

Discursive devices for inserting morality into law: initial exploration from the analysis of a Brazilian Supreme Court decision

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DOI: 10.21747/21833745/lanlaw/6_1a1

Abstract. *The differences and intersections between law and morality are a pervasive theme in legal theory. Scholars have debated for more than a century about how best to distinguish the two as normative phenomena. However, little attention has been paid to how those two normative systems interact with each other on an empirical, i.e., practical level, and to the consequences of this interaction for the theoretical debate that stands above it. Drawing on tools and concepts from discourse analysis – specifically the ethnomethodology of written texts and studies of moral work – this paper aims to attend to the issue of how morality is inserted into legal phenomena by the practical discursive work of jurists. The data comes from a decision by the Brazilian Supreme Court to remove the president of the Lower House of Congress from office following criminal charges. The analysis demonstrates that the judge mixes references to the legal/technical framework with moral work in constructing a deviant character for the defendant. This defendant so-categorized feeds back into legal categories to justify the decision to remove him from office. Implications for the conjoining of morality and law as a practical matter is discussed.*

Keywords: *Law and Morality, Legal Language, Ethnomethodology, Criminal Procedure, Categorization.*

Resumo. *As diferenças e interseções entre o direito e a moral são um tema onímodo na teoria do direito. Estudiosos vêm debatendo por mais de um século sobre como melhor distinguir os dois como fenômenos normativos. No entanto, pouca atenção vem sendo dedicada a como esses dois sistemas normativos interagem um com o outro em um nível empírico, isto é, prático, e às consequências dessa interação para o debate teórico que está por cima. Utilizando ferramentas e conceitos da análise do discurso – especificamente a etnometodologia de textos escritos e os estudos de trabalho moral –, este paper objetiva atender à questão de como a moral é inserida em fenômenos jurídicos pelo trabalho discursivo prático dos*

juristas. Os dados vêm de uma decisão do Supremo Tribunal Federal brasileiro de remover o Presidente da Câmara dos Deputados, por conta de ações penais. A análise demonstra que juízes misturam referências a um enquadramento jurídico/técnico com um trabalho moral para construir um caráter desviante para o réu. O réu assim-categorizado é reinserido nas categorias jurídicas para justificar a decisão de removê-lo do cargo. Implicações para a junção da moral e do direito como um questão prática são discutidas.

Palavras-chave: *Direito e Moral, Linguagem Jurídica, Etnometodologia, Processo Penal, Categorização.*

Introduction

For more than a century, legal theory has debated how to distinguish law and morality as two distinct normative systems. Is a norm that says that “[no] state [shall] deny to any person within its jurisdiction the equal protection of the laws”¹ a truly legal norm or more of a moral norm? What about the conception that no person shall profit from their own turpitude – is it a legal or just a moral norm? What about the rules about forming and waiting in line? Is someone legally obliged to help someone in a life-or-death situation or is this simply a moral obligation?

Even when we can easily differentiate between the two normative phenomena, how different may the consequences be? Surely no one can be sent to prison for simply drinking too much or cutting a line, but can the fact that someone does one of those things make him also more prone to a worse sentence for, say, a fraud conviction? When do a legal norm and a moral norm generate neutral consequences in regard to each other?

More recently, the legal debate has shifted from the “how” and centered on why law and morality should be separated. A subset of this more recent questioning on whether in fact the two phenomena should be separated centers on how much morality can influence law and legal interpretation, with the aim of doing justice, whilst maintaining legal certainty². Although a very important debate that has mobilized some of the greatest minds of legal thinking in Europe, the US and around the globe, this discussion is also a rather fine example of how legal theory has largely abandoned the practical contexts where their legal concepts are supposed to be applied.

As Geertz (2000) has argued from an ethnographical standpoint, morality, justice and even legality can be surprisingly fluid concepts, with different meanings depending on the practices of social actors located in specific social settings. Discourse analysis can help bridge this gap between legal theory and legal practices (Pádua, 2016). In this way, we can have theories that aim at describing what happens in practice, so that we can have practices that are systematized through theory and empirical systematization – instead of having theories that have nothing to do with practice and practices unexplained by any theory (Lupetti Baptista, 2012).

In this paper, I propose to use discourse analysis to illuminate some of the methodical discursive devices³ used in legal decision-making. My main objective is to explore one of the discursive devices that the Judiciary use in conjoining moral evaluations with legal/technical ones on the path to locally arrive at – and justify – a decision, especially if it is about a sensitive issue. To do that, we will use as data the judicial decision issued by the Brazilian Supreme Court to remove from office the then-President of the Lower

House of the Brazilian Congress, as a provisional measure based on his situation as a defendant in several indictments.

I will reconstruct the use that the decision makes of categorizations and contrast structures to bring moral evaluations to the forefront of its reasoning. I will also propose the concept of “moral work” to identify these discursive devices as part of the construction of accounts for normative decisions, especially in legal settings (Pádua and Oliveira, 2015). Because judicial decisions are phenomena that are socially accountable by legal and social convention – i.e., they have to express the basis for their issuance – they are a good source of data on how moral work is done locally and discursively.

In what follows, I will first present a literature review of legal perspectives on law and morality, pointing out their limitations for describing real-world settings and then propose a heuristic criterion for re-specifying this distinction in an empirically tenable way. Next, we will present the theoretical and methodological bases for analyzing written texts as empirical data from an ethnomethodological point of view. Then, we will examine the data and show two discursive strategies for inserting moral evaluations into legal reasoning in a judicial decision. A discussion with a summary of findings and future developments closes the paper.

The distinction between law and morality as an empirical matter

When the first modern legal theorists started out to create a science of law, their first move was to point out ontological criteria that could singularize law from other normative systems. One of the pioneers, John Austin⁴, wrote as early as 1832:

[...] I distribute laws proper [...] under three capital classes. The first comprises the laws [...] which are set by God to his human creatures. The second comprises the laws [...] which are set by men as political superiors, or by men, as private persons in pursuance of legal rights. The third comprises laws, of the two following species: 1. The laws [...] which are set by men to men, but not by men as political superiors, nor by men, as private persons, in pursuance of legal right: 2. The laws which are closely analogous to laws proper, but are merely opinions or sentiments held or felt by men in regard to human conflict. I name laws of the first class *the law* or *laws of God* [...]. [...] I name laws of the second class *positive law*, or *positive laws*. [...] I name laws of the third class *positive morality*, *rules of positive morality*, or *positive moral rules*. (Austin, 2000: 123-124)

Since Austin, a tradition developed in legal theory called analytical jurisprudence (Sgarbi, 2007). A lot of early names of this tradition – that came also to be called “legal positivism” – like Herbert Hart and Hans Kelsen are connected to this early 19th Century enterprise. Their goal was to establish the field of Law as a scientific field, very much on the lines of the general endeavor of other human and social sciences in the 19th and beginning of the 20th Century (Pádua, 2016). To accomplish this the social sciences needed to extricate their specific ontological scope and their epistemological principles from the generalized philosophical inquiry where social questions have been studied at least since post-Platonic Greek philosophy (see Bohman 1993).

For the law, that meant, on the ontological side, to extricate itself from morality. Following that early attempt by Austin, Kelsen also presented his criteria for setting law and morality as different phenomena:

While recognizing law as the specific social technique of a coercive order, we can contrast it sharply with other social orders which pursue in part the same

purposes as the law, but by quite different means. [...] Law, morality and religion, all three forbid murder. But the law does this by providing that if a man commits murder, then another man, designated by the legal order, shall apply against the murderer a certain measure of coercion, prescribed by the legal order. Morality limits itself to requiring: thou shalt not kill. And if a murderer is ostracized by his fellow men, and many an individual refrains from murder not so much because he wants to avoid punishment of law as to avoid moral disapprobation of his fellow men, the great distinction still remains, that the reaction of law consists of a measure of coercion enacted by the order, socially organized, whereas the moral reaction against immoral conduct is neither provided by the moral order, nor, if provided, socially organized. (Kelsen, 1949: 20).

This seemingly simple distinction has many conceptual, not to mention empirical problems. Some of them were pointed out a few years later by Kelsen's fellow legal positivist Herbert Hart. While still trying to convey criteria for ontologically distinguishing law from morality⁵, but also rejecting the idea that coercion (as in Kelsen) or the source of the norm (as in Austin) could be defining criteria, Hart took a big leap forward in admitting that efforts to provide definite ontological criteria would be ultimately futile:

[...] [T]he existence of a legal system is a social phenomenon which always presents two aspects, to both of which we must attend [...]. It involves the attitudes and behavior involved in the voluntary acceptance of rules and also the simpler attitudes and behavior involved in mere obedience or acquiescence. Hence a society with law contains those who look upon its rules from the internal point of view as accepted standards of behavior, and not merely as reliable predictions of what will befall them [...] if they disobey. [...] The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider social ideas. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process. (Hart, 1961: 197, 199)

This dual vision of law as both a normative internal and a coercive external phenomenon was taken up and reinforced more recently by the German legal philosopher Jürgen Habermas. Habermas pointed out that law depends both upon facticity (i.e., the capacity to generate factual obedience through coercion) and upon validity (i.e., the capacity to generate normative obedience through acceptance). On the validity side, acceptance and compliance with legal norms depended on the capacity of legal norms to incorporate social discourses of a moral kind, through various public *fora* where these discourses could be held:

[...] [A]utonomous morality and the enacted law that depends upon justification stand in a *complementary relationship*. [...] moral and legal questions refer to the same problems: how interpersonal relationships can be legitimately ordered and actions coordinated with one another through justified norms, how action conflicts can be consensually resolved against the background of intersubjectively recognized normative principles and rules. But they refer to these same problems in different ways. [...] morality and law differ *prima facie* inasmuch as post traditional morality represents only a form of cultural *knowledge*, whereas law has, in addition to this, a binding character at the institutional level. Law is not only a symbolic system but an action system as well. (Habermas, 2001: 106-107)

The emphasis on law and morality as symbolic systems and their normative dependence on ‘intersubjectively recognized normative principles and rules’ distinguish this further leap by Habermas from the positions of Hart and the other analytic legal theorists. Now, law and morality do not need to be ontologically distinguished as much as they need to be allocated their function within a sort of normative division of labor. And discursive protocols and practices are key to specify this division of labor⁶.

However, despite announcing his conception as an “empirically informed view”, Habermas (2001: 107) falls short of actually incorporating empirical research into his theory. His legal and moral theory remains a discussion of higher order and general concepts that would need to be worked out even to allow empirical testing⁷.

Empirically-oriented discourse-analytic studies have been concerned with developing morality at the local level through the study of the situated use of language in both written and oral modalities and in multiple settings (see, e.g., Bergmann and Luckmann (2013); Turowetz and Maynard (2010); Linell and Rommetveit (1998)). In order to construct an analytical framework that would allow the empirical treatment of moral work in discursive interaction, Bergmann and Luckmann (2013) initially follow the same path as Habermas, in recognizing that the “moral ordering of society” has to do with “a specific type of knowledge: knowledge about values – values wherewith individuals and collectivities can decide whether behavior is good or bad” (Bergmann and Luckmann, 2013: 18).

Nonetheless, they reject two possible extensions of this provisional definition: what they call a “decontextualization of morality”, and its presentation as a merely inner (i.e., cognitive or affective) reality. Therefore, morality from an empirical standpoint is a social construct that is achieved predominantly through the local exchange and circulation of discourse. More specifically, it is a result or a feature of the local discourses where moral questions, themes, norms and the like are discursively made relevant by the participants of the settings themselves.

So, the fundamental analytical questions should be “are these actions [we are talking about] being treated [*wahrgenommen*] by the participants themselves as overall morally relevant and how does the moral interpretation get communicatively represented [*kommunikativen Austausch*] in the verbalization [*Ausdruck*] of the participants” (Bergmann and Luckmann, 2013: 22).

By reconstructively working out the different components of moral work in discourse, and by re-specifying Goffman’s conception of morality as an interactional phenomenon, Bergmann and Luckmann (2013) propose a useful definition for the content one should look for in discourse that signals the interpretation of the participants of it as morally relevant:

[W]e speak of moral communication then, when specific moments of recognition or condemnation [*Achtung oder Missachtung*], that is the social evaluation of a person, are carried into [*mittransportiert werden*] that communication, and therefore a situational relation to a general appreciation [*übersituative Vorstellungen*] of “good” and “bad”, or else “good/correct life” is established. (Bergmann and Luckmann, 2013: 22)

Morally relevant discourse, then, is tied to social evaluations of personal action, behavior or identity, that gets displayed through the person’s choices, actions and attitude towards rules, norms, values, expectations and the like. It is connected not to abstract norms or

systems of rules, but to local accountable actions of specific individuals or groups. It is this very local evaluation that makes visible what the normative patterns of evaluation are in terms of recognition or condemnation of those specific actions, behaviors or identities.

In that sense, morality is necessarily local (Geertz, 2000), since no general system of norms can encompass all real, naturally occurring social behavior. It is also, as Garfinkel (1967c) noted, tied to normality – not only normativity – since the patterns of evaluation of personal actions are connected to the background knowledge, available to and reflexively constructed by social members in specific settings as “what everybody knows to be the case”⁸.

In establishing how legal work and moral work can be distinctively spotted in naturally occurring discourse, one must, then, point out empirically how legal and moral resources for evaluating personal actions, behaviors or identities can be distinctively constructed in the discourse structures and strategies themselves – since, as Habermas (2001) pointed out, law and morality deal with the same questions of personal conduct and norms for it.

One way around the problem would be to dismiss the need for distinguishing law and morality. Everything that gets inside a legal text – whether a legal norm, a judicial decision or whatever – would be legal and therefore not moral⁹. This would be a bad solution, however, since it would be unable to explain not only the centuries-old debate about law and morality, but also the actual distinction that participants – i.e., lawyers and judges – do make between legal and moral justification of legal actions, especially in empirical materials.

A better solution is first to recognize that although moral work in discourse can occur in both every-day and institutional settings, legal work is necessarily institutionally-bound (Bergmann, 2013; Drew and Heritage, 1998; Sarangi, 2006). This is a partial solution, nevertheless, especially when we are dealing with explicitly legal activity-types (Levinson, 1978) or models (i.e., *Gattungen*, see Bergmann 2013, as is the case of the corpus for this paper – judicial written decisions. In these cases, the setting is institutional but we nevertheless need to find ways to distinguish what is presented as legal/judicial features of the activity and what is presented as moral, by the participants themselves.

Since this is work in progress and to our knowledge there is no other empirical work on this topic, this study presents initial heuristic criteria. In our findings detailed below, we present a two-pronged axis for distinguishing how legal activities, models and settings incorporate moral features, while maintaining their legal status. On the one hand, the legal aspects are made relevant as a technical issue, by way of intertextuality (Fairclough, 1992; Sarangi, 2000) with other legal discourses of various kinds¹⁰. So, for instance, in the case of judicial decisions, legal aspects are presented through quotations or paraphrase of legal norms, through quotations of legal doctrines, through invocation of concepts explicitly marked as legal-technical concepts and the like.

Take this example from the data analyzed for this work¹¹:

(1) (page 64-65) Although, as already said, one cannot, nor is it the time for one to formulate a definite judgment about the facts [of the case], it is clear, by the elements brought [by the prosecution] that there is prima facie evidence [*índicios*¹²] that the defendant, in his condition as a congressman and furthermore as President of the Lower Chamber, **has the means to and is capable of effec-**

tively obstructing the investigation, the gathering of evidence, intimidating witnesses and hindering, if only indirectly, the regular proceedings of the indictment ongoing in the Supreme Court, as well as several investigations regularly initiated and ongoing. (Emphasis added).

Now compare this excerpt with the normative text from the Brazilian Penal Procedure Code that authorizes judges to impose restrictions upon defendants pending trial:

Article 282. The restrictive measures contained in this Title shall be applied pursuant to: I – Its necessity for the applying of the penal laws, for the criminal investigation or evidence-gathering proceedings, or, in cases expressly authorized, for avoiding the commitment of criminal offenses; [...]

In excerpt 1, the judge creates an intertextual link with the parameters given by the statute quoted above. His definition of the concrete situation of the defendant in terms of his means to “effectively obstructing the investigation, the gathering of evidence, intimidating witnesses and hindering [...] the regular proceedings” mirrors the legal definition of the circumstances that authorize him to impose extreme provisional restrictions upon the defendant’s legal status. In other words, the “necessity for the [...] criminal investigation [and the] evidence-gathering proceedings’, as required by the statute, is intertextually invoked by the discursive way in which the judge describes the particular situation and capabilities of the defendant. So, we have the framing of the question, by way of intertextual referencing – in this case, of a statute – as a technical-legal one. This sort of “dialogical network” or “intertextual chains” between legal texts and discourses that apply these texts to concrete situations has been demonstrated by the literature as a salient feature of legal discourse (Dupret and Ferrié, 2015).

On the other hand, moral features are incorporated in legal discourse more or less unmarkedly. They lack the intertextuality with legal-technical discourses nor are they marked as technical issues or concepts. And they exhibit specific discursive strategies, some of which are presented below, which are not associated with the questions presented as legal-technical in the data.

In a sense, this means that moral work is inserted into law as a kind of mingling between technical normative considerations, presented as/drawn from a legal source, and informal, everyday normative considerations, presented as/drawn from a common social stock of background knowledge (Garfinkel, 1967c; Jayyusi, 1984). As we shall see, empirical analysis suggests that both legal and moral work are key to arriving at a specific judicial decision. Even more if that decision is politically loaded, as is the case in the decision analyzed here.

Analyzing judicial decisions as textual data

We will treat a judicial decision as (written) discursive data. One of the chief references in doing that is Dorothy Smith’s paper “K is mentally ill” (Smith, 1978). Smith used as a phenomenological/ethnomethodological point of departure the realization that discursive accounts are social constructs which present themselves according to a methodical structure used to achieve specific social goals:

The constructs of the social scientist are [...] second order constructs. The phenomena which she studies and seeks to explain are already structured by the interpretations and characterizations of those she studies. That structure is an essential feature of the phenomena, not something added to it which she must

strip away [...]. Moreover, the procedures she uses to assemble and interpret her data are not essentially different from those that lay actors use in bringing about the phenomena which became her data. (Smith, 1978: 23)

So, first, we must consider written texts as social phenomena in their own right, which exhibits the same features as other social phenomena. They are methodical, goal-oriented, and reflect as well as construct the practical reasons that orient the procedure for being drafted as they are – instead of in any other way (Garfinkel, 1967a; Sacks, 1989). In this sense, the social and discursive analyst's task is to uncover and lay out the methods, procedures and reasons used by the writer himself to draft the text as it is drafted, i.e. instead of any other possible way. Also, the analyst must show how this structure is made evident for any lay reader as a set of resources or instructions for producing specific interpretations – the “text-as-read” as Watson (2009) puts it.

In other words, it is the task of the analyst to show, for the written text as well, the reproducible procedures for meaning-making (Garfinkel and Sacks, 2002) – and for meaning grasping, we might add.

Ethnomethodologically-oriented analyses of written texts have drawn on Smith's theoretical and methodological insights as well as on ethnomethodological insights more generally. Wolff (2011) presented a useful concept for funneling those insights into actual empirical analysis: the concept of the “active text”. The active text is a way of approaching a discourse analysis of written texts that treats them not only as a repository of semantical references, but also and more importantly as a set of “instructions for reading” (Watson, 2009), and, as such, a source of social actions in the same way we already treat speech as both information and action (see Watzlawick *et al.* 2011).

According to Wolff, the specific focal points that one must attend to in considering (written) texts as active are:

- Texts should be understood as *methodic presentations*. The ordering should be searched in the actual text, not in external [phenomena];
- Texts should be understood as a *practical solution* to author's expressive problems. The point is to isolate both these expressive problems and the practices and formats [used by the text to] solve them;
- Texts should be treated as situated social phenomena. [...]. Texts should be read as instances [*Züge*] in an action sequence, to which they relate and to which their specific understandability and rationality reveal [*ergeben*] them to be related. [...].
- Texts should be understood as reflexive phenomena, that seek [*sorgen*] their understandability and acceptance. [...]. (Wolff, 2011: 254)

In analyzing texts, we must therefore look for and reconstruct discursive strategies inserted into the text structure to present the task(s) it aims to accomplish, how it accomplishes it and how it is related to other texts and social phenomena that are presented as relevant to the said task(s). These strategies should be reproducible from the analysis and illuminate the indexical relation of the text(s) to the patterns/methods of meaning-making it draws on and actualizes. In Garfinkel's (1967a) words, the analysis should present the accountable and reflexive nature of texts as social actions, guided by practical reasons and by specific ways to formulate their meaning (Garfinkel and Sacks, 2002).

Data and analysis

We will use for this exploratory work one (written) judicial decision (or opinion, in American legal terminology), issued by one of the judges of the Brazilian Supreme Court [*Supremo Tribunal Federal*]. These judges, referred to as “ministers” [*ministros*] in Brazilian law, unlike in the US or the UK, have the power to make a judicial decision acting on their own – i.e., without the consent of any of the other ministers let alone a majority of them –, if they present the decision as urgent, in the sense that the time taken to gather the other ministers for a public session would be likely to cause irreversible damage¹³. This is called under Brazilian law a monocratic decision [*decisão monocrática*].

In the case under consideration, Minister Teori Zavascki, now deceased, who was the judge responsible, argued that it met the criteria for a monocratic decision. So, on May 4th, 2016, he delivered this decision, whose effect was to remove from office the then-President of the Lower Chamber of the Brazilian Congress [*Câmara dos Deputados*], Eduardo Cosentino da Cunha. In addition to removing him from office, the decision also suspended him from his duties as a congressman. This led to a chain of events which eventually caused Eduardo Cunha to lose his congressional seat and be sent to jail later the same year, this time as a result of a decision by a lower court Federal Judge.

This written decision is approximately 25000 words long and officially has 73 pages. One copy of the decision is on file with the author and can also be easily retrieved online¹⁴. The decision, although originally monocratic, was later ratified unanimously by the other four members of the Second Chamber [*Segunda Turma*] of the Brazilian Supreme Court. Under the by-laws of the Court, monocratic decisions have to be brought at some point to ratification by one of its decision bodies – one of the two chambers of the Plenary, depending on the issue. The by-laws do not determine how long the monocratic decision remains in effect until it is validated by a group decision. In this case, it took days. Sometimes, it may take years. It mostly depends on whether the minister wants to take it quickly to ratification or not.

As the title of my paper suggests, I will present an initial exploration, describing the device of categorization coupled with the building of contrast structures, which emerges from the data as a way of framing – and accounting for – normative issues. Along with Turowetz and Turowetz and Maynard (2010), I am calling devices such as these “moral work”, in a similar vein as Goffman (1955), who treated language that aims at framing sensitive issues for members of an interaction “face work”. As stated above, these normative issues are framed as a general concern, not as a legal/technical issue, although they have to do with judging the actions and character of those involved. In this case, the moral work falls specifically on the actions and character of the then-President of the Brazilian *Câmara dos Deputados*, Eduardo Cunha.

Categorization coupled with contrast structures

Smith (1978: 26-27) argued that a “conceptual schema [...] provides a set of criteria and rules for ordering events against which the ordering of events in the account may be matched, or tested. An account which is immediately convincing is one that forces that classification and makes any other difficult”¹⁵. So, in presenting facts – such as the case to be decided judicially – a set of instructions for the reading of the facts are embedded in the method of presentation.

Sacks (1974, 2008) demonstrated that members of society construct Membership Categorization Devices (MCDs) in order to provide and recognize a piece of discourse as “possible descriptions” (Sacks, 2008: 240) of some persons (or events, actions, etc.). These possible descriptions, organized as MCDs, make up “inference rich” categorizations, in the sense that “a great deal of knowledge that members of a society have about the society is stored in terms of these categories” (Sacks, 1989: 90-91). Also, further studies have shown the relevance of categorization practices to the “moral and practical typing of persons, labelling and the like” (Fitzgerald and Housley, 2015: pos 453)¹⁶. In what touches upon legal issues, Pádua (2017) has shown that MCDs can be used as discursive devices to categorize events in specific ways, so as to construct apparently unexpected meanings to supposedly clear legal texts.

In Sacks’ (1974: 32) concept, an MCD is a “a collection of membership categories [...] plus rules of application”. So, in constructing and discursively displaying MCDs, members of society present categories and explain by which rules these categories apply to a given person or persons.

On the other hand, members of society may use (discursive) procedures for establishing a given person as deviant from a general set of categorical features. That process sets a categorical *normal* that will be contrasted to the deviant case. Smith calls these *contrast structures*. She defines them thus: “Contrast structures are those where a description of [a] behaviour is preceded by a statement which supplies the instructions for how to see that behaviour as anomalous” (Smith, 1978: 39).

Therefore, if we couple the two analytical concepts together, we get a discursive device, centered on categorization, that makes sense in two complementary steps. First, one constructs an MCD that displays two collections of categories, one of which is a moral standard (i.e. *normal*) to the other (i.e. *anomalous/deviant*). Second, this MCD has as one (or more) of its rules of application a rule that contrasts the standard collection to the contrasted one, in order to present the compared one as (morally) deviant.

Consider the following excerpt:

(2)

(page 68)

[...] it is regrettable that the constitutional text has not explicitly universalized this rule of immediate functional suspension for cases of indictment [*instauração de processo penal*] against **incumbents of the highest leadership positions in other powers**, namely those under the jurisdiction of the Plenary of the Supreme Court (**article 5, item II, of the Bylaws** [*regimento interno*] of the Supreme Court¹⁷). After all, although it does not imply consequences in the strict plane of culpability, the accepting of the indictment, collectively assessed, without dissent, by the eleven members of the highest judgeship in the land, is an indication of an **atmosphere of uncertainty**, that fosters **suspicion** about the commitment of power to public interest. (All emphases added)

Here, the text presents a collection of categories of an MCD explicitly called “incumbents of the highest leadership positions in other powers”. The collection of categories is gathered intertextually through the invocation of a legal rule (article 5, item II, of the Bylaws [*regimento interno*] of the Supreme Court) that states that the incumbents of the categories it enumerates (see below) are “under the jurisdiction of the Plenary of the Supreme Court”. So, we have now a collection of categories (highest leadership posi-

tions) and one rule of application that provides for the filling of the same collection of categories (under the jurisdiction of the Plenary of the Supreme Court).

In the next excerpt, the decision provides further rules for the application of the MCD:

(3)

(page 67)

[...] When normalizing [*ao normatizar*] the responsibilities of the President of the Republic, the constitutional text **has protected** [*precatou*] the **honorability of the Brazilian State** against the **suspicion of bad conduct** [*desabono*] occasionally existent against the person invested with the position, mandating his suspension from office when the indictment for regular crimes against him is accepted by the Supreme Court. This suspensive norm would have no sense whatsoever if the leadership [*condução*] of the Brazilian State was transferred to another authority that was also subject to the **same objections of credibility**, because he responded to a criminal charge at the same judicial level. (All emphases added)

By using the President of the Republic as a role model for the collection of categories previously constructed, the text now presents two more rules of application that justify the same collection. The basis for the existence of the MCD is that all the categories of the collection are equivalent to the first one (President of the Republic) in representing the “honorability of the Brazilian State”. Furthermore, the incumbents of the categories of the collection are protected against “suspicion of bad conduct” or “objections of credibility”, exactly by being placed under the direct jurisdiction of the highest court in the land. With this move, all the rules of application are tied together with the collection of categories that they organize.

We are now in position to systematize the MCD developed above:

MCD “Incumbents on the highest leadership positions in other powers”

Collection of categories

President of the Republic
Vice-president of the Republic
President of the Senate (Higher House)
President of the <i>Câmara dos Deputados</i> (Lower House)
Ministers of the Supreme Court
Attorney General

Rules of application:

1. Members are judged by the Plenary of the Supreme Court (article 5, item I, of the Bylaws [*regimento interno*] of the Supreme Court)
2. Members represent the “honor (ability) of the Brazilian State”
3. Members are unsuspected, unobjectionable

Note that the collection of categories was constructed through an intertextual reference to the text of the by-laws of the Court, as said above (and in the rule of application #1). The referenced norm determines who is placed under the direct jurisdiction of the

Plenary of the Court. Even though under the Brazilian Constitution other authorities also are placed under the jurisdiction of the Supreme Court, its by-law distinguishes those who are under the jurisdiction of the Plenary – those on the collection of categories above – from those who are under the jurisdiction of one of its two chambers – for example, senators and congress(wo)men. That is why the decision can state that the categories represent the highest leadership positions of the land.

The assembly of this MCD constructs a normal pattern, and at the same time uses it as a sense-making resource. The “incumbents of the highest leadership positions in other powers” are the honorable, unsuspected political leaders that receive the protection of the direct jurisdiction of the Supreme Court. This normal pattern gives the judicial decision a discursive basis for evaluating the case under review – i.e., that of the then-President of *Câmara dos Deputados* –, which can thereby be viewed not simply as deviant from that pattern, but as absurdly deviant. Consider the following excerpt:

(4)

(page 71)

The factual and legal elements considered so far denounce that the keeping of the defendant, congressman Eduardo Cunha, in the free exercise of his parliamentary mandate and holding the position of President of the Lower House of Congress [*Câmara dos Deputados*], besides representing a risk for the criminal investigations¹⁸ [...], **is a pejorative [pejorativo] that conspires against the actual dignity of the institution led by him.** Nothing, absolutely nothing can one extract from the Constitution that minimally justifies his continuance in **the exercise of his high public functions.** (All emphases added)

This excerpt, as well as the ones that construct the MCD, come after a long part of the text, where the decision engages in a detailed narrative of the criminal conducts imputed to the President of *Câmara dos Deputados* and the mounting evidence that the accusers have gathered to prove these crimes¹⁹.

The normality of the individuals categorized as “incumbents of the highest leadership positions in other powers”, and the expectations associated with this categorization are contrasted with the “factual and legal elements considered so far”. This contrast structure puts in collision the expectations associated with some categories and the actions a particular so-categorized individual engaged in. This contrast structure uses a normality that is outside the specific conduct of the person under evaluation, but is also shown to be culturally and morally expected of that person in that position.

The evaluation of the person in judgment is not a legal one. No legal rule is invoked. Rather the evaluation is moral. The maintaining of this congressman in “free exercise of his parliamentary mandate and leading the position of President of *Câmara dos Deputados*[...], is a *pejorative* that conspires against the *actual dignity of the institution* led by him”. Because of this evaluation the decision is then able to state that “nothing can one extract from the Constitution that minimally justifies his continuance in the exercise of his high public functions”.

It is the moral evaluation of his character and actions, discursively displayed through the coupling of an MCD and a contrast structure, that allows the meaning of the constitutional system of norms to be constructed as not permitting this sort of absurd things, as discursively and hence, morally constructed. The moral outrage of the blatant violation of the rules associated with the category ascribed to the defendant is the discursive

method that creates a schema for interpreting the factual version of the case being decided in this way as opposed to any other.

It also paves the way for the unavoidability of the legal conclusion to the case:

(5)

(page 72-3)

One decides here an extraordinary, exceptional, and, because of that, pointed and individualized situation. The syntax of the law will never be complete in the solitude of the texts, nor could ever be negated by the unforeseeability of the facts. On the contrary, the unfathomable [*imponderável*] is what legitimates the civilizational advances guaranteed [*endossadas*] by the hands of justice. **Even if there is no specific provision, with constitutional import**, about the ousting, by criminal adjudication, of members of the parliament in the exercise of their mandate, or the imposed ousting of the President of the Lower Chamber of Congress [*Câmara dos Deputados*], when its incumbent comes to be criminally prosecuted, it is demonstrated that, in this case, both are clearly needed. The postulated measure is therefore, **necessary, adequate and sufficient** to neutralize the risks described by the Attorney General [*Procurador Geral da República*].

Excerpt 5, which comes 5 paragraphs after excerpt 4, draws on the moral conclusion of the latter, to make sense of the legal norms relevant to the case, while also fending off possible legal objections to the ruling (consider the sentence “even if there is no specific provision...”, which is contrasted not with any assertion explicit in the preceding text, and, hence contrasting with an imagined implicit objection (See Stoll 1998). It is, then, the moral work used to construct the character of the defendant that creates the normative scaffolding over which the making sense of the legal norms is based. This interpretive circle, back and forth between legal norms and moral work is further demonstrated by the concluding of the excerpt with the phrase “necessary, adequate and sufficient”, which intertextually refers to the interpretive parameters of the legal principle of proportionality, long recognized in the Civil Law tradition, stemming from German Law, as a basis of constitutional interpretation (see, e.g., Alexy 1990).

Discussion

The theoretical debates about law and morality and the empirical analyses offered in this work put into perspective the seeming abyss there is between the way legal theorists think about the (supposed) distinction between legal questions and moral questions – or between law and morality as normative systems – on the one hand, and the actual practical ways legal actors use legal norms and moral norms or values, on the other.

The path I followed here inverted the figure-ground relation of traditional legal analysis, so to speak²⁰. Normally, legal analyses center on conceptual categories and try to demonstrate how these categories are present in judicial decisions. They also focus on the strict legal reasoning of those decisions, looking for those concepts that explain why a court ruled as it ruled – what Brooks (2013: 1438) calls the “plum-pudding reading”. Narrative of facts – either of the case, or historical facts deemed relevant – and discursive ways of constructing them are thought to be immaterial. However, as the analysis above has shown, the very discursive devices used to construct the story, its characters and the details of how these characters interact with the plot so constructed are essential features of how the legal reasoning of the decision is presented as the correct one, under the circumstances.

As it turns out, from the perspective of legal actors as members of a community of practice (Holmes and Meyerhoff, 1999) legality and morality complement each other. Although they are still framed as distinct systems, used for different practical discursive purposes, they also are intertwined as ways of achieving the normative tasks at hand. In the case analyzed here, the legal task at hand was the issuing a judicial decision about a very important and sensitive issue, that involved, amongst other things, the relationship between Constitutional Powers. Although this was a legal decision, supposedly interpreting constitutional and statutory norms, the use of this legal power proved to be inextricably linked to moral concerns.

These moral concerns were not only explicitly acknowledged. They were methodically inserted into the legal decision's written text through reproducible discursive devices. In this paper, one of these strategies has been highlighted. It coupled the construction of a Membership Categorization Device (MCD) – with contrast structures. As we have shown, the decision constructed an MCD that selects a collection of categories of which the defendant is one instance. These categories are then subjected to rules of application that presume a normality pattern for them and this normality pattern is associated with moral demands. Only then is the case of the specific individual under scrutiny demonstrated to contrast with the expectations dictated by those rules of application, so that the individual can be construed as a morally devaluated person, with a morally devaluated conduct.

Through this device, normality is discursively constructed. Then, it is used as a normative pattern to morally frame the facts of the case – especially the criminal conduct imputed to the defendant. This normative pattern, in turn, morally frames the facts and, from this framing, two discursive tasks are accomplished. First, a morally bad character is imposed on the defendant, more or less independent from the legal question of whether he is legally guilty of the crimes imputed and whether the constitutional and statutory norms allow his removal from office by a decision of a Supreme Court *Ministro*. In this task, morality as categorized normality functions as a semi-independent system of blame allocation, inside an institutional act (Hall *et al.*, 1997).

The second discursive task, drawing on the first, is the sense making of the legal norms themselves. Although the construction of the morally deviant character of the defendant was done through moral – not a legal – blame allocation work, this work is the basis for the construction of the meaning of the legal norms involved. As seen specifically in excerpt 5, the potential controversy about the interpretation of the relevant legal norms was dismissed mostly as a result of the moral imperative occasioned by the absurdity of the (morally framed) case.

So, the moral work, done by the categorization and contrast structure devices, along with other devices that were not presented here, was necessary to account for the decision as being the only defensible one to make, even in the light of its exceptionality – the ousting of a leader of the Legislative Branch by the Judicial Branch.

This study then shows preliminary data in favor of a view of law and morality as complementary and maybe mutually dependent at the empirical level. It also adds new insights into other studies that, from a psychological standpoint, also argued for that inevitable complementarity. For example, as studies in the field of procedural justice have shown with interviews and experimental data, that the legitimacy of the law and legal

institutions is essential in compliance with them (Tyler, 2006). The conversion of moral norms as internal values of conduct and the perceived correspondence between these internalized values and what legal norms mandate people to do, or refrain from doing, is essential to compliance with the said norms, more than the deterrence generated by the fear of punishment (Darley *et al.*, 2002).

This echoes the fact that moral conceptions underlie legal phenomena pervasively and maybe unavoidably. On the social side, besides the specific discursive devices explored in this paper, morality influences law by determining how legal issues are framed, how claims are constructed and argued, how blame is allocated and how accounts for those allocated blames are judged (Turowetz and Maynard, 2010; Pádua and Oliveira, 2015). On the psychological side, morality not only correlates with compliance, but also influences the ways judges and other bodies with decision-making power approach legal issues, including in ways that are not supposed to be legally relevant, such as damages for victims in crimes of negligence (see, in general, Struchiner and Brando 2014).

Of course, the generalizability of this study is limited. As this is a qualitative study, that focuses on one set of data, from one specific case, from one specific court, further studies will be needed to determine if and how widespread the use of these and other discursive strategies are both in the same legal systems and across different legal systems. Also, further research could derive possible uses of moral work in other settings and for other purposes.

Nevertheless, this paper offers initial evidence about, (1) possible criteria for distinguishing morality and law as separate moral systems from an empirically grounded, discursively oriented and locally produced vantage point; and (2) the interplay that these two normative systems exhibit in the, again, empirical/local application of law by courts.

In this way, the evidence presented in this paper calls into question whether metanormative considerations about the desirability of having moral values and considerations inserted into law would have empirical relevance – as, incidentally, seems to be the case with many legal theories.

Notes

¹US Constitution, XIV Amendment (1868)

²See, e.g., the studies in Carbonell (2005).

³The concept is based on Gumperz's (1982), but we will not limit its use to the settings Gumperz analyzed in his work – nor are we aiming at conceptual rigorousness in the use of the term herein.

⁴Not to be confused with the analytical philosopher John L. Austin, who although also being British, would not begin his scholarly career for roughly another century.

⁵Hart relied on a very convoluted set of distinction criteria we do not need to delve into here (see Hart 1961: 168).

⁶To be sure, Habermas takes many more steps in his “discursive theory of law”, one of which is to rework the Kantian ‘U-principle’ of universal morality into a “D-principle” of the ideal discourse situation. There is no point in examining this rather complex theory here, since we are only trying to reconstruct the debate about the relation between law and morality as normative systems. To further this issue, see Habermas (1996) and also Habermas (2001: ch. 3).

⁷Also, after referring to the law-morality debate in Hart's work and his discussion with other legal theorists, Heimer (2010: 182) conceded that ‘sloppy definitions of morality are appropriate because morality is in fact sloppy in the empirical world’

⁸This is also the main conclusion of patterns of evaluation of (legally relevant) conduct by juries discovered by Garfinkel in the so-called “Jury study” (Garfinkel, 1967b).

⁹Some of this is discussed in legal theory under the debate of so-called “exclusive” and “inclusive” legal positivism. For a general view of the debate, see Sgarbi (2007). For a conception where everything inside the law is law – an “exclusive legal positivist” position, see Raz (2011).

¹⁰This is somewhat similar to how Struchiner and Shecaira (2012) propose to differentiate legal and moral arguments. They base their proposition on the fact that legal arguments are an institutionalized form of practical argument, whereas moral arguments are a pure form. Pure practical arguments depend on reasons to succeed, whereas institutional arguments are backed by authority. The similarity with the heuristic criteria offered in the text ends, however, when we propose that moral considerations enter into legal decisions through discursive strategies. So, in Struchiner and Shecaira’s sense moral considerations get “legal force” by being entangled with legal considerations in legal authoritative discourse.

¹¹All translations are mine, from the original in Portuguese.

¹²This is a technical term of difficult translation. It means, roughly, a “lighter evidence”, in the sense that it has not yet been subjected to confrontation by the defendant and his counsel. This term is generally used to refer to evidence gathered during preliminary investigations (normally by the police) to harness the indictment with probable cause.

¹³Legally, this is actually one of two criteria for permitting ministers to issue a decision monocratically (see below). Besides urgency, the judge must also show that the order stands on very solid legal and evidentiary ground, in the sense that this is a decision the court will probably uphold as a group when the case is brought before them.

¹⁴See, e.g.: <http://agenciabrasil.ebc.com.br/politica/noticia/2016-05/veja-integra-da-decisao-de-teori-zavascki-que-afasta-eduardo-cunha-da>. Accessed: 10 sept 2017.

¹⁵Smith was talking about the classification of mental illness and actually stated that no special procedure was needed for the classification of deviant behavior, which occupies us now. However, as we will show, there are different ways of categorizing someone as deviant, especially from a moral (not legal/technical) standpoint.

¹⁶A great deal of research and theorizing has followed Sacks’ initial proposition of the concept. I shall not delve into this here, but for general reviews, see, among others, Fitzgerald and Housley (2015) and Pádua (2017).

¹⁷Although this is the correct quotation, the reference to the legal norm is wrong. The decision is actually referring to article 5, item I (not II) of the Bylaws. These Bylaws can be accessed (in Portuguese) at http://www.stf.jus.br/arquivo/cms/legislacaoRegimentoInterno/anexo/RISTF_integral.pdf. Accessed 09 oct 2017.

¹⁸Note that the moral evaluation analyzed in the text is mingled with a legal/technical one, that stems from the implicit intertextual referencing here to the legal criteria for allowing a judicial decision to impose restrictions on a defendant pending trial. See excerpt (1) above and the text around it.

¹⁹One example of how this narrative is constructed is the following excerpt: “It is certain that in the exercise of the Presidency of the Lower Chamber of Congress [by the defendant] the risk of reiteration of the practices of these acts, the attempt to conceal possible crimes and the interference on the investigations are, obviously, potentially elevated. Considering this condition, there is more recent evidence, brought by the Attorney-General, that Congressman Eduardo Cunha continues to act with wrongful objectives and promoting spurious interests. The elements brought by the prosecution reveal, for instance, congressional conducts by Eduardo Cunha with wrongful objectives, during the Congressional Inquiry Committee [*Comissão Parlamentar de Inquérito*] called CPI of Petrobrás.” (p. 50).

Although it is not the focus of this paper, consider briefly how the rhythm of this narrative, evoking facts, formulating its meaning and then announcing some more facts for further narration – similar to the device Komter (2009) has called the formulating of the “record-thus-far” – also contributes to create the contrasts between the pattern of normality to be expected and the actual conduct of the Congressman.

²⁰I thank Lawrence Solan for pointing that out in personal communication.

References

Alexy, R. (1990). Grundrechte als subjektive Rechte und objektive Normen. *Der Staat*, 29(1), 49–68.

- Austin, J. (2000). *The province of jurisprudence determined*. Amherst: Prometheus.
- Bergmann, J. (2013). Zur Analyse der Formen moralischer Kommunikation: Konzepte, Methoden, Daten, Transkriptionssymbole. In J. Bergmann and T. Luckmann, Eds., *Kommunikative Konstruktion von Moral. Band 1: Struktur und Dynamik der Formen moralischer Kommunikation. [Communicative construction of morality. Side 1: Structure and dynamic of the forms of moral communication]*. Mannheim: Verlag für Gesprächsforschung, 39 – 57.
- Bergmann, J. and Luckmann, T. (2013). Moral und kommunikation. In J. Bergmann and T. Luckmann, Eds., *Kommunikative Konstruktion von Moral. Band 1: Struktur und Dynamik der Formen moralischer Kommunikation. [Communicative construction of morality. Side 1: Structure and dynamic of the forms of moral communication]*. Mannheim: Verlag für Gesprächsforschung., 13–36.
- Bohman, J. (1993). *New philosophy of social science: Problems of indeterminacy*. Cambridge, MA: MIT Press.
- Brooks, P. (2013). Law and humanities: Two attempts. *Boston University Law Review*, 93, 1437–68.
- M. Carbonell, Ed. (2005). *Neoconstitucionalismo(s)*. Madrid: Trotta.
- Darley, J., Fulero, S., Haney, C. and Tyler, T. (2002). *Psychological jurisprudence: taking psychology and law into the twenty-first century*. New York: Kluwer.
- Drew, P. and Heritage, J. (1998). Analyzing talk at work: an introduction. In P. Drew and J. Heritage, Eds., *Talk at work: interaction in institutional settings*. New York: Cambridge University Press, 3–65.
- Dupret, B. and Ferrié, J.-N. (2015). The practical grammar of law and its relation to time. In B. Dupret, M. Lynch and T. Berard, Eds., *Law at work: Studies in legal ethnomethods*. New York: Oxford University Press, 27–48.
- Fairclough, N. (1992). Intertextuality in critical discourse analysis. *Linguistics and Education*, 4, 269–93.
- R. Fitzgerald and W. Housley, Eds. (2015). *Advances in membership categorisation analysis*. London: Sage, kindle ed.
- Garfinkel, H. (1967a). "Good" organizational reasons for "bad" clinical records. In H. Garfinkel, Ed., *Studies in ethnomethodology*. Engelwood Cliffs: Prentice-Hall, 186–207.
- Garfinkel, H. (1967b). Some rules of correct decisions that jurors respect. In H. Garfinkel, Ed., *Studies in ethnomethodology*. Engelwood Cliffs: Prentice-Hall, 104 – 115.
- Garfinkel, H. (1967c). Studies of the routine grounds of everyday activities. In H. Garfinkel, Ed., *Studies in ethnomethodology*. Engelwood Cliffs: Prentice-Hall, 35–75.
- Garfinkel, H. and Sacks, H. (2002). Sobre estruturas formais de ações práticas. *Veredas*, 16(2), 220–256.
- Geertz, C. (2000). Found in translation: on the social history of moral imagination. In C. Geertz, Ed., *Local knowledge: further essays in interpretive anthropology*. Cambridge: Basic Books, 36–54.
- Goffman, E. (1955). On face-work: An analysis of ritual elements in social interaction. *Psychiatry*, 18(3), 213–231.
- Gumperz, J. J. (1982). *Discourse strategies*. Cambridge: Cambridge University Press.
- Habermas, J. (1996). Discourse ethics: notes on a program of philosophical justification. In J. Habermas, Ed., *Moral consciousness and communicative action*. Cambridge: MIT Press, 43–115.
- Habermas, J. (2001). *Between facts and norms: Contributions to a discourse theory of law and democracy*. Cambridge: MIT Press.

- Hall, C., Sarangi, S. and Slembrouck, S. (1997). Moral construction in social work discourse. In B. Gunnarson, P. Linell and B. Novdberg, Eds., *The construction of professional discourse*. London, UK: Longman, 265–291.
- Hart, H. L. A. (1961). *The concept of law*. New York: Oxford University Press.
- Heimer, C. (2010). The unstable alliance of law and morality. In S. Hitlin and S. Vasey, Eds., *Handbook of the Sociology of Morality*. New York: Springer, 179–202.
- Holmes, J. and Meyerhoff, M. (1999). The community of practice: theories and methodologies in language and gender research. *Language in Society*, 28, 173–183.
- Jayyusi, L. (1984). *Categorization and the moral order*. Boston: Routledge and Kegan Paul.
- Kelsen, H. (1949). *General theory of law and state*. New Brunswick: Transaction.
- Komter, M. (2009). From talk to text: the interactional construction of a police record. *Research on Language and Social Interaction*, 39(3), 201–228.
- Levinson, S. (1978). Activity types and language. In P. Drew and J. Heritage, Eds., *Talk at work: interaction in institutional settings*. New York: Cambridge University Press, 66–100.
- Linell, P. and Rommetveit, R. (1998). The Many Forms and Facets of Morality in Dialogue: Epilogue for the Special issue. *Research on Language & Social Interaction*, 31(3-4), 465–473.
- Lupetti Baptista, B. (2012). *Entre “quereres” e “poderes”: Paradoxos e ambiguidades na imparcialidade judicial.*, Universidade Gama Filho.
- Pádua, J. P. (2016). Direito como sistema de normas e direito como sistema de práticas: Aportes teóricos e empíricos para a refundação da “ciência” do direito (em diálogo com a Linguística Aplicada). In R. Pinto, A. L. T. Cabral and M. d. G. S. Rodrigues, Eds., *Linguagem e direito: Perspectivas teóricas e práticas*. São Paulo: Contexto, 29–47.
- Pádua, J. P. (2017). “Apenas encaminhado”: categorizações como estratégias discursivas de (in)efetivação de garantias fundamentais em uma decisão do Supremo Tribunal Federal. *Language and Law / Linguagem e Direito*, 4(1), 60–72.
- Pádua, J. P. and Oliveira, M. C. L. (2015). Accounting practices na negociação de normas jurídicas. In Sonia Bittencourt Silveira, C. S. Abritta and A. T. Vieira, Eds., *Linguística aplicada em contextos legais*. Jundiaí: Paco Editorial, 161–182.
- Raz, J. (2011). *Between authority and interpretation*. Oxford: Oxford University Press.
- Sacks, H. (1974). An initial investigation into the usability of conversational data for doing sociology. In D. Sudnow, Ed., *Studies in social interaction*. New York: The Free Press.
- Sacks, H. (1989). Introduction. *Human Studies*, 12, 211–215.
- Sacks, H. (2008). The baby cried. The mommy picked it up. In A. Jaworski and N. Coupland, Eds., *The discourse reader*. New York: Routledge, 2 ed.
- Sarangi, S. (2000). Activity types, discourse types and interactional hybridity: the case of genetic counseling. In S. Sarangi and M. Coulthard, Eds., *Discourse and social life*. London: Longman, 1–27.
- Sarangi, S. (2006). The conditions and consequences of professional discourse studies. In R. Kiely, P. Rea-Dickins, H. Woodfield and G. Clibbon, Eds., *Language, culture and identity in applied linguistics*. London: Equinox, 199–220.
- Sgarbi, A. (2007). *Teoria do direito: Primeiras lições*. Rio de Janeiro: Lumen Juris.
- Smith, D. (1978). 'K is mentally ill': The anatomy of a factual account. *Sociology*, 12, 23–53.

- Stoll, P. (1998). Text as conversation: An interpretive investigation of utterances in a women's magazine. *Journal of Pragmatics*, 29, 545–570.
- Struchiner, N. and Brando, M. S. (2014). Como os juízes decidem os casos difíceis do direito? In N. Struchiner and R. Tavares, Eds., *Novas fronteiras da teoria do direito: da filosofia moral à psicologia experimental*. Rio de Janeiro: PoD and Puc-Rio, 171–215.
- Struchiner, N. and Shecaira, F. (2012). A distinção entre direito e moral e a distinção moral do direito. *Revista de Direito do Estado*, 22, 131–145.
- Turowetz, J. and Maynard, D. (2010). Morality in the social interactional and discursive world of everyday life. In S. Hitlin and S. Vasey, Eds., *Handbook of the Sociology of Morality*. New York: Springer, 503–526.
- Tyler, T. (2006). Psychological perspectives on legitimacy and legitimation. *Annual Review of Psychology*, 57, 375–400.
- Watson, R. (2009). *Analysing practical and professional texts: A naturalistic approach*. Surrey: Ashgate, kindle ed.
- Watzlawick, P., Bavelas, J. B. and Jackson, D. D. (2011). *Pragmatics of human communication: A study of interactional patterns, pathologies and paradoxes*. New York and London: WW Norton & Company.
- Wolff, S. (2011). Textanalyse. In R. AyaSS and J. Bergmann, Eds., *Qualitative methoden der medienforschung*. Mannheim: Verlag für Gesprächsforschung, 245–273.