the account of the event remains incomplete without the presentation of detailed evidence with respect to the knife and the bicycle, and with respect to the way in which respectively defendant and plaintiff used these objects.

Most striking is the passage in which the counsel characterises Jansen's intention to throw a stone through Bertinus's window with the help of a biblical metaphor (438-439). The counsel quotes a fragment
from the Old Testament, Leviticus 25: 20: "Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again." It is obvious that the bible is a rich domain with numberless wise sayings to be quoted. It is also undoubtedly the case that fragments are strategically selected, with anticipation to the argumentative point of view which one seeks to defend. A quotation of Jesus’s words "But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you; (...)" (New Testament; St. Matthew 5: 44) would have failed to accomplish the justificationary force which the counsel seeks to achieve. The two expressions call for divergent associations, the first one for justifiable "revenge", or to a lesser degree self-defence, the second one for remission. Lawyers employ metaphors not as a form of poetic decoration, but as as a rhetorical device with the strategic aim to influence the opinion of those who are in charge of the decision-making:

"Metaphor is the traditional device for persuasion. Eliminate metaphor from the law and you have reduced its power to convince and convert."
(Fuller 1967: 24).

The functioning of (biblical or other) metaphors cannot exclusively be explained on a semantic basis. Rather, metaphors are an instructive rhetorical device: metaphors may be used for example to support the author's intention to evoke certain opinions in the mind of his/her audience.

Contrary to traditional poetics, Ricoeur favours the idea that metaphor is a necessary device in order to be able to talk about something new. "A good metaphor may not simply be an oblique reference to a predetermined subject, but a new vision, the birth of a new understanding, a new referential access. A strong metaphor compels new possibilities of vision." (Soskice 1987: 58). Hence, metaphor is disclosure rather than description (id: 89), it is a transposition of meaning, a movement which carries meaning beyond the logical frontiers of language through the mechanisms of similarity, resemblance or analogy (Ricoeur 1975\(^\text{15} \): 30).\(^\text{16}\) This, however, seems to imply a suggestion that we should examine the capacity of metaphor to generate meaning rather than force.
Instead of this semantic approach, Levinson (1987) and Black (1962: 30) propose a pragmatic approach of metaphor (without eliminating the semantic approach) and to throw more light on processes of metaphorical interpretation and their transformative force (Levinson 1987: 161). Apparently, says Levinson, the metaphor links two domains "in potentially elaborate paralellisms of indefinite depth" (id: 160). Language users who apply metaphor require knowledge of "a corresponding domain"; "the interpretation of metaphor must rely on features of our general ability to reason analogically." (id: 161). An example is that language-users think of "argument" as "war" (i.e. Arbib & Hesse 1986: 155): "your claim is indefensible" or "she attacked every weak point in my argument". Similarly, in the "Jansen versus Bertinus"-case the presentation and interpretation of the biblical metaphor requires fundamental knowledge of two opulent semantic domains. Interesting is that the biblical expression enshrines a rationality-principle which differs from the one applied in criminal law in the case of attempted manslaughter: provocation does not amount to a justifiable reason to try to kill or ill-treat the other. But by analogous application of this biblical expression, the lawyer invites (or challenges) the audience to attribute a different interpretation to Jansen's "attempt". This is a very illustrating example of how in the process of legal reasoning alternative patterns of rationality are adopted from domains which are not too remote via the employment of metaphors. The rhetorical effect which Jansen's defence-counsel achieves is one of sympathetic understanding... but it does not suffice to convince the judge that charges against Jansen should be dismissed. Metaphor therefore has a potential transformative power when it is employed as a discursive strategy (i.e. Ricoeur 1975: 311f).

The last party, the judge, attempts to define which doctrinal definition of criminal intention to her mind applies to the particular situation of Jansen's crime: she argues that his case is a case of dolus eventualis, or a form of possibility intention, which is closest to guilt (culpa). A hypothetical construction of the cause-effect-relation determines her view on the bad ending of the story; Jansen could have known the consequences:
The judge thus pays more attention than the prosecutor to the clarification of the divergence between common and legal definition of criminal intention. She says that the legal definition is applicable to Jansen's state of mind before he committed the crime: she repeats the norm by remonstrating him with the admonishment that he could have known the consequences (533/534) or did take the risk that something 'horrible' would happen (537/538).

It is the task of the judge to balance between the interests of the defendant and that of the prosecution. She has to demonstrate that her decision is well-considerate, which removes the ritual agony between the parties. This can be illustrated by her employment of various euphemistic expressions: "among other things" (527), "in fact" (534), "still has in that way" (535) and the demonstration of appreciation or
sympathy for the defendant's view on the event (528/529). But the understanding attitude of the judge ("I understand that you can't understand that very well" (528/529) is misleading. Never during the trial did defendant Jansen express a lack of understanding about the legal imposition of intentionality on his actions: he actually denies having had the intention (see transcript above: 123-125). The judge thus facilitates her own verdict by transforming Jansen's reaction from a denial into a misunderstanding: her judgement becomes an explanation instead of a motivation.

In retrospect, we should reconsider the macrodynamics of the trial. We may conclude with the observation that the concept of criminal intention is established within an argumentative triangle, of which the angles are constituted by fixed role-definitions. It is according to these role-prescriptions predictable that the Prosecutor and the defence-counsel defend the more extreme points of view (which are attempts to pull the qualification of the intentional element in the crime out of its centre), while the judge sticks to a balancing act which is not tied up with a prejudiced position.

One may wonder with Seibert (1989a: 242) whether the trial adds something new to the qualification of the crime. Although the different argumentations and points of view seem to suggest that a lot is happening, the outcome is that the defendant is convicted conform the suggestion of the public prosecutor, and that the defendant goes home with the feeling that whatever excuse s/he thought s/he had, from the legal point of view s/he was definitely wrong. Our findings therefore endorse Seibert's suggestions, namely that he orality of the trial is confined to a semantic field which is disclosed and demarcated by the written documents such as the police record and the summons. Surprises, which Seibert thinks are also possible because of the cross-cutting of the trial with a non-circular discourse, prove to be rare.

10.7 Conclusions

During the trial, the reconstruction of Jansen's crime remains rather misty with regard to the question of the provocation: who started to provoke the other? The construction is also imprecise with regard to the act of purpose: it is unclear whether Jansen held his knife in the
air as an act of defence or offence. Finally, some details lack or remain obscure. How exactly did Bertinus hold up the bicycle? Did he lift it up, and if so, did he lift it up high into the air, and further, did he approach suspect Jansen by walking into his direction?

To summarise these remarks, it appears that the major action, i.e. the crime, remains undefined. And it is exactly during this trial where the criminal intention, preceding the final state of that action, is made opaque by variations in the representations of the event. No homogeneous evidence of "what really happened in the head of the perpetrator" has been explicitly put forward. The reconstruction of the event only excludes what a person normally speaking (plausibly) could not have done in a certain succession of actions and events. Both the judge and the public prosecutor evade the absence of clear evidence. Their hat-rack is the (observation of the) knife. They both lay bricks into the story by the insertion of a legal-normative expectation: one ought to foresee such consequences.

Except for a selection-strategy, the inquiry into the mens rea is employed as a clue to cohere the elements of the various narratives. The construction of a motive for the committal of a crime generates the narrative about the crime. Standardised, normative expectations of conduct thus facilitate the interpretation of complicated matters.
NOTES CHAPTER 10

1. The idea is that causes and intentions may be part of a narrative structure without necessarily being linked with an action. For example, a plane may crash without anybody actually doing something which makes that happen (cause: technical failure). Also, I may have a deeply hidden intention to kill someone without actually doing so: the intention remains "unrealised".

2. A "macro-intention" relates to the global planning of an action-pattern (in which actions are combined in a standard-sequence); a "micro-intention" relates to each of the actions taking part in the larger sequence.

3. The question is obviously whether this establishes a sufficient determination of the distinctive character of legal interpretation.

4. Garfinkel's example is that of a psychiatrist's "suppression of antecedents" in the history of a female client (as opposed to insistence on the complete antecedent) (Garfinkel 1981: 144).

5. This section is mainly quoted from my article "A Linguistic Analysis of Narrative Coherence in the Court-Room" (1990), in particular pages 364-367.

6. This passage also appears in my article (see under 5 above). However, the numbers (and less frequently words or underlinings) of the transcript in the article differ, because of a review of the transcript and subsequent computerisation, resulting in some editing changes.


8. This corresponds to e.g. the following definition of action, such as "Eine Handlung beginnt nicht erst, wenn der Aktant sichtbar eine Bewegung, einen Ausruf, ein Signal usw. auf dem Handlungsfeld macht." (Rehbein 1977: 143).

9. There are, however, exceptions. In one of the more than ninety "politierechter"-cases recorded by Sauer and Pander Maat, two female defendants who are under suspicion of spraying graffiti (feminist slogans) onto public buildings exercise their right of silence (therefore refuse to admit their involvement in the offence), but are under pressure from particularly the Prosecutor to give evidence about their (political) intentions or motives. The Prosecutor employs his questions as "catch"-questions: if the two women admit to have had an intention at the time of the offence, they can also be held responsible for the committal of the offence itself (see: Den Boer 1990a).

10. A major action is "any action which directly, or with other, major actions, has the intended final state (the 'goal' of the agent) to bring about this final consequence." (Van Dijk 1979: 64).

11. As under 5: passage can be found at pages 367-368.
12. As under 5 and 6: passage can be found at pages 369-370.

13. As under 5, 6 and 12: passage can be found at pages 372-374.

14. The word "metaphor" stems from the Greek *meta* (which means: beyond / over) and *pherein* (to bring, to carry, to bear): the metaphor is a figure which "brings a meaning beyond."

15. Reference to the original French text; English translation issued in 1986.

16. "Metaphorical" is traditionally known as the opposite of "literal". Having said this, it is not strange at all that this trope is generally attributed to "fictive fiction", while its neighbour "metonymy" is attributed to "realistic fiction". The difference between the metaphorical and the metonymical process is that in the first case, the first discourse topic leads to the other one by means of similarity, while in the second case, the one discourse topic leads to the other one by means of contiguity (Prince 1988: 51).

17. As under 15.

18. As under 5, 6, 12 and 13: passage can be found at pages 371-372.
GENERAL CONCLUSIONS

The criminal process largely consists of two macro-levels of information-processing. On the one hand information is gathered by police officers from the alleged perpetrator(s) and the witnesses of the imminent crime. Guided by their training, experience and professional knowledge, police officers select the information of which they expect that it will become the subject of an argumentative discussion in a later stage of the criminal procedure. Police officers are thus responsible for the obtainment of a series of heterogeneous narratives. Recording police officers are also responsible for the standardisation of the obtained information by modelling it according to interview-protocols and preprinted institutional forms. The selected information about everyday experience is therefore institutionally enframed or embedded in the police-record. The legal pre-qualification of the experience (i.e. the crime) is facilitated by the insertion of a legislative terminology. Furthermore, the stigmatisation or individualisation of criminal responsibility is facilitated by the employment of a legal-evaluative vocabulary which carves the profile of the crime.

The second macro-level of legal-institutional information-processing has received major attention in this dissertation. Linguistic performances of legal agents before, during and after the trial are responsible for the skimming of the 'plurality of voices' which often characterises the information in the police-record. The two levels of legal-institutional information-processing are mediated by an important textual nexus, which is represented by the summons of the public prosecutor. In that document, the original heterogeneity of information (testimonies and statements) is channelled, filtered and redefined in the terms of the criminal law. The trial-proceedings concentrate on closing the discursive gaps between the formulation of the crime in the police record and the formulation of the crime in the summons.

One of the most important arguments of this dissertation is therefore that the legal discourse should be regarded as a dynamic discourse in which the "absorbed" criminal evidence is continuously shaped and remodelled by means of a goal-oriented series of steps or shifts. The discursive strategy of homogeneisation or narrative coherence requires
the participation of the involved legal agents. The performance of *narrative transformations* on the available information is thus caused by the legal-institutional desire for uniformity.

The transformations are not radical; the term "jumps" is therefore inadequate for the description of these discursive shifts. The rational purpose of narrative-discursive transformations, which is the establishment of a coherent narrative which is acceptable to all members of the legal-professional community, remains mostly latent for the layperson.

Important in this context is that the "politierechter"-trial has a *façade-function*. First of all, there is relatively little concentration on the actual reconstruction of the events surrounding the crime, unless a testimonial discrepancy is decisive for conviction or acquittal. In trials in which the defendant admits to the charge, reconstructive questions are only raised in order to find corroboration for the already existing evidence. They also support the moralistic function of the trial, in the sense that 'factual statements' are transformed into moralisations. More importantly however, the reconstruction of the crime tends to hide a *circularity*: the legal discourse only seeks to bring narratives as definitions of reality in concordance with its own definitions with which it is willing or not willing to construct the crime. Narrative transformations are therefore *not* shifts of the reality, but of a *discourse*. For example, the narratives of the witnesses, which are already pre-organised and infiltrated with legal definitions and perspectives, are discursively processed to cohere with the legal expectation, which is laid down in the nodal point or touchstone of the criminal evidence, the summons. Similarly, the official trial-record contains information which is produced by legal agents, namely by the authors of the dossier and the interrogators in the trial. The trial does therefore *not add* much to the documentation of the case (which also indicates the preponderance of the written pre-organisation of the legal discourse). To repeat: the circular character of narrative-discursive transformations is caused by the fact that not a narrative coherence between colloquial and legal definition of the crime is intended, but a *narrative coherence between legal-narrative reconstructions of the crime*.

In line with this circularity, one could say that the achievement of an overall or global form of narrative coherence is coupled with the
attempt to create a narrative about the crime which meets minimal support of the involved legal agents, or alternatively, which is likely to acquire maximal consensus among the legal agents.

The title of this dissertation reverberates not only in the hypotheses but also in the answers which we have formulated. Indeed, the chain of linguistic performances by various legal agents in different stages of the criminal procedure does cause discursive shifts of criminal evidence. But furthermore, also the second meaning of the metaphorical play "legal whispers" has made itself visible: the outcome of the legal decision can, in general, be broadly envisaged by the members of the professional community, thereby prompting them to reconcile their narrative versions with that presumption.

A far from negligible impetus for the performance of narrative transformations is also the constraint of the process-economy within the legal institution. Information is generally economised by the performance of omissions or summaries, thereby avoiding a time-consuming repetition of statements. The economisation of legal-institutional information-processing is also visible in the selective integration of documentary information during the trial-session and the suppression of unelicited information in the trial-record. Finally, economisation demonstrates itself in the launching of standardised interpretations onto central narrative cues, such as criminal intention. However, it is important to note that the protection of the legal-institutional process-economy remains within the margins of the 'master narrative': the narrative elements which are considered to be valuable for the argument in courtroom are not omitted, but emphatically repeated.

The employment of a narrative-textual metatheory has provided us with a fruitful method for the analysis of legal reasoning. Legal rationality demonstrates itself in language, (narrative) text and discourse. Methodologically, a comparison of 'original' and 'reported' texts and interactions A' and A" has facilitated the tracing and stepwise reconstruction of narrative transformations. Narrative analysis is thus able to disclose some of the rational moves behind the façade of legal speech.

Although the scope of this research has been restricted to the Dutch forensic discourse, our analysis of narrative-discursive transformations has resulted in several ideas and suggestions for
research in related areas. We believe that it has been useful to widen
the empirical study of legal discourse to the linguistic performances
of several legal agents, and to concentrate on the existence of
discursive flows between the various phases or levels of legal
interpretation. Hence, it would be desirable to conduct more of these
empirical studies.

In order to make a communal research-project possible for in the
future, more standardisation of our method of 'discovery' and
interpretation is required, enabling participants in the analysis to
exchange their findings (ideally supported by an international data-
bank which gives access to trial-transcripts and dossiers). Secondly,
future analysis of transformations in the legal discourse would have to
examine the discursive construction of cases from beginning to end,
namely from police interview to the issue of an official trial-record,
which facilitates a chronological reconstruction of discursive shifts
throughout the whole criminal procedure. Thirdly, research-questions
and findings could be sharpened by interviewing the legal agents about
the way in which they perceive their contribution to the construction
of crime. Finally, it would be preferable to realise the plan which
originally underlied this dissertation, which is to analyse and compare
the performance of narrative transformations within non-forensic legal
discourses and within legal systems in different countries.
APPENDIX I: THE DUTCH POLITIERECHTER

General Remarks and Comparison with Magistrate’s Court

The Dutch Politierechter is in some ways similar to the English and Welsh Magistrate’s court. The similarities are that both of them are the lower courts in the system, that they both deal with the highest percentage of criminal cases and that the criminal cases in these courts are often of a relatively trivial nature (petty offences). The differences however are that the magistrate is a lay judge, while the "politierechter" is not; that the magistrate’s court sits with three judiciaries, and the "politierechter" with only one judge, that the magistrate also deals with civil cases, and the "politierechter" only with criminal ones and finally that the magistrate's court fulfils a filter-function for that it tests the evidence in most cases first. Other differences are obviously related to the different system-context in which they operate, but also to their respective history and time-planning (in England and Wales, a person who is charged normally goes to trial the day after, whereas in the Netherlands there are lapses of several months or sometimes even a year before the defendant can go to court; this is mainly due to the enormous work-load and the labouriousness of the preparation of cases, even when they are less serious crimes) (i.e. Berlins & Dyer 1989: 21; 75ff). The main similarity between the two courts is that they are simplified forms of the higher criminal courts, with briefer and more flexible procedures, which is an enormous support of the the process-economy of criminal justice system.

History of the "politierechter"

During World War I, the number of crimes in The Netherlands increased, which presented the courts with an extra pile of work. In 1919, the Minister of Justice proposed to create a new court, called the "politierechter", to relieve the other courts. The politierechter would be a court with a jurisdictional judge, a court which would deal only with simple cases. While the proposal (Voorstel van Minkenhof, Minister van Justitie, 1919) was being considered by Parliament, the amount of crimes decreased again. Yet, one held another argument for the establishment of this new court, namely that simple crimes should be dealt with in a simple way. According to Minister Minkenhof, the immediate contact between judge and suspect was of essential importance, the kind atmosphere and effect of the immediate pronouncement of the verdict at the end of the trial. The court was finally instituted in September 1922. Nowadays, the majority of the crimes is dealt with by the "politierechter". This is similar to the Magistrate’s Court in England and Wales, who deal with 96% of all criminal cases (source: Berlins & Dyer 1989: 75). However, the Magistrate’s Courts in England and Wales also function as examining justices who prepare the case for the later trial and who decide whether or not the evidence is sufficient for a committal (Baker & Dodge 1981: 51) at least before being referred to higher courts.
Procedure of the "politierechter"

The procedure in this court is a simplified version of the procedure in the court which has more than one judge (art. 376 - 2 Dutch Code of Criminal Procedure) (the "rechtbank"). The differences in procedure are: 1). The charge term is diminished (Article 370 Dutch Code of Criminal Procedure); 2). The judge ("politierechter") announces the verdict orally and immediately after the trial (Article 378 Dutch Code of Criminal Procedure); 3). Documents of evidence do not necessarily have to be read out during the trial with permission of the suspect and his/her lawyer (Article 297 Dutch Code of Criminal Procedure); 4). The public prosecutor and suspect may turn down the possibility of using legal remedies, such as appeal, immediately after the trial (Article 381 Dutch Code of Criminal Procedure) (Snel 1977: 19), and 5). No official trial-record is made up, unless there is a specific request or one of the parties goes in appeal (Article 378a).

The Cases which Generally Appear before the "Politierechter"

The cases the "politierechter" deals with are distinctive in terms of their sentencing. Generally, offences such as alcohol-abuse, traffic-offences and petty theft are referred to the "politierechter". These are crimes which are sentenced with no more than six months of imprisonment (this is also the maximal imprisonment which the Magistrate's Court can impose) or at least Dfl. 5,- fine, a matter which has to be decided by the public prosecutor. If the "politierechter" decides that the suspect will be sentenced with more than six months of imprisonment, the case must be referred to a court with more than one judge (Article 376-2 Dutch Code of Criminal Procedure).

Legal Agents, Defendants and Others

The politierechter (the judge) is the chairperson during the trial, which means that if a member of the audience for example does not 'behave', he/she can be admonished or expelled by the judge (Articles 274 lid 1 and 124 Dutch Code of Criminal Procedure). The judge must be neutral, which means that he/she may not have been involved in the investigation of the case before trial (Article 268 Crim. Proc.), and may not show any conviction about guilt or non-guilt of the suspect in the course of the trial (Article 302 Crim. Proc.; Snel 1977: 20).

The public prosecutor ("Officier van Justitie") presents the summons of the case. He is the defendant's counter-party and demands the sentence against the defendant (Snel 1977: 20).

The defendant ("verdachte") is summoned to appear in court. However, the suspect is not obliged to do so; the case can also be dealt with without him/her. This however does not hold for the witnesses ("getuigen"), who are obliged to appear in the court (Article 213 Criminal Procedure) or are otherwise charged (Article 282 Criminal Procedure) or imprisoned (Articles 221 and 269 Criminal Procedure). Experts ("experts"), like psychiatrists, doctors and probation officers, can be charged but cannot be imprisoned for non-cooperation (Articles 227 and 296 Crim. Proc.).
The presence of a defence counsel ("advocaat") is not obligatory, but the legislator assumes that the defendant cannot dispense with a lawyer in the case of imprisonment or custody (Snel 1977: 20ff).

The Function of the Dutch Criminal Trial

The Dutch criminal trial aims at the investigation of two different questions. The first question concerns the substance of the case. In particular, one examines the question whether it can be proved that the defendant is liable. One decides this on the basis of the charge and on the basis of the investigations during the trial. If the defendant is indeed liable, the question becomes which criminal fact the proved fact leads up to. Furthermore, one decides on the punishability of the defendant and on a legal sentence or means (Article 350 Dutch Code of Criminal Procedure). The second question relates to formal matters. Object of investigation is whether the summons is valid, whether the court is competent and whether the public prosecutor is susceptible, and whether there are reasons for suspension or continuation of the prosecution (Article 348 Dutch Code of Criminal Procedure).

The Order of the Politierechter-trial

1) Calling the case: The investigation at the trial starts with the judge who calls the case (Article 278 Criminal Procedure; Snel 1977: 21; Sauer 1989).

2) Identification: The judge asks the defendant for his/her surname, christian name, age and place of birth, profession and address (Article 278 Criminal Procedure).

3) Caution and Instructions: The 'politierechter' cautions (Article 29 Criminal Procedure) and warns the defendant to pay attention to what he/she will hear (Snel 1977: 21).

4) Presentation of the summons: The word is then passed on to the Public Prosecutor who reads out the charge (i.e. Snel 1977: 21), f.e.:

5) Interrogation of witnesses: If there are any witnesses, the politierechter interrogates them. Generally, the witnesses "à charge" (those of the public prosecutor) are interrogated first and then the witnesses "à décharge" (those of the suspect) (i.e. Snel 1977: 21).

6) Interrogation of experts: If there are any experts, they are interrogated after the witnesses (i.e. Snel 1977: 22).

7) Interrogation of defendant (Article 298 Dutch Code of Criminal Procedure): In politierechter-cases, the interrogation of the defendant normally follows immediately after the prosecutor's reading of the charge. The aim of this interrogation is mainly to establish whether the defendant's testimony is based on his *own knowledge/eigen wetenschap* (i.e. Snel 1977: 22).

8) Requisitory: The public prosecutor presents the requisitory, which includes a conclusion with regard to the factual status of the crime, and a charge of the sentence or means (i.e. Snel 1977: 22).
9) **Plead:** The requisitory is succeeded by the counsel's plea (if present) (i.e. Snel 1977: 22).

10) **Last word of the defendant.**

11) **Closure of examination, motivation and decision by judge:** If the judge does not see any problems, and if s/he considers the trial to have offered a complete picture of the charge and the defence, s/he decides about the verdict (i.e. Snel 1977: 22). The verdict depends on the answer to a few questions which the judge has to pose during the trial. First it concerns the question whether it has been proven that the fact was committed by the defendant. Secondly, the judge has to find out whether the criminal fact results from this proof according to the law. And finally, it has to be found out whether the defendant is guilty or not, and which sentence should be imposed (Snel 1977: 23).
APPENDIX II: PRESENTATION OF CORPUS

Details of selected core material is presented in order to facilitate a contextualisation of the analysed fragments. From the more than ninety cases recorded by H. Pander Maat and C. Sauer in a Dutch "politierechter"-court (Appendix I), we have selected five cases. The recordings were made with the consent of the defendants, under the condition that their names and other personal data would not be used or be figurative in the transcripts. The presented transcripts were all made by the author. The five cases in the corpus are all documented. Below one finds for each case:

A. The code of the case.
B. A short summary of the (narrated) event.
C. The legal qualification according to the Dutch Criminal Code before and after the trial (charge and decision).
D. A list of documents accompanying the case.
E. A sketch of the sequential order of the trial-proceedings.
F. Comments (if any).

CASE 1

A. JaBe/mishandeling/politierechter/24b/tramdb101589

B. Defendant Jansen has not (yet) returned the tools belonging to his father-in-law, because Jansen awaits financial compensation for a pigeonry which he built for his father-in-law during the period that Jansen and his family lived with him. On a Saturday morning, Jansen's brother-in-law Bertinus visits Jansen and demands the tools back, resulting in a dispute between the two. Bertinus throws a conifer through the front-door of Jansen's house, and leaves. Jansen puts a piece of concrete on the back of his bicycle and cycles to Bertinus's home. There, another dispute follows. The two get hold of garden equipment with which they threaten each other, which is calmed down by by-standers. Bertinus lifts up Jansen's bike and Jansen stabs Bertinus through the openings of the bike, thereby inflicting two injuries. While Bertinus receives first aid from by-standers, Jansen cycles to his parents' home. Jansen accompanied by his mother reports himself to the police in Turp after having visited his G.P..

C. The defendant is charged with Article 45-1 in combination with Article 287 of the Dutch Criminal Code (first subsidiary charge: Article 302 Crim. Code; second subsidiary charge: Article 25-1 in combination with Article 302 Crim. Code). The judge decides to acquit Jansen from the primary charge, and to convict him on the basis of the second subsidiary charge. Jansen is sentenced to three months suspended imprisonment, with a probationary period of two years. Convict does not appeal against this decision.

D. The dossier of this case consists of:
   1. Summons: primary charge; two subsidiary charges;
   2. Annotation of oral sentence: decision judge; acquittal of primary charge; details conviction (see c.).

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3. Notice of suspended sentence: originates from the public prosecutor;
4. Working-sheet 'politierechter': registration of relevant qualifications by the clerk;
5. Handwritten notes made by clerk (an official trial-record is not necessary in 'politierechter' cases (Article 378a., Dutch Code of Criminal Procedure; exceptions in Article 378-2 C. of Crim. Proc.));
6. Police- record, containing:
   .taking into custody of suspect;
   .'prologue' or account of police activities in the inquiry;
   .first interview/statement suspect Jansen;
   .interview/testimony witness Paardebloem (eyewitness);
   .interview/testimony witness Van Daalen (eyewitness);
   .interview/testimony witness De Koe (eyewitness);
   .interview/testimony witness Hazelnoot (eyewitness; neighbour of Bertinus);
   .interview/testimony witness Windhoek-Jansen (mother of suspect);
   .second/interview/statement suspect Jansen;
   .interview/testimony witness Van Reeswijk (wife Bertinus;
   .'epilogue' or account of further police inquiries + synopsis of dossier enclosed with police record
7. Medical report;
8. Report of the Judicial Medical Laboratory of the Home Office (Ministerie van Justitie);
9. Charge during trial by Prosecution Service: fine (Dfl. 300,- (subsidiary 6 days in custody), suspended imprisonment for the length of 3 months with a probationary period of 2 years.
10. Dismissal of charge against Bertinus;
11. Summaries from General Documentation Register concerning earlier charges and convictions of Jansen and Bertinus;

E. The sequence of the trial:

1. Announcement of Case (informal greeting (1); judge looks for dossier (1-5); judge tells defendant he can sit down (5-7).
2. Identification of defendant (7-9).
3. Caution and Instructions (9-12).
4. Presentation of summons by prosecutor (informal (12-13); introduction (14-16); paraphrase (16-45).
5. Interrogation of defendant by judge (verification police record (45-136); relation Jansen and in-laws (136-166); discussion social inquiry report (166-216); financial circumstances (216-224).
7. Questions by counsel (234).
9. Requisitory prosecutor (259-322);
10. Question for clarification by judge (322-325);
11. Plead counsel (325-516);
12. Last word by defendant (516-526);
13. Motivation decision by judge (526-583) (closure of examination (526); motivation (527-540); decision (540-583).
14. Coda: moralisation by judge (584-590);
15. Appeal yes/no? (590-597);

**F. Comment:** The "Jansen versus Bertinus-case", as we frequently call it, is very well-documented. Most of the analyses in chapters 6-10 are performed on the basis of this material.

**CASE 2**

A. Niehe/vernieiling/politierechter/17ab/tramdb291189

B. On a Saturday night, the district police in Kessen receives three successive reports from people whose car has been damaged by one or two men. The damage varies from broken panes to dents in the roofs of the cars. One victim has to undergo medical treatment as a result. The three reports have in common that the people in the cars are all "courting couples". The police traces the co-owner of a red BMW, partly tipped by Mr. Boshuis who wrote down the registration number of the car. Evidence suggests that the mud was still dripping off the BMW when the police investigated it early in the night from Saturday to Sunday. Furthermore, a truncheon was found in the boot of the BMW. The defendant persistently denies the charge held against him.

C. The defendant is charged with Article 350 of the Dutch Criminal Code (destruction). The conviction by the judge is consistent with charge. Sentence: 3 months imprisonment of which 2 months are suspended with a probationary period of two years. Special conditions: convict must compensate damage (Dfl. 1500,-) to one of the aggrieved parties, who appears as witness in the trial (Jos Vijzel: G1/W1), within four months after the start of the probationary period. Furthermore: withdrawal from traffic of seized truncheon. Convict appeals against this decision.

D. The dossier of this case is incomplete (see comment below), and consists of:

1. Trial-record.
2. Annotation of oral sentence by 'politierechter';
3. Extract of judgement by the Court of Appeal (Gerechtshof);
4. Charge during trial at the Court of Appeal by the attorney-general (procureur-generaal);
5. Condensed judgement by the Court of Appeal.
E. The sequence of the trial:

1. Announcement of case (1), informal talk and greeting (2).
2. Identification of defendant (2-5);
3. Caution and Instructions (6-8);
4. Interaction between judge and defendant (9-11);
5. Presentation of summons: (11-15);
6. Judge asks defendant about work (15-19);
7. Judge asks defendant to confirm or deny the charge (19): defendant denies (20);
8. Start of interrogation witnesses (20-21);
9. List of witnesses presented by prosecutor (22-26): addition of one witness (G3/W3 Niehe sr., father of defendant);
10. Judge starts interrogating witness Waterlas (G1/W1), who is police officer; sends G2/W2 (Vijzel) and G3/W3 (Niehe sr.) to the corridor (26-31);
11. Identification G1/W1 (31-38);
12. Oath G1/W1 (38-42);
13. Interrogation of G1/W1 (42-289); interrupted twice to discuss with defendant (147-161; 252-261);
14. Judge asks prosecutor and counsel whether they have any questions (290-291);
15. Calling of second witness (Vijzel; G2/W2) (291-296);
16. Greeting and instructions (296-301);
17. Identification of G2/W2 (301-305);
18. Oath G2/W2 (305-317);
19. Interrogation G2/W2 by judge (317-452);
20. Discussion between judge, prosecutor, counsel and second witness about G2/W2 as aggrieved party and compensation of damages (451-490);
21. Counsel questions G2/W2 (involvement of judge, Prosecutor and G1/W1) (490-567);
22. Interaction between judge, defendant and counsel: defendant denies charge; earlier conviction (567-607);
23. Arrival G3/W3 and instructions (610-612);
24. Identification G3/W3 (612-618);
25. Oath G3 (618-627);
26. Counsel interrogates G3/W3 (627-645);
27. Judge interrogates G3/W3 (646-670);
28. Judge asks defendant and prosecutor whether they have questions for G3/W3 (671/673);
29. Prosecutor interrogates G3/W3 (673-679);
30. Prosecutor accuses G3/W3 of perjury (679-686);
31. Judge re-interrogates G3/W3 (687-710);
32. Judge concludes G3/W3 lies; explains consequences of perjury-procedure (710-714);
33. G3/W3 sticks to position (715-720);
34. Judge calls officers to arrest G3/W3 (720-724);
35. Judge asks counsel what the reason is for G3/W3's position (723-734);
36. Judge asks prosecutor about procedure (settling the case or further pre-investigations?) (736-741);
37. Counsel talks with G3/W3 (?) (741-748);
38. Judge takes over; interrogates G3/W3 (749-760) --> G3/W3 shifts position;
39. Judge asks prosecutor what he thinks of it (760-761).
40. Further interrogation of G3/W3 (761-765);
41. Judge asks defendant whether he wants to ask questions about that (766);
42. Judge remits perjury-procedure (767);
43. Judge asks G1/W2 question, resulting in dispute between defendant and G1/W1; judge is arbiter (768-801);
44. Judge interrogates defendant; defendant denies the charge (801-838; making love in cars; private and financial circumstances);
45. Requisitory prosecutor (838-1043; interruption by judge in 878-879);
46. Judge asks defendant whether the requisitory is clear, followed by another denial (1043-1076);
47. Plead counsel (1076-1153);
48. Judge asks defendant what he thinks of it (1153-1156);
49. Deliberation by judge (1156-1158);
50. Closure of examination, motivation and decision by judge (1158-1212; interrupted by question at defendant who denies once more (1172) and question at G2/W2 (1204));
51. Interaction between judge and defendant (1213-1215; denial by defendant);
52. Coda: remarks made by woman in audience (mother of G2/W2's fiancée), followed by reaction of judge (1215-1237);
53. Closure of trial-proceeding (1237-1239).

F. Comment: because no pre-trial documents of this case are available, no analysis will be made or oral references to written material. The post-trial documents are analysed in section 8.4, which is specifically oriented at the analysis of written references to the oral discourse.

Comment: Parts of the trial-sequence were not transcribed because of performance of interaction at a far distance from the microphone.

CASE 3

A. Ter Haar/heling/politierechter/15b/tramdbl41189

B. Marcel Ter Haar has an alarm-clock in his possession which he got from two twin-brothers Karel and Kees Keijzer. Ter Haar is arrested after Karel and Kees have admitted 9 burglaries to the police, and that one of these occasions an alarm-clock was stolen and that they told Marcel that the alarm-clock was stolen when he received it from them. Marcel denies the charges, claiming that he knew only in a much later stage that the alarm-clock had been stolen. The trial focuses on the discrepancy between the statements.

C. The defendant is primarily charged with the offence of Article 416 of the Dutch Criminal Code (intentional receiving of goods) and subsidiary with the offence of Article 417 bis Criminal Code). The defendant is acquitted of both charges, because the charge can not be proven legally and convincingly.
D. The dossier of the case consists of:

1. The summons (primary and subsidiary charge; see under c.);
2. Annotation of oral sentence (acquittal);
3. Working-sheet 'politieerechter';
4. Handwritten notes made by clerk;
5. Synopsis of involvement of various persons in and around the case "Karel and Kees Keijzer";
6. Police record with information about inquiries, arrests and interrogations of suspects involved in the burglary-case ("Karel and Kees Keijzer"); a complaint; a report of a technical inquiry; a statement to the police made by Kees Keijzer; a statement to the police made by Karel Keijzer and a statement made to the police by Marcel Ter Haar.

E. The sequence of the trial:

1. Small-talk (1);
2. Calling defendant (2);
3. Identification defendant (2-5);
4. Caution and Instructions (5-10);
5. Presentation of summons by prosecutor (10-15; interrupted by defendant who denies the charge (14-15));
6. Interrogation of defendant by judge (16-70);
7. Calling the witnesses Karel and Kees (resp. G1/W1 and G2/W2); Kees remains in corridor (71-81);
8. Spontaneous identification G1/W1 (81-84);
9. Judge asks about relation between G1/W1 and defendant ((84-88);
10. Oath G1 (88-94);
11. Judge interrogates G1 (94-129); involvement of defendant and prosecutor (129-187);
12. Calling of G2 (187);
13. Consternation (187-189);
14. Greeting G2 and instructions (189-191);
15. Oath G2 (192-200);
16. Judge interrogates G2 (200-230); involvement of defendant and prosecutor (230-250);
17. Question counsel (251-261);
18. Witnesses may leave (261-266);
19. Prosecutor asks defendant question (266-297);
20. Requisitory prosecutor (299-323);
21. Judge gives turn to counsel; plead counsel (323-333);

CASE 4

A. Van Straaten/drinken/politierechter/25a/tramdb161189

B. Theo Van Straaten is stopped by the police in Meidorp after they noticed his swaying driving-style. A blood-test shows a permillage of 2.10 (the maximum allowed is 0.5). Two months later, the police stops Van Straaten again in the same town, this time without observations indicating excessive alcohol-consumption. The blood-test shows a permillage of 1.86. The defendant admits to the charges, but pleads mitigating circumstances in connection with
trouble in his private life. A complication is formed by Van Straaten's job: he drives a truck inside and outside the country.

C. The defendant is charged with two separate offences, both involving Article 26 of the Dutch Road Traffic Act (Wegenverkeerswet). The prosecutor asks that the defendant will be sentenced with a fine of Dfl. 2000,-, subsidiary 30 days of imprisonment, suspended imprisonment for four weeks with a probationary period of two years and suspended denial of the competence to drive a motor-vehicle for six months with a probationary period of three years. The judge convicts the defendant conform the charge of the prosecutor, with addition of a special arrangement, namely that the convict may pay the fine of Dfl. 2000,- in 20 monthly instalments of Dfl. 100,- a time.

D. The dossier of the case consists of:

1. Summons, containing two separate charges;
2. Annotation of oral sentence;
3. Working-sheet of the 'politierechter';
4. Handwritten notes made by clerk during trial;
5. Verification- and information-sheet;
6. Summary from General Documentation Register ("Algemeen Documentatieregister");
7. Charge during trial (Prosecution);
8. Police Record concerning the first offence;
9. A report of the Judicial Medical Laboratory of the Home Office ("Ministerie van Justitie");
10. Police Record concerning the second offence.

E. The sequence of the trial:

1. Identification defendant (1-5);
2. Caution and Instructions (6-10);
3. Presentation summons by prosecutor (11-20);
4. Interrogation of defendant by judge (21-135);
5. Question by prosecutor (136-192);
6. Question/remark by counsel (193-233; involvement of judge and defendant);
7. Requisitory by prosecutor (236-303);
8. Plead by counsel (304-355);
9. Question of judge, resulting in technical discussion (involvement of counsel, prosecutor, judge and defendant (356-506));
10. Judge asks defendant whether he wants to say something (last word: 507-535);
11. Closure of examination, motivation and decision by judge (535-584);
13. Closure of trial-proceeding (590).
CASE 5

A. Sint/diefstal/politierechter/20b/tramdb151189

B. After some shopping and a visit to a pub with two friends, Kees Sint seizes a bike. His account is that he did not have a bike with him and that the bicycles of his friends had soft tyres, so that he could not sit on the back. He accounts furthermore that he wanted to put the bike back in place. The defendant stands trial because he failed to pay the fine by means of a cheque. The defendant pleads mitigating circumstances (private and financial).

C. The defendant is charged with Article 310 of the Dutch Criminal Code (unlawful seizure, theft). The prosecutor charges a fine of Dfl. 250,-, subsidiary 5 days of imprisonment. The judge sentences the defendant conform the charge of the prosecutor.

D. The dossier of this case consists of:

1. The summons;
2. Annotation of oral sentence;
3. Summary from General Documentation Register ("Algemeen Documentatieregister");
4. Working-sheet 'politierechter';
5. Handwritten notes made by clerk during trial;
6. Police Record, containing statements of denunciator and suspect, and testimonies of two eye-witnesses.

E. The sequence of the trial:

1. Greeting (1)
2. Identification of defendant (1-4);
3. Instructions and Caution (6-9);
4. Representation summons by prosecutor (9-12);
5. Interrogation of defendant by judge (12-139);
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7. Requisitory by prosecutor (157-178);
8. Explanation of charge by judge (178-188);
9. Last word of defendant (188-193);
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APPENDIX III: TRANSLATION AND SEQUENTIAL REPRESENTATION OF "PROLOGUE" TO POLICE RECORD IN CASE JaBe/mishandeling/politierechter/24b/ tramdb101189

S1 (We ((X1 DES), (X2 DES), (X3 DES), (X4 DES) and (X5 DES), (all belonging to the group (in Turp))) declare):

S2 ON DATE AT TIME IN PLACE (a person (who stayed unknown) informed me (X4))

S3 THAT (JUST NOW (two persons were fighting); (one of them wielded a knife))

S4 (The fight was supposed to take place (in the Wemelaarstraat))

S5 (We (officers* (X1), (X4), (X3) and (X5)) reported to the place IMMEDIATELY)

S6 ON DATE TIME (we (officers (X4), (X3), (X1) and (X5)) saw)

S7 THAT (in the Wemelaarstraat (near to plot no. 35) a crowd had gathered)

S8 FURTHER (we saw)

S9 THAT (a man was lying (on the ground (on the pavement (in front of this plot))))

S10 (We saw)

S11 THAT (the man was lying (on his left side))

S12 AND THAT (his clothes were smeared (with blood))

S13 AS WELL AS (the pavement (in his neighbourhood))

S14 (The man was able to answer)

S15 AND ( ( ) told us THAT he was: Bertinus)

S16 THEN (we (officers) saw)

S17 THAT (the left wrist (of Bertinus) showed a yawning wound (of a length (of about five cm)))

S18 FURTHER (we (officers) saw)

S19 THAT (Bertinus had a yawning wound (between (his neck) and (his left shoulder)) (near to his collarbone))

S20 (The length (of this wound) amounted to about four cm)

S21 (The blood squirted (out of both wounds))

S22 AND (we (officers) presumed)

S23 THAT (arteries had been hit)
(Bystanders told us namely)

THAT SHORTLY BEFORE (Jansen had stabbed Bertinus (with a knife))

(Bystanders rendered first aid (to victim Bertinus))

AND LATER (transported to the hospital (in Merkenbacht))

(A woman (who presented herself (as being the wife (of victim Bertinus)) informed us (officers (X4) and (X3)))

THAT (her husband had been stabbed by Jansen (known to her) (living in Turp Tulpenstraat 5) (between 24 and 26 years old))

AT THE SAME TIME (it became clear to us (officers))

THAT (Jansen and Bertinus have had a quarrel (for a long time))

AND THAT ([ON THAT MORNING) this quarrel had continued)

(We (officers) established an inquiry)

(It turned out)

THAT (the personal notes of Jansen (mentioned) sound: Petrus Wilhelmus Jansen (born in Hoek (the 26th of September 1956)), (living in Turp Tulpenstraat 5))

(We did not find suspect Jansen ANYMORE (at the spot))

AND (bystanders informed us)

THAT (Jansen had hurried away (by bicycle))

(We (officers) informed the group officer in command (in Turp) about the event)

AND (he requested immediate tracing, apprehension and bringing before the law (of suspect Jansen (mentioned))

BECAUSE OF (SUPPOSED infringement (of article 287 (in relation to (article 45) of (article 302)) of the Criminal Code)

ON DATE AT TIME (a person appeared (at the group office (of the state police (in Turp)))

(Who told us (officers (XI) and (X2)) THAT he was: P.W. Jansen (mentioned))

ON DATE IN PLACE AT TIME (P.W. Jansen (mentioned) was arrested by us (officers (X2) and (XI)))

BECAUSE OF (SUPPOSED infringement (of article 287 (in relation to (article 45) or (article 302))) of the Criminal Code)
((IMMEDIATELY AFTER arrest) suspect Jansen was brought before W.E. Rosie (primate sergeant (of the state police)) (second replacement (of the group officer in command (in Turp))))

(This assistant public prosecutor examined suspect Jansen BRIEFLY)

AND ( ) ordered us (officers) TO carry out a further inquiry

ON DATE AT TIME (suspect Jansen testified to us (officers (X2) and (X3))

AFTER (he had been informed)

THAT (he was not obliged to answer)

THAT (he had stabbed Bertinus (known to him) (living in Turp Wemelaarstraat 35) twice with a knife)

AND THAT AFTER THIS (he had gone (to his parents (in Brakke (living at the address: Steenseweg 18, Brakke)))

((ACCORDING TO Jansen) he had left the knife (at his parents'))

ON DATE AT TIME (assistent public prosecutor (W.E. Rosie) took suspect Jansen into custody (for the maximum time (of two days)))

(We acted ACCORDING TO the instructions (for this arrest))

(We (officers (X5) and (X4)) reported to the house (of the parents (of suspect Jansen (plot Steenseweg 18))))

((IN PURSUANCE OF what suspect Jansen testified) in relation to the whereabouts of the knife (which was wielded by him))

ON DATE AT TIME (we (officers) arrived at this plot)

AND (a woman (who told us THAT she was (W.E.Windhoek (wife of Jansen)) (62 years old)) (being the mother of (suspect Jansen (mentioned))) gave us a hearing)

((WHEN requested) W.E. Windhoek handed over to us (officers (X5) and (X4)) a pocketknife (comprising (a brown wooden haft) and (a blade (with a length (of about 10 cm))))

(W.E. Windhoek declared thereby)

THAT (the pocketknife belonged to her son (P.W.Jansen))

AND THAT SHORTLY BEFORE (he had given this to her husband)

(thereby declaring)

THAT (he had stabbed someone (with the knife))
S67 (We (officers (X5) and (X4)) took possession of the knife in question (from W.E.Windhoek))

S68 (The seized knife was transported (to the group office (of the state police (in Turp))))

S69 AND (in expectation (of a decision (of the public prosecutor (in xxxxx)))) ( ( ) ( ) placed at the disposal (of the group officer in command (of the state police (in Turp))))

S70 ON DATE AT TIME (We (officers (X5) and (X4)) resorted to the hospital (in Merkenbacht) WHERE (victim Bertinus was treated/nursed))

S71 ((On our (officers) request) (nursing personnel (of this hospital) saved the shirt (of Bertinus (which he wore (at the time (of the event))))))

S72 (A nurse delivered a shirt to us (officers (X4) and (X5)))

S73 (We (officers) saw)

S74 THAT (this shirt was smeared COMPLETELY (with blood))

S75 (It was a light blue shirt)

S76 FURTHER (we (officers) saw)

S77 THAT (an incision was visible (in the shirt))

S78 (( ) PRESUMABLY made during event (meant previously))

S79 (We (officers (X5) and (X4)) took possession and transported the shirt in question (to the group office (of the state police (in Turp))))

S80 WHERE ((in expectation (of a decision (of the public prosecutor))] it was placed at the disposal (of the group-officer in command (of the state police (in Turp))))

* officers: officers recording names and addresses of eye-witnesses (in Dutch: "verbalisanten")
ON DATE STARTING AT TIME (we (officers (X4) and (X1))
heard the suspect (Petrus Wilhelmus Jansen (mentioned))
in the groupbureau (of the state police (in Turp)))

AFTER (Jansen had been informed THAT (he was not obliged
to answer))

(he declared:)

"(I know THAT ( I am not obliged to answer))

((For six years (I have been married to Anja van Reeswijk)

(Joost Bertinus (living in Turp, Wemelaarstraat 35) is
married to a sister (of my wife))

AND THEREFORE (he is my brother-in-law)

(I kept up a good relationship with Joost Bertinus)

((LAST YEAR) (I (with my family) lived in Wormster)

BUT ((IN OCTOBER 1984) the mother (of my wife) died)

AND (the father (of my wife) requested us TO come and
stay with him)

(WHICH we did)

((IN OCTOBER 1984) I (with my family) went to live with
my father-in-law)

(My father-in-law and I (with my family) lived in plot
Wemelaarstraat 35 in Turp)

((IN THE COURSE OF TIME) the relationship between me and my
family (with respect to my father-in-law) deteriorated)

AND ((IN JANUARY 1985) my father-in-law gave us to understand)

THAT (we had to look for another residence)

(I was not happy (with this situation))

PARTICULARLY AS (I had invested money in the house (of my
father-in-law))

((IN FEBRUARY 1985) we exchanged houses)

(Joost Bertinus (with his family) went to live with my
father-in-law)
AND (I (with my family) went to live in the previous house (of Joost Bertinus))

(NAMELY plot Tulpenstraat 5 in Turp)

((DURING (the move to plot Tulpenstraat 5 in Turp)) I took the tools (of my father-in-law) with me)

(I knew)

THAT (my father-in-law wanted to have these tools back)

HOWEVER (I had not yet returned the tools)

MOREOVER BECAUSE (I had invested an amount of money (in the house (of my father-in-law)))

(I thought (totally about 3.000,-))

(((YESTERDAY NIGHT) my sister-in-law came to us)

AND (she requested the tools (of my father-in-law))

IN ORDER TO (return these (to my father-in-law))

(I told her)

THAT (she should not meddle in this)

AFTER WHICH (she left again (with her daughter))

AFTER THAT (I had words with my wife)

(WHO left (with our daughter))

(My wife and our daughter have not been at home either (LAST NIGHT))

(I do not know (where they stayed this night))

ON DATE AT TIME (my brother-in-law Bertinus came to visit me)

(He wanted to collect the tools (of my father-in-law))

(I found)

THAT (Bertinus was aggressive (in his behaviour))

AFTER WHICH (I forbid him to enter my house))

(Bertinus grumpingly left the house)

WHEN (Bertinus stood on the pavement (in front of my house))

(I called him names)

(I said fatty bastard to him)
THEN (Bertinus told me:)

"I dare to pull your conifer (out of the soil)
AND (to throw it through your window-pane.")

THEN (I saw)

THAT (Bertinus pulled a conifer (which was standing in my garden) out of the soil)
AND THEN (( ) threw it through the pane (of the front-door (of my house)))

AFTER THAT (Bertinus bicycled away)

THEN (I also took my bicycle)
AND ALSO (( ) ( ) a bit of concrete)

(I bicycled to the house (of Joost Bertinus) (Wemelaarstraat 35 in Turp))

(I INTENDED to throw the bit of concrete (through the window pane there))

(I wanted to take revenge (for what Joost Bertinus had done shortly before))

((WHEN I arrived at the house of Bertinus) I did not get a chance (TO throw the bit of concrete (through the window-pane)))

BECAUSE (Joost Bertinus and his wife (Truus) had ALREADY come outside)

(Truus tried to calm down the affair)

(IN WHICH she succeeded in doing at first)

((IMMEDIATELY AFTER THAT) I saw)

THAT (Joost Bertinus had grasped a hayfork (out of his shed))
AND (he threateningly walked in my direction with it)

(I do not remember (whether Bertinus said something to me))

(I dropped the bit of concrete)

AND (I walked to the neighbour (of Joost Bertinus))

((AT THAT MOMENT) this neighbour was working (in his garden))

AND (in his frontgarden there was a spade)

(I grasped this spade)
AND (I threatened with it (in the direction (of Bertinus)))

(I remained in the garden (of the neighbour (of Bertinus)
(that is to say: Kees Hazelnoot)))

(Hazelnoot tried to calm down the affair)

AFTER WHICH (Bertinus put the hayfork away)

AND (I did the same with the spade)

AFTER THIS (Bertinus grasped my bicycle)

AND (I saw)

THAT (he wanted to place my bicycle in the shed)

(PRESUMABLY he wanted to take my bicycle as a guarantee
(for the tools (of my father-in-law)))

(WHICH (as I ALREADY declared) I STILL possessed)

(I walked in the direction (of Bertinus))

AND (I told him)

THAT (he should leave my bicycle alone)

((ACCORDING TO ME) Bertinus heard this)

AND WHEN (I was in his neighbourhood)

(he lifted up my bicycle)

AND (made a pushing movement with it (in my direction))

(The steer and the front wheel (of the bicycle) touched me)

(Joost Bertinus was angry)

(I do not remember (whatever he told me))

(I thought)

THAT (he made a pushing movement (with my bicycle) (in my
direction) about three or four times)

((AT THAT MOMENT) I did not have anything in my hands)

(The knife (which you show me) is my property)

AND (I kept this knife (in my pocket (AS USUAL)))

(The knife is ACTUALLY my father-in-law's)

(WHILE I was STILL standing face to face with Bertinus)

(I grasped the knife (out of my tail-pocket))
5102 (I grasped the knife)
5103 IN ORDER TO (be an antagonist (against Bertinus))
5104 (WHO (AT THAT MOMENT) STILL kept the bicycle in his hands)
5105 (I opened the knife)
5106 AND (( ) took it in my left hand)
5107 ((IN THE FIRST INSTANCE) I kept the knife directed downwardly)
5108 ((AT THE MOMENT) (THAT) Joost Bertinus AGAIN made a pushing movement (with my bicycle) (in my direction))
5109 (I lifted the knife)
5110 (I pushed the bicycle away (with my right hand))
5111 AND ((with my left hand) AT LEAST (with the knife (which I held in my hand)) I stabbed (AT THAT MOMENT) the left upperarm (of Bertinus))
5112 (I saw)
5113 THAT ((AS A CONSEQUENCE OF THIS) Bertinus was injured)
5114 (I saw NAMELY)
5115 THAT (his arm bled heavily)
5116 ((In withdrawing the knife) I cut Bertinus (in the underarm))
5117 (I made brandishing movements (with the knife (in the direction (of Bertinus)))))
5118 ((DURING these brandishing movements) I stretched my underarm (in which I held the knife))
5119 (I stabbed the knife (in between the frame pipes (of the bicycle)))
5120 (I grasped the knife)
5121 BECAUSE (I was looking for an instrument (with which I could offer resistance (against Bertinus)))
5122 (I wanted to defend myself (against Bertinus))
5123 (WHO stood threateningly face to face with me (with my bicycle))
5124 ((IN THE FIRST INSTANCE) I brandished the knife)
5125 IN ORDER TO (keep Bertinus at a distance)
5126 AFTER THAT (I attempted to cut him (over the hand))
(IN WHICH I did not succeed)
(I cut him (in his underarm))
(I saw)
THAT (Bertinus collapsed)
AFTER WHICH (I wanted to help him)
BUT (I saw)
THAT (bystanders rendered him aid)
AND (I went away)
(I understand)
THAT (Joost (THROUGH me) could have died)
(ITAL WAS MY INTENTION)
to cut Joost over the hand)
SO THAT (he would have let go of my bicycle)
((DURING the brandishing movements (with the knife))
I also injured Bertinus (near to his collarbone))
(I admit)
THAT (I inflicted harm on Joost Bertinus)
(possibly severe physical harm)
AS A RESULT OF WHICH (Joost could have had died)
MOREOVER IF (he would not have received aid (of others))
(With aid I mean first aid (with accidents))
(I regret this all TERRIBLY)
AND ((AFTER ALL THIS) I left for the house (of my parents
(in Brakke)))
(I undressed myself (in the house (of my parents)))
AND (I laid down (on the bed))
(I presume)
THAT ((WHILE I undressed) the knife fell out of my trouser
pocket)
(I take medicine (that is to say Valium V))
(I swallow these tablets (four or five times a day)
AND EXCEPT FOR THAT (I ALSO take sleep tablets (that is to say Prometazine 5mg.))

(I am employed as a gardener (by the social labour provision))

(I earn about 1.500,- per month net)

(My family doctor is mister Pilaar (from Turp))

AND EXCEPT FOR THAT (one assigned Hannes Praatgraag as my companion (of the Bureau of Alcohol and Drugs (in Korenstreep)))

(I am addicted (to valium))

FINALLY (I want to remark)

THAT ((DURING the problems with Joost Bertinus) I did not walk away from him)

BECAUSE (I knew)

THAT (Joost would have come after me ANYWAY")

(The suspect P.W. Jansen)

((AFTER LECTURE) suspect Jansen declared (to stick to his testimony))

AND (he signed this in draft)
ON DATE ABOUT TIME (I (officer (XI)) heard (at the
group office (of the state police (in Turp))) a person (who
told me THAT he was: Joseph Hendrikus Maria Bertinus (born in
xxxxxx (on the 17th of October 1946)) (living in Turp,
Wemelaarstraat 35))

(He reported (an attempted manslaughter) in casu quo* (severe
ill treatment))

(I informed him)

THAT (he was not obliged to answer)

(He declared:)

("I am a brother in law of Piet Jansen)

(Our wives are each other's sisters)

(I have known Piet Jansen since his wedding (which is
about six years))

(I NEVER have had trouble with Piet)

((AFTER the death of my mother in law) Piet (and his family)
moved to my father in law (who lives at the Wemelaarstraat 35
in Turp))

((BY THE END OF FEBRUARY) it turned out)

THAT (the situation (between my father in law and Piet) had
become untenable)

((In family consultation (where Piet was not present) it was
decided)

THAT (my wife Truus and Piet's wife Anja would swop houses)

((On February 26th 1985) I (and my family) moved into the
house of my father in law (Wemelaarstraat 35 in Turp))

THEN (Piet (and his family) moved into our previous house
(plot Tulpenstraat 5 in Turp))

FOR THIS (permission (of the housing association) had been
obtained)

SHORTLY AFTER THIS (my father in law noticed THAT he had
lost some tools)

(These tools comprised (among others) a claw hammer (which he
had got from his brother (who had died meanwhile)))

(My father in law was pretty attached to this claw hammer)
AND (I would like to have it back)

(It turned out)

THAT (Piet had taken the tools with him (SO among which was the claw-hammer))

(I had heard (from a sister-in-law))

THAT (I was supposed to own Piet STILL some stuff)

HOWEVER (this was not true)

AND (I wanted to go and talk this over with Piet)

ON Saturday March 6th 1985 ABOUT 10.00 a.m. (I bicycled to Piet's house (plot Tulpenstraat 5 in Turp))

THERE (I rang the bell)

AND (Piet opened ( ) ( ))

AND (( ) showed me into his house)

AT THAT MOMENT (nobody else was present in the house)

AT LEAST (I did not see anybody)

((AFTER we had been talking for a while) Piet became angry)

(He told me)

THAT (I still owed him Dfl. 2.000,- (as a compensation for a pigeonry (which he had built (behind plot Wemelaarstraat 35))))

((IF I would have paid him those Dfl. 2.000,-) I would get the tools (of my father-in-law) back)

(I told him)

THAT (that was not true)

AND THAT (everything had been arranged both financially as well as materially)

THEN (he told me)

THAT (I should leave his house)

(I went outside)

WHEN (I stood on the pavement)

(Piet started to call names at me and to threaten me)

(I heard (THAT he said:))
"I hope that father-in-law drops dead IMMEDIATELY"
AND ((IF I meet you) I will stab you down)
AND FURTHER (I will eradicate the complete family Van Reeswijk!)
BESIDES (he has said this more often)
THEN (I became angry)
AND (I walked back (in the direction of the front door))
THEN (this was closed (by Piet))
ALREADY BY THEN (I yelled at him:)
("Then come on the street)
(we will fight it out then.")
AFTER (the door had been closed)
(I walked back to the pavement)
AND (( ) took my bicycle)
AT THAT MOMENT (the front-door was opened AGAIN)
AND (I saw Piet standing with a knife (in his lifted right hand))
(I dropped my bicycle)
AND (I grabbed a conifer (out of his garden))
AND (( ) threw it in his direction)
(I did this out of self-defence)
BECAUSE (Piet screamed:)
("Come here)
THEN (I'll stab you into pieces!"
BECAUSE ((I threw that conifer) Piet closed the door AGAIN)
THEN (the conifer flew through the bottom pane (of the front door))
THEN (I IMMEDIATELY jumped on my bicycle)
AND (cycled away)
(I saw)
THAT (Piet came running after me)
(I saw)

THAT (he STILL kept the knife (in his lifted right-hand))

THEN (I heard)

THAT (Piet screamed:)

("Come here!")

(or words to that effect)

ALSO (I heard)

THAT (he screamed:)

("Come here")

THEN (I will stab you to pieces!)

HOWEVER (I cycled through)

AND (( ) returned home)

(((WHEN I arrived at home) I put away my bicycle)

AND (I took off my coat)

THEN (I IMMEDIATELY walked to the street AGAIN)

BECAUSE (I wanted to go shopping (with my wife))

AT THAT MOMENT (my wife and I saw (Piet arriving on a bicycle))

(I saw)

THAT (he STILL had the knife in his hand)

(He held the knife downwards)

AND (a bit hidden)

(I am sure)

THAT (the knife was clapped open)

NAMELY (I saw the blade)

((In his other hand) he held a brick (or something))

((WHEN we saw Piet) he had put down his bicycle ALREADY)

AND (he came by foot (in our direction))

THEN (my wife told Piet)

THAT (the damage of the pane would be arranged)
HOWEVER (Piet did not listen to her)

THEN (I saw)

THAT (Piet threw the brick (in my direction))

THEN (I had to duck)

OTHERWISE (I would have been hit (by that brick))

THEN (I walked back DIRECTLY)

AND (I grabbed a fork)

HOWEVER ((BEFORE I was at the street with it) my wife took that fork away from me)

AT THE MOMENT WHEN ((I went to the street AGAIN) Piet stood near by my neighbour Hazelnoot)

(I did not see)

(what he did there)

(I told Piet:)

"Put away that knife"

AND (come on the street)

THEN (we can talk it over (with bare hands*))

HOWEVER (Piet remained standing)

THEN ((I walked to Piet's bicycle (which stood in front of plot Wemelaarstraat 37))

(I grabbed that bicycle)

AND (( ) walked with it (in the direction of my entrance))

(It was my INTENTION)

(TO exchange that bicycle for the tools (which Piet STILL had))

THEN (I saw)

THAT (Piet came walking to me (with considerable speed))

(I saw)

THAT (he kept the knife (in his lifted right hand))

((ACCORDING TO ME) it was CLEARLY his PURPOSE (TO stab me with that knife)))
THEN (I grasped Piet's bicycle)

AND ( ) held it in between us (IN ORDER TO defend myself)

ALSO (I thrusted that bicycle forward (in Piet's direction) (WHEN he came towards me))

(This was MERELY to defend myself)

(I saw)

THAT (Piet made a stabbing movement (with his right hand (with the knife inside)) (in my direction))

(That movement ran from up to down)

(I felt)

THAT (he hit me in my left wrist)

(I felt)

THAT (he stabbed with force)

(I felt)

THAT (my wrist hurt terribly)

AND (I saw)

THAT (my pulse bled heavily)

(I saw)

THAT (I had a stab-wound on my wrist (of a length of about 5 cm.))

WHILE (I caught my left wrist (with my right hand) to stop the bleeding) I saw)

THAT (Piet lifted his right hand ONCE MORE)

ALSO (I saw)

THAT (he stabbed me ONCE AGAIN (with that knife))

(I felt)

THAT (he hit me (in my left shoulder))

(I saw)

THAT APPARENTLY ((ALSO the second time) Piet stabbed INTENTIONALLY)

(I saw)
THAT (my shoulder bled heavily)

THEN (I fell to the ground)

WHEN I was lying on the floor I saw (in Piet's eyes) AND (by his way of acting))

THEN (he INTENDED to stab ONCE AGAIN)

THEN (I heard)

THAT (somebody screamed)

AND (I saw)

THAT (he cleared off (on his bicycle))

(It is my conviction)

THAT (Piet would have stabbed AGAIN for a third time (IF nobody had screamed))

AT THE MOMENT (WHEN Piet stabbed me (with that knife) I cannot remember how far we stood from each other)

AFTER ALL (I was lucky (THAT there were some first-aiders in the neighbourhood (who stopped the bleeding IMMEDIATELY)))

(I had an arterial bleeding in my shoulder)

ALSO ((in the hospital) one thought INITIALY)

THAT (I was in a very bad state)

ALSO ((I was lucky) THAT one could stitch the artery)

((AT THE MOMENT WHEN I was lying on the floor AND ( ) had been stabbed) I REALLY thought)

THAT (I was finished)

ESPECIALLY BECAUSE (IN FIRST INSTANCE one did not succeed in stopping the bleeding)

((ONCE I was in the hospital) AFTER two hours the doctor came to look (WHETHER the bleeding had stopped))

FORTUNATELY (this was the case)

OTHERWISE (I should have had to be operated upon)

BECAUSE (the wounds stayed close)

(I could return home AGAIN (about 18.00 p.m.))

(They gave me pain-killers)

AND ON Saturday (I will have to return for a check-up)
((I do not know) how long it is going to take BEFORE I will recover)

(My profession is as a window-cleaner)

HOWEVER (I do not have a job)

AND (I receive social security)

(I do not recognize the knife (you show me) as the knife I have been stabbed with)

(It might be the one)

AND (it might not be the one)

(I do not know)

FINALLY (I ALSO want to remark)

THAT ((WHEN (AFTER I had been at Piet's) I arrived home (on my bicycle)) I had ALREADY told my wife BRIEFLY (what had happened at Piet's))

(I had told her)

THAT (Piet had chased me with a knife))

AND THAT (a window had been broken)

BY THEN (we had ALREADY decided (to compensate for the damage of the pane))

HOWEVER ((IN PURSUANCE OF everything that has happened) I do not INTEND to compensate for Piet's pane)

IN FACT (I threw that conifer out of self-defence)

(I have the impression)

THAT ((IF Piet had caught me at the Tulpenstraat) THAT he would have stabbed me there ALREADY")

(Plaintiff/witness: J.H. Bertinus)

(Officer: XI)

((AFTER lecture) plaintiff/witness declared (to stick to his testimony))

AFTER WHICH (we signed this information in draft)

*"in casu quo" ought to be "casu quo"; however, this was literally taken over from the original police-record
APPENDIX VI: ORIGINAL TEXTS OF SUMMONS (A) AND ITS PARAPHRASE (B) DURING TRIAL BY PUBLIC PROSECUTOR: JaBe/mishandeling/politierechter/ 24b/tramdb101189

A. Summons

De verdachte wordt telastegelegd dat

verdachte op of omstreeks 6 maart 1985 in de gemeente Turp opzettelijkt* ter uitvoering van het voorwenden om opzettelijkt J.H.M. Bertinus van het leven te beroven, met een mes, in elk geval met een hard en/of scherp voorwerp, deze een of meermalen heeft gestoken en/of gesneden en/of geslagen, in elk geval getroffen, zijnde de uitvoering van dat voorgenomen misdrijf niet voltooid, alleen tengevolge van de van verdachtens wil onafhankelijke omstandigheid dat de door verdachte toegebrachte verwonding(en) niet dodelijk was/waren, in elk geval alleen tengevolge van een of meer van verdachtens wil onafhankelijke omstandigheden;

althans, indien het vorenstaande niet tot een veroordeling leidt:

dat verdachte op of omstreeks 6 maart 1985 in de gemeente Turp opzettelijkt J.H.M. Bertinus zwaar lichamelijk letsel heeft toegebracht, hierin bestaande dat verdachte die Bertinus met een mes, in elk geval met een hard en/of scherp voorwerp een of meer malen heeft gestoken en/of gesneden en/of geslagen, in elk geval getroffen, tengevolge waarvan die Bertinus een gapende wond aan zijn linkeronderarm en een gapende wond met een slagaderlijke bloeding aan zijn linkerschouder, in elk geval zwaar lichamelijk letsel bekwaam;**

althans, indien het subsidiair telastegelegde niet tot een veroordeling leidt:

Dat verdachte op of omstreeks 6 maart 1985 in de gemeente Turp opzettelijkt, ter uitvoering van het voorwenden om opzettelijkt J.H.M. Bertinus zwaar lichamelijk letsel toe te brengen, met een mes, in elk geval met een hard en/of scherp voorwerp een of meermalen heeft gestoken en/of gestoten en/of gesneden en/of geslagen, in elk geval getroffen, zijnde de uitvoering van dat voorgenomen misdrijf niet voltooid, alleen tengevolge van de van verdachtens wil onafhankelijke omstandigheid dat de door verdachte toegebrachte verwonding(en) geen zwaar lichamelijk letsel opleverde(n), in elk geval alleen tengevolge van een of meer van verdachtens wil onafhankelijke omstandigheden;

*All underlinings in the original are maintained in this copy (appears as *italics*).

**(Big cross in left margin along this text-fragment. It turns out in a later stage that the public prosecutor will finally charge the suspect with this second, subsidiary fact. It is not surprising that the defendant is finally not charged with the first fact, because such would amount to imprisonment for over six months. That, however, is a sentence which the "politierechter" cannot impose (maximum imprisonment is six months).
B. Paraphrase of Summons During Trial

16 // 't Komt wel
17 hier op neer dat ik u in ieder geval ervan verdenk op
18 6 maart 1985 in de gemeente Turp opzettelijk zou hebben
- (.)
19 geprobeerd om een zekere Bertinus van het leven te
- (.)
20 beroven door eh opzettelijk met een mes, in ieder geval
- (.)
21 met een ander (gevaarlijk) of scherp voorwerp Bertinus
- (.)
22 meermalen, één of meer malen te steken (.....) te stoten
- (.)
23 met dat mes of met dat mes hebt gesneden of geslagen.
- (.)
24 Nou, meneer Bertinus is niet doodgegaan, maar dat heeft
- (.)
25 niet aan u gelegen, maar aan de omstandigheid dat eh
- (.)
26 hij verwondingen heeft opgelopen dat/die (niet) dodelijk
27 waren. Nou datzelfde verhaal geldt ook als dit niet
- (.)
28 bewezen is dat u datzelfde hebt gedaan, maar dan met de
29 bedoeling niet om 'm te doden, maar om
30 'm zwaar lichamelijk letsels toe te brengen en dat op de
- (.)
31 manier zoals ik al verteld heb met dat mes hebt gestoken
32 of gesneden. Maar, hij heeft daaraan overgehouden een
33 gapende wond in zijn linker onderarm. Een gapende wond met
34 een slagaderlijke bloeding aan z'n linkerschouder. In
- (.)
35 ieder geval vind ik dat letsel heel ernstig. Je zou het
- (.)
36 kunnen noemen: zwaar lichamelijk letsels. En dan staat er
37 als derde en dat gaat nog steeds over diezelfde dag en
38 over diezelfde dingen die u gedaan heeft hetzij dat u
39 geprobeerd hebt om Bertinus zwaar lichamelijk letsels toe
40 brengen door gebruik te maken van het mes. Nou,
- (.)
41 Bertinus heeft die twee verwondingen opgelopen als het
42 geen zwaar lichamelijk letsels oplevert, dan zeg ik, dat is
43 dat niet iets wat u gewild heeft, maar gewoon een
- (.)
44 verwonding die zwaar lichamelijk letsel heeft
45 (veroorzaakt) (..............)
APPENDIX VII: SHADOW-CASE I: ORIGINAL DUTCH TEXTS OF SUMMONS (A) AND ITS PARAPHRASE (B) BY THE PROSECUTOR, FOLLOWED BY AN ANALYSIS OF THE ENGLISH VERSION (C): Sint/diefstal/politierechter/20b/tramdb151189

A. SUMMONS (WRITTEN) : B. TRIAL (ORAL)

De verdachte wordt telaste gelegd dat
verdachte op of omstreeks ((datum))
in de gemeente Rapen-
stein
met het oogmerk van wedderrechtelijke toeeigening heeft weggenomen
een fiets
geheel of ten dele toe-
behorende aan K.D. Venis,
in elk geval aan een ander of anderen dan verdachte;

C. Translation and analysis of fragment above (Sint/diefstal/politierechter/20b/tramdb151189)

SUMMONS (WRITTEN) : TRIAL (ORAL)

1. Personification; Prosecutor addresses himself directly at the defendant; illocution "is accused of" is becoming a "reading of the accusation".
   The suspect is being charged with [that]
   suspect

2. Personification by changing noun into second personal pronoun.
   you

3. Omission of wide description; change into exactness.
   on or toward ((date))

4. Omission of wide description.
   in the town of Rapen-

   unlawful conversion
6. Inversion with 5 above. Addition of "to the detriment" due to change of technical vocabulary. 
a bicycle would have stolen to the detriment

7. Omission of wary technical legal description.
in whole or in part of a certain K.D. Venis belonging to K.D. Venis,

in any case to someone or others than suspect;
APPENDIX VIII: SHADOW-CASE II: ORIGINAL DUTCH TEXTS OF SUMMONS (A) AND ITS PARAPHRASE (B) BY THE PROSECUTOR, FOLLOWED BY A TRANSLATION AND ANALYSIS (C): Van Straaten/drinken/politierechter/25a/tramdb161189

<table>
<thead>
<tr>
<th>A. SUMMONS (WRITTEN)</th>
<th>B. TRIAL (ORAL)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. φ</td>
<td>1. Mevrouw de politierechter.</td>
</tr>
<tr>
<td>2. verdachte wordt telas-tegelegd dat</td>
<td>2. meneer staat hier terecht (.) omdat</td>
</tr>
<tr>
<td>3. I</td>
<td>3. φ</td>
</tr>
<tr>
<td>4. verdachte</td>
<td>4. hij</td>
</tr>
<tr>
<td>5. φ</td>
<td>5. in de eerste plaats</td>
</tr>
<tr>
<td>6. op of omstreeks ((datum))</td>
<td>6. op ((datum))</td>
</tr>
<tr>
<td>7. in de gemeente Meidorp</td>
<td>7. in de gemeente Meidorp</td>
</tr>
<tr>
<td>8. een voertuig (motorrijtuig) op de Spiegelkade, althans op enige weg heeft bestuurd</td>
<td>8. met een auto heeft gereden</td>
</tr>
<tr>
<td>9. na zodanig gebruik van alcoholhoudende drank</td>
<td>9. hh terwijl hij teveel alcohol op had.</td>
</tr>
<tr>
<td>10. dat het alcoholgehalte van verdachtes bloed bij een onderzoek 2,10 milligram alcohol per millimeter bloed in elk geval hoger dan een half milligram alcohol per millimeter bloed bleek te zijn;</td>
<td>10. Uit het onderzoek is gebleken dat het promillage lage twee komma tien (.) bedroeg.</td>
</tr>
<tr>
<td>11. II</td>
<td>11. Hh 't tweede feit</td>
</tr>
<tr>
<td>12. φ</td>
<td>12. gaat over een gebeurtenis die zich heeft afgespeeld</td>
</tr>
<tr>
<td>13. verdachte</td>
<td>13. φ</td>
</tr>
<tr>
<td>14. op of omstreeks ((datum))</td>
<td>14. op ((datum))</td>
</tr>
<tr>
<td>15. in de gemeente Meidorp</td>
<td>15. ook weer in Meidorp.</td>
</tr>
<tr>
<td>16. φ</td>
<td>16. En toen</td>
</tr>
<tr>
<td>17. φ</td>
<td>17. reed de verdacht daar</td>
</tr>
<tr>
<td>18. een voertuig (motorrijtuig)</td>
<td>18. met zijn auto</td>
</tr>
<tr>
<td>19. op de Koninginneweg, althans op enige weg</td>
<td>19. φ</td>
</tr>
</tbody>
</table>

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20. heeft bestuurd : 20. φ (zie 17)


22. dat het alcoholgehalte van verdachtes bloed bij een onderzoek 1,86 milligram alcohol per millimeter bloed in elk geval hoger dan een half milligram alcohol per millimeter bloed bleek te zijn;

22. En uit dat onderzoek is gebleken dat het promillage één komma zesentachtig bevatte.

C. Translation and analysis of fragment above (Van Straaten/drinken/pol.rech/25a/tramdbl61189)

SUMMONS (WRITTEN) : TRIAL (ORAL)

1. Addition due to addressee (the judge) in court.

   : Madam the police judge.

2. Personification: illocution "accusing of" is changed into its effect: standing trial. Addition of vocal stress.

   suspect is being charged : mister stands trial here
   with (that) : (.) because

3. Omission of structural organiser in this position; returns in 5 below however (inversion).

   I : φ

4. Personification: noun into third person pronoun; no direct addressing of the defendant (see 1).

   suspect : he

5. Addition of structural organiser (previously omitted; see 3 above).

   : in the first place


   on or toward ((date)) : on ((date))

7. Identity.

   in the town of Meidorp : in the town of Meidorp


   has driven a vehicle (motor vehicle) on the Spiegelkade, at least on some road : has driven with a car

9. Anticipation on next clause in accusation ("too much"); change into colloquial language.

   after such consumption : hh while he had taken too
   of alcoholic drink : much alcohol.
10. Omission of detailed and wary description. Subclause becomes a main clause.
that in examination the suspect's blood turned out to be 2.10 milligramme of alcohol per millimetre blood in any case higher than half a milligramme alcohol per millimetre blood;

11. Structural organiser is synonymous.

   \[\phi\]
   : concerns an event which took place

13. Omission; narrative introduction in 12 is neutral with regard to perpetrator.
suspect : \(\phi\)

on or toward \((\text{date})\) : on \((\text{date})\)

in the town of Meidorp : again in Meidorp.

16. Addition due to narrative reorganisation.
   \[\phi\]
   : And then

17. Inversion with clause 20 below.
   \[\phi\]
   : the defendant drove there

18. Omission of wary description; change into colloquial speech.
a vehicle (motor vehicle) : with his car

on the Koninginneweg, : \(\phi\)
at least on some road

20. Inversion with clause 17 above.
   has driven : \(\phi\) (see 17)

21. Deletion of such; addition of stress.
   after such consumption of alcoholic drink : after consumption of alcoholic drink.

that the strength of alcohol in examination of suspect's blood turned out to be 1.86 milligramme of alcohol per millimetre blood in any case higher than half a milligramme per millimetre blood;

It has become evident from the examination that the permillage amounted to two comma ten (\(\cdot\)).
APPENDIX IX: TRANSCRIPT-SYMBOLS

The applied transcript-symbols are an adapted version of the common HIAT-transcript-system. The symbols as they are presented below have been used by H. Pander Maat, C. Sauer and M. den Boer.

120..........................phrase-number in transcript
V/D.............................Verdachte/Defendant
R/J..............................Rechter/Judge
O/P.............................Officier van Justitie/Public Prosecutor
A/C.............................Advocaat/Counsel
G/W.............................Getuige/Witness
_/_..............................Unidentified Speaker

120 R nu
   V het begon
120 J now
   D it started............Immediate succession of speech-turns

120 R ja
   V het begon
120 J yes
   D it started............Simultaneous claim of speech-turns

120 R gew/gewoon..........Repair
120 R (4.7)...............Pause (four point seven seconds)
120 R (.)....................Brief pause (less than .5 seconds)
120 R eh:.................Prolongation
120 R hh....................Breathing
120 R ((kucht))............Noise
120 R (ongeloofwaardig).....Transcriber heard "ongeloofwaardig", but is not entirely sure

120 R ( ).............Transcriber could not hear what was said
120 R nou..................Emphasis on words appears in italics
120 R ONGELOOFWAARDIG.....Raising voice (emphasis and volume)
120 R niet?//............End of transcript-fragment


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