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Toward a narratology of court reporting

By Jane Johnston and Rhonda Breit *

Abstract

This paper proposes using the theory of narratology to connect legal discourses and processes with the way the media translate the law into news. It identifies how narratology has been used by other disciplines, notably the law, to provide a framework for better understanding, and uses a range of theories and examples to propose a narratology for court reporting. The research identifies six key elements of narrative and expands these into a three-level schema of story level, discourse analysis and the interpretative context of stories. Finally, the paper foreshadows a methodology through which to develop the narratology which follows court proceedings through various stages: from the metanarratives within court to the final production of courts as news. It suggests that such an approach may assist the media gain greater insights into its involvement within the court system while also providing a deeper understanding between the courts and the media.

Introduction

When the news media were used in March 2010 to air allegations of sexual impropriety against popular sitcom star Robert Hughes of 'Hey Dad' fame, the vexed relationship between media and the courts again came into focus. It is accepted that tensions between the courts and media coverage of legal issues are part of modern life, with some seeing it as a 'healthy' element of a 'lively relationship between two active institutions' (Basten 2005: n.p.). Judges draw the line, however, where the media 'get it wrong' with calls for greater powers being granted to judges to respond to media inaccuracies and 'scandalous' criticism (Basten 2005: n.p.). A study reviewing suppression orders and media access to court documents (Australia's Right to Know Coalition 2008), points out media concerns about this relationship. The study calls for laws providing greater access to court documents and fewer suppression orders. These criticisms of the current state of relations between law and the media are developed in recognition of the courts and media performing public functions that, when combined, help to foster open justice whereby the public can scrutinise the administration of justice.

This paper seeks to add to the understanding of how the courts and media contribute to open justice and public understanding of law and justice. It argues the case for deploying

the techniques of narrative to help make sense of the complex relationship between courts and court reporting. Narratology – the theory of narrative structures – could provide an analytical framework to analyse how court stories are reproduced as news stories. Such a narratology could foster a more nuanced understanding of the languages of courts and the media; and help explain how journalists and the legal profession use professional knowledge to construct and interpret courtroom processes. Narrative theories, we argue, provide a conceptual framework by which to interrogate the relationship between the courts and media to better inform professional development in the fields of media and law and to target reform with a view to promoting open justice and greater public access to the law and the media.

Narratology has its roots in structuralism with its value lying in the way narratives are applied to our broader understanding (Wake 2006, p.14): Prince expands this idea:
:

> [N]arratology does have crucial implications for our self-understanding. To study the nature of narratives, to examine how and why it is that we construct them, memorise them, paraphrase them, summarise them and expand them or organise them … is to study one of the fundamental ways…in which we make sense (in McQuillan 2000: 129).

Thus, we suggest narrative theories can offer a more expansive understanding of the processes at work as the news media interpret the narrative environment of the courts. The study builds on the work of other scholars who have investigated narrative theory and discursive practices within the legal profession (Goodwin 1994; Brooks 2006; Jackson in McQuillan 2000: 163-165).

Having set out this case, the paper foreshadows an alternative methodology for researching these relationships; thereby expanding the theoretical explanations of how journalists' interpret the courtroom spectacle.

The gap in the law-media literature

Previous research into courts and court reporting includes investigations into a range of issues along the spectrum of court processes and story outcomes. Some have considered the effect of publicity on audiences to predict the likely effect of publicity on potential jurors, witnesses and public attitudes to the court's ability to administer justice (Chesterman, Chan & Hampton 2001). Others have looked at the language in courts and news (Chibnall 1977; Israel 1998); or attempted to map how news is created from the court environment (Drechsel 1983; Greenhouse 1996; Stack 1999). Still others have analysed the media's relationship with courts (Parker 1998; Stepniak 1999; Cohn & Dow 1998; Ginsburg 1995). Sometimes this has focused on the uneasy relationship between the courts and the media (see, for the example, the various writers in Keyser 1999; Fife-Yeomans 1995; Breit 2008).

Very often this research has been legal-focussed, with lawyers/legal academics or judges leading the debate (see for example Stepniak 1999; Parker 1998; Keyser 1999; Australian Press Council 1999; Chesterman, Chan & Hampton 2001). In contrast to this legal-centric focus, John Bourke (2007: 9) collapses the relationship between media and courts, positing courts as a form of 'alternative media'. His analysis explains that journalists, as court observers, 'circumvent the reconstruction' of news stories in the court environment because they are at the very source of the story. While this is not discounted, we argue for a more nuanced analysis of how court stories are reconstructed in news (set out below).

Other studies have attempted to analyse both legal and journalistic perspectives by canvassing the attitudes of lawyers, members of the judiciary and court reporters to map the relationship between the media and courts (see particularly Australia's Right to Know 2008; Breit 2007). We argue such studies only tell part of the story as they do not explain how the different bodies of professional knowledge inform decision-making. Thus studies investigating the relationship between courts and the media could benefit from considering the question posed by Brooks (2006: 2) in his call for a narratology of the law:

> If the ways stories are told, and are judged to be told, makes a difference in the law, why doesn't the law pay more attention to narratives, to narrative analysis and even narrative theory?

We extend this question to court reporting and ask:

> If the ways stories are told in court and retold by the media makes a difference in how the law is understood; why doesn't the law *and* the media pay more attention to narratives, to narrative analysis and even narrative theory?

This paper repositions the focus of study away from the law and lawyers and the media and journalists to look at the *stories themselves* as acts of production and interpretation within specific contexts that frame sense-making. We acknowledge the works cited above contribute to the field of scholarship and investigation, however, we contend that none have provided a holistic explanation of the creation, production and consumption of court news. Thus parts of the process are ignored in positioning reform agendas. This paper seeks to address this gap by treating the court and news stories of the courts as narratives.

Narratology

Narratology is the theory of narrative structures (Jahn 2005). Jahn (2005: N1.2) explains that 'anything that tells a story, in whatever genre, constitutes a narrative' and further that 'a narrative is a form of communication which presents a sequence of events caused and experienced by characters'. While there are various ways of describing narrative, Jahn's explanation of the hyponarrative is instructive as we develop the idea of multiple approaches and levels of story-telling: When a character 'begins to tell a story of his or her own ... the original narrative … becomes a "frame" or "matrix" narrative, and the story told by the narrating character becomes an "embedded" or *hyponarrative'* (Jahn 2005: N.2.4.1).

Narrative analysis has been used to bridge gaps between disciplines (see Rimmon-Kenan 2006): 'An emphasis on the plurality of stories is, among other things, a reaction against such concepts as "truth", "reality", or "validity in interpretation"' (2006: 16). Indeed, as the poststructuralist approach calls for the 'invitation to read [texts] differently' (Besley, 2006) so too does this paper acknowledge differences in media and legal story-telling, while suggesting a proposed methodology for working through these differences.

According to Brooks (2006) storytelling strategies and legal doctrine are closely linked. He argues that the law needs a specific narratology to assist in understanding of legal procedures and outcomes: understanding narratives aids understanding people, particularly how they construct and learn from stories. In fact, he sees courtroom narratives as relevant as 'economic or social theory to understanding how cases come to the law and are settled by the law'(Brooks 2006: 2). Brooks' observations follow an upsurge in interest into legal narratology marked by a major symposium on the topic by the Yale Law School in 1995. That symposium argued that literary theory could provide the intellectual tools for examining and evaluating law (1996). Perhaps an even more likely connection though, is the media's claim to narrative structures. Bell (1991: 147) explains that 'journalists … write stories' which have 'structure, direction, point, (and) viewpoint'.

However, before progressing to how the law and media *use* narrative structure, we first need to outline the building blocks of narrative. Here we borrow from and build on the work of Founding Director of the Nieman Program on Narrative Journalism, Mark Kramer, (2004) who identifies some key elements of narratives:

> At a minimum, narrative denotes writing with (A) set scenes, (B) characters, (C) action that unfolds over time, (D) the interpretable voice of a teller — a narrator with a somewhat discernable personality — and (E) some sense of relationship to the reader, viewer or listener, which, all arrayed, (F) lead the audience toward a point, realization or destination.

Each of these areas may be viewed as important in the telling of stories about law and justice and can be applied to the court room and to news stories of courts. These six elements of narrative thus provide a starting point for understanding why aspects of narrative are fundamental to court stories. They plot the technical elements essential to producing interesting court stories. We argue, however, narrative is a cognitive construct or mental image built by a response to textual and *non-textual* stimuli (Ryan (2004: 8-15).

Thus a more nuanced approach to investigating narratives is needed that goes beyond an examination of effective story-telling techniques to engage with how language affects meaning. Therefore, we propose a three-level schema for analysis (see Ryan 2004: 8-9):

a. Story level: This is the superficial level which focuses on how stories are told within the different domains of law and journalism.
b. Discourse level: This level of the study focuses on the type of language used in telling stories and the professional knowledge deployed in construction of those stories.
c. Interpretative context: This level targets the audience and the environment in which a narrative is interpreted.

Using Ryan's three levels of narrative we develop a 'narratology matrix' across the levels of story, discourse and interpretative context. This schema for inquiry provides a manageable process by which to undertake an in-depth study of court and news narratives. The matrix acknowledges the complexity of narrative – it addresses Kramer's six key elements of narrative, taking into account how application of different forms of professional knowledge and internal and external interpretative contexts can affect narrative construction and interpretation. Such comparison, we argue below, might help identify some of the underlying tensions between the courts and news organisations involved in reporting courts.

Story level

It is obvious from the previous discussion that courtroom narratives and news reports of courts can be multi-textual and multi-voiced. Thus we need to chart how news and courts set scenes and how characters are developed within these different story modes. We also need to compare and contrast how action unfolds within news and courtroom narratives and explore the different voices of the storytellers. In essence, the starting point of this investigation into the different narrative forms of courts and news begins by developing a typology of courtroom and news narratives.

Courtrooms can be places of high drama and this drama engages both verbal and non verbal narrative elements. Brooks (2006: 27) argues that the 'law tends to limit and formalize conditions of telling and listening'. In courtrooms, stories are told through first and third person narratives (compare, for example, a witness testimony in third person and an accused testimony in first person), while in news stories the third person or authorial narrative is used. This stems, in part, from the reporter's legal obligation to present a fair and accurate report and impartial representation of the story. In this respect, the law and professional ethics can affect how court room and news media narratives are structured. (This issue is addressed again in the section on discourse.)

Increasingly, the Australian news media employ a range of verbal and non-verbal narrative elements in story telling. Australian courts, for the most part, do not allow television cameras or photographers into court rooms (Johnston 2004). Therefore, if vision is used, it is primarily of people leaving court or avoiding media cameras; hence it barely has the potential to expand the textual input. This can result in a one-dimensional narrative. Journalists look to different elements of the court room stories to engage audience interest. Thus the structure, style and focus of news reports can differ greatly from court room narratives. Journalists tend to identify novelty, the extraordinary or high profile characters to develop relationships with audiences whereas the courts rely on the rules of evidence and courtroom protocols to define audience relationships.

By comparing and contrasting these elements of journalistic and court room story-telling, it is possible to compare and contrast the stories being told across the two professional fields of journalism and law. However, such methods do not offer insights into how professional knowledge is deployed to determine value. Nor do they offer insights into why certain stories are given greater value. Therefore, we argue that we can learn more from an in-depth analysis of courtroom and news discourses which incorporates professional knowledge and context.

Discourse level

We contend the language of courts and news is framed by professional knowledge. In this sense we are employing Foucault's notion of discourse (1972) as the study of language within the discursive context in which it is made (see Malpas and Wake 2006: p 175).

> Any language community, such as medicine, will share a methodology, phraseology and a body of thought that makes up their discourse. This discursive field contains within it rules governing language use within the community; thus certain usages will be prohibited as unacceptable or excluded altogether.

When telling stories, both law and journalism use their own language. Both languages have developed in response to professional routines – journalism grounded on populist traditions; law steeped in formality. An example taken from the South Australian 'Snowtown Case' illustrates the disjuncture between formal language of the courts and the populist language of journalism. In *R v Bunting and Others (NO 3)* (2003), the relationship between the accused was described by Justice Brian Martin in these terms:

> …the evidence was capable of establishing the existence of an over-arching joint enterprise to which each accused was a party and pursuant to which each deceased was killed. The common enterprise began in about 1992 …. The accused were linked by their common hatred of homosexual persons and paedophiles. The enterprise developed. Where possible the accused sought to benefit from the property of the deceased and to access any Centrelink benefits to which the deceased were entitled at the times of their deaths. Where necessary; personal details were extracted from the deceased immediately before their deaths with a view to ensuring the continuation of the benefits and to arranging access by the accused to those benefits. Steps were taken to create the impression that the deceased were still alive. False stories were spread to explain disappearances and false sightings of deceased were created. (R v Bunting & Others (No 3): par 346)

By contrast, a news report of the case, which featured on ABC's 7.30 Report, summarised the relationships in these terms:

> Between them, John Bunting and Robert Wagner have been found guilty of torturing and murdering 11 people in what's become known as the bodies-in-the-barrel case.
> Almost as shocking as the details of the crimes themselves is the grim portrait of a vulnerable underclass, which provided their victims.
> The victims were not chosen randomly, but rather, in the words of a senior police officer, the two were part of a group that preyed upon itself. (Sexton 2003: 9 September.)

This example highlights the different languages used by journalists and the judiciary to tell stories to multiple audiences (which we address in the next section). At times, the formal language of the courts can be at odds with the stories it is telling. Translating legalese into readable news can be particularly difficult when the court reporter may not understand expert testimony or crucial legal points on which a case may hinge (Lotz 1991). This increases the possibility of misunderstandings by those listening, understanding, translating, re-writing and constructing. Thus the interpretation of legal narratives involves a risk of confusion. This risk of confusion is exacerbated by the journalistic selection, editing and packaging processes. By treating courts and news reports as separate, distinct narratives, we can explore how legal language is interpreted into journalistic language and how the attribution of journalistic and popular meanings reinvents the story. We suggest this is one locus of inter-professional tensions between journalism and the law.

Chakravati v Advertiser Newspaper Ltd (1998) provides an excellent example of where the technical nature of court proceedings and the complexity of the editing process can lead to journalistic inaccuracies. This case arose from two articles published in the *Adelaide Advertiser* reporting on a Royal Commission, set up in March 1991, to investigate the near collapse of the South Australian State Bank. The plaintiff was Mandobendro Chakravarti, who claimed he was defamed in two articles. He argued the articles were not a true and

accurate record of the proceedings. He argued further the articles created a false inference of him being involved in civil or criminal conduct and conducting himself in an improper manner as a director. He ordered a copy of the proceeding's transcript, which indicated that *The Advertiser* had inaccurately recorded a response from the witness quoted. Based on this, Mr Chakravarti wrote a letter seeking an apology and correction from *The Advertiser*. No apology or correction was published. It was later revealed that the transcript had been incorrect and the reporter's version of the evidence was correct. However, the court had to consider whether the report, as a whole, was inaccurate or unfair. Notwithstanding, the accuracy of the reporter's notes, the articles were inaccurate because of the positioning of images, captions and the headline (see Breit 1999: 37-59). The problem was not with the story alone, but the compilation and packaging of the story with images, headlines and text.

This example exemplifies the fact that understanding language is not enough to minimise risks of confusion. Account must be taken of how language is interpreted and reconstructed, thus we argue the need to examine the *discursive practic*es of law and journalism. Professional knowledge about legal doctrine, the seniority of legal representatives and courtroom protocols form a crucial part in courts' determining the value of a legal argument (Jackson in McQuillan 2000). Journalists, however, employ a completely different set of interpretative strategies to attributing value to information or the quality of an argument. This is decided by applying concepts like 'news values' or 'story logic' based on how a story will appeal to a news organisation's audience.

While there is no set list of news values, certain concepts are seen as determining news criteria. In contemporary media these generally include conflict, impact, prominence, human interest, timeliness, proximity, currency, the unusual (developed from Galtung and Ruge's original 12 news values, 1965). Research by Harcup and O'Neill (2001, p. 279) revised these values arguing media stories take account of the power of the elite (stories concerning powerful individuals, organizations or institutions); celebrity (stories concerning people who are already famous); entertainment (stories concerning sex, showbusiness, human interest, animals, an unfolding drama, or offering opportunities for humorous or entertaining treatment); surprise (stories with an element of surprise or

contrast); bad stories (negative overtones such as conflict or tragedy); good stories (positive overtones such as rescues and cures); magnitude (significant events in terms of people involved or potential impact); relevance (issues, groups or nations perceived to be relevant to the audience); follow ups (subjects already in the news); media agenda (stories that set or fit the news organization's own agenda).

Grabosky and Wilson (1989: 12) identify primary news values in crime as "the exceptional, the unusual, and the novel, at the expense of the ordinary'. This is reinforced by Stack (1998: 7) who refers to 'reconstruction strategies' in courts, which include the importance of people, national impact, conflict, controversy, protest, decision, violence or scandal, moral disorder, embodied in disruptions to traditional values.

Take, for example, the case of Rosemary Pekar where a simple speeding hearing with a guilty plea, resulted in the following *Courier Mail* story.

> A FORMER police officer has successfully challenged a speeding fine from one of the Gold Coast's most notorious camera traps.
>
> Rosemary Pekar, 43, an officer in NSW for eight years, was one of hundreds of people caught speeding at a section of highway affected by roadworks late last year, and yesterday she took her fight to Southport Magistrates Court (Peirce, 2010).

This is an example of a follow-up and media-agenda stories where even the most mundane of court room narratives can nevertheless translate into 'news'. The *Courier Mail* story – which was seven paragraphs in total – provided more information than was available in court on 10 May, 2010. Its reliance on a previous story, from an earlier court appearance and a court-house step interview by Ms Pekar, provided background information *beyond* the court narrative. It used the brief court appearance to build an issue-based story, illustrating what has been described by some scholars as a selective process of court reporting based on cultural, social or legal conditions at the time (Roshier in Chibnall, 1977; Schlesinger & Tumber 1994) – in this case a contentious speed trap.

In much the same way, Brookes (2006) argues that Roland Barthes idea of *'doxa'* – that is, the cultural beliefs that structure our understanding of everyday happenings – are embedded in normative courtroom narratives. These become 'stock narratives' which represent the way things 'are supposed to happen' (2006: 14). While Brooks puts the case for how judges use *doxa* in their reconstruction of events, we argue that the media do so, as illustrated in the media coverage of Lindy Chamberlain and the death of her baby Azaria (*Chamberlain v. The Queen (no 2*) *1984).* Renowned as the most publicised case in Australia's legal history (Johnstone, 1982), media coverage often focussed on what was the expected, normative behaviour: the expectation of how a mother should grieve for her dead baby; the idea of going camping with a nine-week old baby at Uluru; the rumoured religious practices of the Seventh Day Adventists, and so on.

> The trial provides a vivid example of how the ability to see a meaningful event is not a transparent, psychological process but instead a socially situated activity accomplished through the deployment of a range of historically constituted discursive practices…. Narrative accounts provide descriptions of action and belief in ways appropriate to the particular interpretative context ... (Edmond, 1998: 2.A)

Edmond's account of the Chamberlain case highlights the need to understand the relationship between how stories are constructed and how they are interpreted. Discourse analysis can aid understanding through various ways, however special emphasis must be placed on how stories are interpreted. Thus a narratology of court reporting needs to take account of the interpretative context.

Interpretative context

The interpretative context goes beyond the relationship of language and knowledge to evaluate the effects of relationships and context on meaning, acknowledging its plurality (Bahktin in Zappen: 2000). Jackson (in McQuillan 2004: 164) argues judicial (or courtroom) narratives are constructed for three audiences:

- 'doctrinal audiences' (i.e. the fit of a decision in terms of legal doctrine);
- 'judicial audiences' (i.e. the judiciary); and

- ‘the audience of the particular litigation’ (usually limited to the parties and witnesses involved).

Thus the quality of argument (and a court’s truth creating procedures) is framed by an argument’s internal acceptability in terms of legal doctrine, members of the legal profession and those involved in the proceedings (which can include jurors). The quality of argument is not affected by its acceptability to external audiences namely the general public.

In contrast, the major purpose of a news report of a court case is for consumption by external audiences. Applying Jackson’s schema, news reports of courts are prepared for:

- *doctrinal audiences* (i.e. report’s fit in terms of news which involves a range of internalised rhetorical strategies that determine the value of information including news values or story logic);
- *journalistic audiences* (i.e. other journalists and professional expectations); and
- *story-specific audiences* (i.e. the audience of a particular story including sources and people *involved* in or *affected by* the story).

However, overwhelmingly, the quality of a court story is also determined by its fit in terms of *external audiences* within the general public (i.e. media consumers).
This brings an extra layer into the way we might view narratology within the courts and provides a way of reviewing the narratology of court reporting.

This part of our three-level schema offers insights into how different audiences make sense of court stories: how audiences decode news and court stories. We need to locate court stories within the lived experiences of internal and external audiences. For example, in the Rosemary Pekar case, cited above, a *local* reader/viewer would have a greater potential for empathy and understanding of the story than an *unaffected* reader/viewer. Here, deploying a case study approach will enable in-depth interviews and focus groups to be conducted with parties involved in all levels of the courts and news processes. Through individual feedback we will be able to evaluate the importance of factors such as time and sequencing, story medium, voice and news frames, incorporating Kramer’s narrative elements. Through

this holistic approach we will garner insights into how court and news stories are interpreted across all levels of production and consumption.

In summary, we see narratology as a useful conceptual tool by which to interrogate the relationship between media and the courts. Such investigation needs to go beyond the technical focus of Kramer's narrative features to look at how narratives are acts of creation, production/construction and interpretation. We therefore adapt Ryan's three-levelled schema of:

- Approaches to storytelling – how scenes are set; the characters; point of view, perspective, language, structure and the transportability of narratives across media.
- Discourse: How journalists and lawyers mobilise professional knowledge, core values and professional methodologies and language as well as the critiques proffered by journalism and the judiciary to claim authority over courtroom narratives.
- Interpretative context: How relationships are developed with multiple audiences within courts and news and how these might affect how stories are interpreted and valued.

Methodological implications of a narrative research

By viewing courts and news as narratives, we have been able to highlight a number of key stages that need to be investigated in order to explain the relationship between the legal professions and journalists. Drawing from our earlier discussion of Prince (in McQullian, 2000), we argue that narratology is about making sense, organising and understanding narratives. We accept that in many ways these categories are inter-related and inform each other. However, they identify key approaches or phases of research needed to explain how journalism and the media contribute to open justice and help identify inter-professional tensions arising from the different narrative techniques deployed.

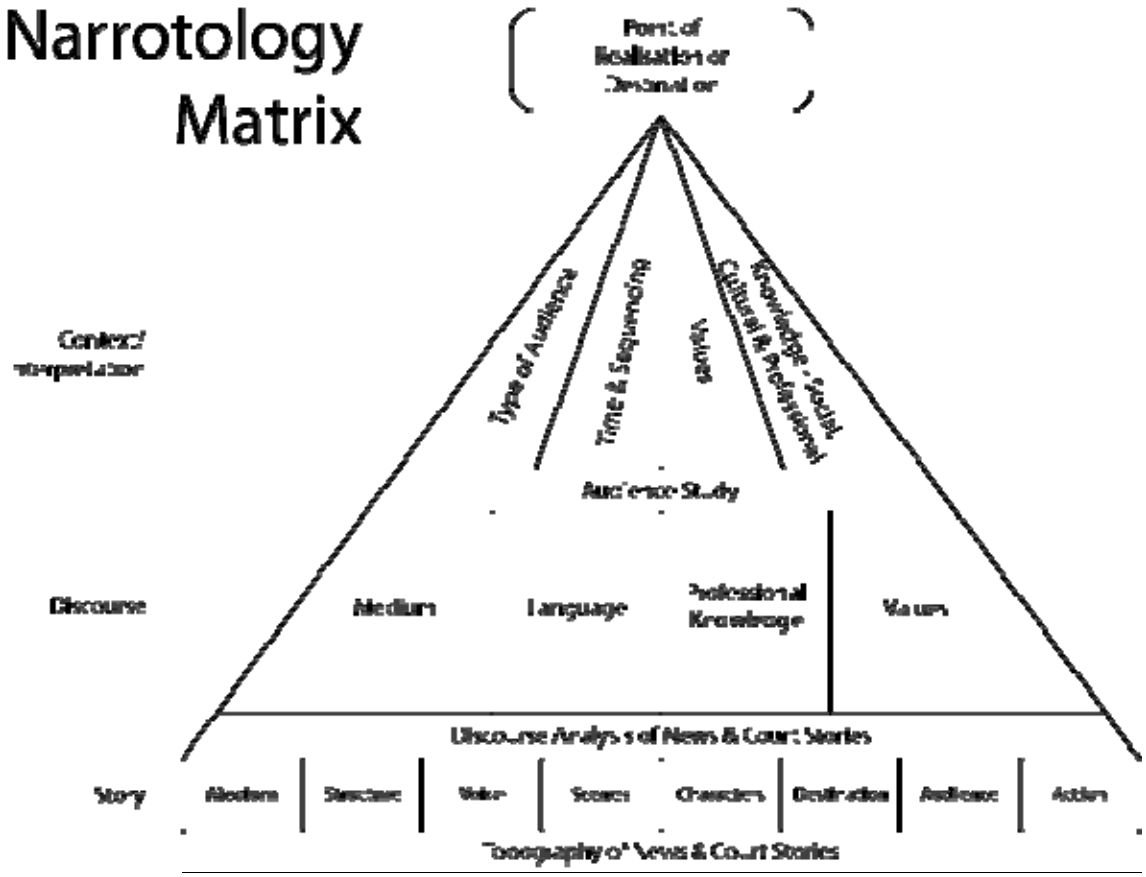
In order to map the relationship, we call for a three-pronged approach which we describe as a narratology matrix (set out in Figure 1 below) comprising:

1. Mapping the typology of news and court room stories. Here we build on the framework of Kramer (2004) to explain narrative structures. This also needs to address how changing technology is having a marked effect on how news and courts communicate. Our typology of news and court stories will take account of the medium transportability of court room stories into news.

2. The second phase highlights the importance of language and the need to understand how journalists and legal professionals evaluate the quality of stories emerging from the complex web of hyponarratives within a courtroom setting. We describe this phase as a study of discourse that takes account of the language used to describe stories, the professional strategies deployed to evaluate quality and the core values – legal, social and ethical – informing these choices. In essence this phase seeks to position narratives within an ideological framework to help us understand how narratives are constructed and their role in promoting open justice and public interest.

3. The third phase acknowledges that narratives are an act of construction *and* interpretation. Therefore, we need to understand how journalists, legal professionals and external audiences make sense of the courtroom spectacle. Here we need to map the different relationships that exist within the courtroom and the media and evaluate whether these relationships affect understandings of story quality. We recommend a case study approach to limit this level of investigation and to provide the opportunity for in-depth interrogation of how people interpret and act upon court stories. We anticipate this phase will provide the richest insights for the reform agenda across both law and journalism.

Figure 1: Narratology Matrix



By taking this approach, we can explore how court stories and events are interpreted into journalistic language and how this becomes news. In turn, it will aid understanding of how journalistic and popular meanings reinvent legal language. Beyond this, however, we also seek to gain an understanding of why and through what methods, inter-professional tensions or 'hot spots' between journalism and the law occur. Finally, we will gather insights into what factors people take into account in interpreting these stories.

In summary, our narratology of court reporting would assist in:

- identifying a theoretical framework for understanding how courts become news;
- identifying ideological and procedural differences between courts and media;
- providing a working framework for court reporters; and
- providing a framework for professional and legal reform.

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