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## Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative

Frances H. Foster

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# Parental Law, Harmful Speech, and the Development of Legal Culture: Russian Judicial Chamber Discourse and Narrative

Frances H. Foster\*

I. Introduction . . . . .	924
II. Judicial Opinion as Performance and Conversation: U.S. Perspectives . . . . .	928
III. Setting the Stage: The Author and Its Opinions . . . . .	938
IV. Judicial Chamber Performance: The Harmful Speech Opinions . . . . .	946
A. The Plots . . . . .	947
B. The Characters . . . . .	952
1. Society . . . . .	952
2. The Speaker . . . . .	953
3. The Publisher . . . . .	955
4. The Audience . . . . .	958
5. The Target . . . . .	959
6. The State . . . . .	960
C. Judicial Chamber Self-Definition . . . . .	961
1. Compelled Performance . . . . .	962
2. Judicial Chamber Roles . . . . .	966
3. Self-Limitations . . . . .	970

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V. Judicial Chamber Conversation . . . . .	973
A. General Parameters: Law, Democracy, and Mass Media . . . . .	973
B. What Kind of Conversation? . . . . .	975
1. Rejection of White's Democratic and Authoritarian Typologies . . . . .	975
2. Parental Conversation . . . . .	978
a. Berman's Parental Law Model . . . . .	978
b. Application to the Judicial Chamber . . . . .	980
VI. Concluding Remarks on Comparative Law Translation of Methodology . . . . .	985

### I. Introduction

Throughout history, scholars have asserted that a developed legal culture is a precondition for establishment of the rule of law.<sup>1</sup> Yet, they have failed to offer any concrete blueprint for creating such a culture.<sup>2</sup> For post-Soviet Russia this is not a theoretical concern but a practical imperative. With a "barren legal culture"<sup>3</sup> as its legacy from its imperial and socialist

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1. See, e.g., Harold J. Berman, *The Rule of Law and the Law-Based State (Rechtsstaat) With Special Reference to the Soviet Union*, in TOWARD THE "RULE OF LAW" IN RUSSIA? POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD 43, 57-58 (Donald D. Barry ed., 1992) (citing Friedrich Carl von Savigny) [hereinafter TOWARD THE "RULE OF LAW" IN RUSSIA?]; A.P. Semitko, *Russian legal culture: Mythological and socio-economic sources and premises*, GOS I PRAVO, no. 10, 108 (1992); Robert Sharlet, *The Fate of Individual Rights in the Age of Perestroika*, in TOWARD THE "RULE OF LAW" IN RUSSIA?, *supra*, at 197, 199. Gray Dorsey has developed the innovative concept of "jurisculture" to capture this integral relationship between law and culture. See, e.g., GRAY L. DORSEY, JURISCULTURE: CHINA (1993); GRAY L. DORSEY, JURISCULTURE: GREECE AND ROME (1988).

2. There are beginning to be some tentative efforts in this direction. See, e.g., KATHRYN HENDLEY, TRYING TO MAKE LAW MATTER: LEGAL REFORM AND LABOR LAW IN THE SOVIET UNION 178-90 (1996) (considering possible models for evolution and development of "rule of law" in Russia); Kathryn Hendley, *The Spillover Effects of Privatization on Russian Legal Culture*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 39, 63 (1995) (testing hypothesis that transition to market economy is "catalyst for a profound change" in legal culture); John C. Reitz, *Constitutionalism and the Rule of Law: Theoretical Perspectives*, in DEMOCRATIC THEORY AND POST-COMMUNIST CHANGE (Robert D. Grey ed., 1997) (discussing possible sources for development of rule of law in post-communist countries).

3. Albert Schmidt, *Soviet Legal Developments 1917-1990: A Comment*, in TOWARD THE "RULE OF LAW" IN RUSSIA?, *supra* note 1, at 339, 341. See generally HAROLD J. BERMAN, JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW 279-82 (rev. ed. 1963); RICHARD S. WORTMAN, THE DEVELOPMENT OF A RUSSIAN LEGAL CONSCIOUSNESS (1976).

past, Russia confronts the enormous challenge of constructing a legal tradition, language, and culture virtually from scratch.<sup>4</sup>

This Article examines Russian efforts to develop a popular legal consciousness and, ultimately, legal culture<sup>5</sup> during the Second Russian Republic of January 1994 to the present. It focuses on techniques employed by the Russian Federation Presidential Judicial Chamber for Information Disputes (Judicial Chamber), a body specifically created by Boris Yeltsin in December 1993 to assist in effective enforcement, interpretation, and inculcation of constitutional norms and rules.<sup>6</sup> In its brief history, the Judicial Chamber has wrestled with issues that have challenged more developed legal institutions worldwide. These include the constitutionality of hate speech, pornography, unpatriotic speech, limits on public access to government information, and direct and indirect controls on the media by state and commercial entities.<sup>7</sup> In the process, it has made a concerted effort to provide a "public assessment"<sup>8</sup> of information disputes and to raise citizens' "understanding"<sup>9</sup> of the

4. See generally Frances H. Foster, *Izvestiia as a Mirror of Russian Legal Reform: Press, Law, and Crisis in the Post-Soviet Era*, 26 VAND. J. TRANSNAT'L L. 675, 738 (1993); Frances H. Foster, *Procedure as a Guarantee of Democracy: The Legacy of the Perestroika Parliament*, 26 VAND. J. TRANSNAT'L L. 1, 3 (1993).

5. For a discussion of Russian legal consciousness and legal culture, see DAVID H. LEMPERT, *DAILY LIFE IN A CRUMBLING EMPIRE: THE ABSORPTION OF RUSSIA INTO THE WORLD ECONOMY* 366-411, 1254-65 (1996); Louise I. Shelley, *Legal Consciousness and the Pravovoe Gosudarstvo*, in *TOWARD THE "RULE OF LAW" IN RUSSIA?*, *supra* note 1, at 63, 63. For definitions of "legal culture," see, e.g., LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 15 (1975) ("those parts of the general culture — customs, opinions, ways of doing and thinking — that bend social forces towards or away from the law and in particular ways"); and MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES* 8 (1985) ("the network of values and attitudes relating to law and practice").

6. Russian Federation Presidential Decree No. 2335 On the Russian Federation Presidential Judicial Chamber for Information Disputes (Dec. 31, 1993), ROSS. GAZETA, Jan. 10, 1994, at 4 [hereinafter *Judicial Chamber Decree*], *translated in F.B.I.S.-SOV*, Jan. 10, 1994, at 35.

7. During the lengthy suspension and reorganization of the Russian Constitutional Court, the Judicial Chamber provided the closest equivalent to judicial review of the constitutionality of legislation and acts. The Constitutional Court finally resumed operations in March 1995 after a one and one-half year hiatus. See generally Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243 (1996); Robert Sharlet, *Russian Constitutional Crisis: Law and Politics Under Yeltsin*, 9 POST-SOVIET AFF. 314 (1993); *Roundtable: Redesigning the Russian Court*, E. EUR. CONST. REV., Summer/Fall 1994, at 72.

8. Ol'ga Bychkova, *Court Retires in Favor of Chamber*, MOSKOVSKIE NOVOSTI, Jan. 9-16, 1994, at A7, *translated in F.B.I.S.-SOV*, Jan. 13, 1994, at 29.

9. Statement No. 3 On the Russian Press House (May 11, 1994), ROSS. GAZETA, May 21, 1994, at 4.

appropriate relationship between individual constitutional rights of free speech, press, and information and the competing interests of the Russian "democratic" community.<sup>10</sup> Moreover, from the start, the Judicial Chamber has relied heavily on "publicity" as a powerful sanction and enforcement mechanism.<sup>11</sup>

This Article is based on an examination of Judicial Chamber opinions published in the newspaper *Rossiiskaia gazeta* from February 1994 through December 1996.<sup>12</sup> My primary interest is not in the results of these opinions but rather in the texts themselves. What do they convey to the reader about the court's definition of itself, the parties before it, its audience, and the relationship between Russian citizens and institutions? What do these texts communicate about "law in general and the Constitution in particular?"<sup>13</sup> How do they contribute to development of a post-Soviet Russian legal discourse and culture?

To answer these questions I turn to a substantial literature by U.S. legal scholars on how courts attempt to "influence patterns of thought"<sup>14</sup> through

10. For a detailed discussion of these points, see generally Foster, *supra* note 7.

11. Bychkova, *supra* note 8, at A7 (citing Anatolii Vengerov).

12. I have chosen *Rossiiskaia gazeta* because it is the official source for publication of Judicial Chamber opinions. Statute on the Russian Federation Presidential Judicial Chamber for Information Disputes art. 23 (Jan. 31, 1994), ROSS. GAZETA, Feb. 3, 1994, at 4 [hereinafter Statute on the Judicial Chamber]. In addition, Judicial Chamber opinions often explicitly call for publication in *Rossiiskaia gazeta*. Nonetheless, there are problems with the use of *Rossiiskaia gazeta* as a data base. From the start, there has been an ongoing conflict between the Judicial Chamber and *Rossiiskaia gazeta* over the newspaper's practice of selective and abridged publication of opinions. The original legislation required "mandatory publication" of Judicial Chamber recommendations and "its most important decisions" (Statute on the Judicial Chamber, *supra*, art. 23) without specifying who determines which decisions are "most important." In September 1994, the Judicial Chamber issued a special decision clarifying that it had sole authority to determine which decisions fall under the "most important" category. Decision No. 23 On an Addendum to the Regulations of the Russian Federation Presidential Judicial Chamber for Information Disputes (Sept. 2, 1994), in JUDICIAL CHAMBER FOR INFORMATION DISPUTES: NORMATIVE ACTS, COMMENTARY, SURVEY OF PRACTICE 140 (A.B. Vengerov ed., 1995) [hereinafter JUDICIAL CHAMBER COLLECTION]. Moreover, the Judicial Chamber has ruled against *Rossiiskaia gazeta* in several cases. See, e.g., Decision No. 12 (49) On the Appeal by Russian Federation Press Committee Chairman S.P. Gryzunov Regarding N. Bachurina's March 14, 1995 Publication in "Rossiiskaia gazeta" of "The Thief's Hat is on Fire" (Apr. 26, 1995), ROSS. GAZETA, May 13, 1995, at 6 [hereinafter Decision No. 49]. *Rossiiskaia gazeta* has become a vocal opponent of Judicial Chamber policy and practice. See, e.g., Vladimir Klimov, *The Decision is Final. There is No Appeal. The Judicial Chamber for Information Disputes is Ready to Take Command of the Press of All Russia, Using the Legal Norms of 1937*, ROSS. GAZETA, May 13, 1995, at 1. For a complete collection of Judicial Chamber opinions from February 1994 to March 1995, see JUDICIAL CHAMBER COLLECTION, *supra*.

13. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 113 (1990).

14. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 171 (1985).

judicial opinions. In particular, I draw on the pioneering work and methodology of James Boyd White. Professor White has demonstrated that analysis of the discourse, rhetoric, and narrative of legal texts, including judicial opinions, can yield new insights into the U.S. legal system.<sup>15</sup> A key methodological goal of this Article is to offer a critical examination of the application of these analytical techniques to foreign law, an examination that explores not just the new insights these techniques can offer but also the dangers inherent in any attempt to use domestic methodologies to study truly foreign legal systems.

Part II briefly reviews existing U.S. scholarship on the communicative functions of judicial opinions. It introduces Professor White's metaphors of judicial opinion as "performance" and "conversation" and considers possible extensions of U.S. analytical approaches to comparative study of judicial opinions.

The remainder of the Article applies White's notions of performance and conversation in the Russian context. Part III provides the background necessary for evaluating Judicial Chamber opinions. Part IV utilizes White's performance metaphor to examine the major group of cases decided by the Judicial Chamber, those involving media dissemination of "harmful speech."<sup>16</sup> I study Judicial Chamber discourse and narrative techniques by reconstructing the plots and characters of these opinions. Following Professor White's lead, I place particular emphasis on the Judicial Chamber's "self-definition" or "self-creation."<sup>17</sup>

Part V poses the question White raises in the United States context: "What kind of conversation do . . . [these opinions] establish, with what

15. See generally WHITE, *supra* note 13; JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984).

16. For an outstanding discussion of definitions and approaches to "harmful speech" in U.S. constitutional jurisprudence, see generally Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329 (1991). Professor D'Amato identifies two main "types" of harmful speech. Harmful Speech Type I involves cases in which "the factfinder and/or decisionmaker . . . does not need to make a judgment as to the harmfulness of the precise speech in question in order to reach a conclusion that the speech caused harm . . . . The harm in all these cases is provable independently from the content of the speech." *Id.* at 330. Examples include "speech used to effectuate fraud, misrepresentation, conspiracy, blackmail, and the like." *Id.* at 329. Harmful Speech Type II, in contrast, describes "cases in which the factfinder and/or decisionmaker must arrive at a judgment . . . that harm must have occurred because the particular utterance in question is itself harm producing." *Id.* at 330. A classic example is a racial epithet that allegedly "causes hurt" to "members of a particular minority group." *Id.* As will be seen in Part IV, Russian Judicial Chamber opinions comprehend both types of "harmful speech."

17. WHITE, *supra* note 13, at 103.

relation to democracy?"<sup>18</sup> Not surprisingly, Russian judicial discourse does not fall easily into either of the "democratic" or "authoritarian" categories that White uses to describe the range of American judicial discourse. To provide a more accurate picture of Russian judicial discourse, I rely on a peculiarly Russian view of the role of law, specifically, the idea of "parental" law articulated by Harold Berman in 1950.<sup>19</sup>

Finally, Part VI builds on the analysis of Part V to assess the rewards and risks of importing domestic legal methodology into comparative law scholarship. Although use of the sophisticated tools developed in American legal scholarship can provide valuable insights into foreign legal systems, the comparative law scholar must adapt those tools to the culture in which the scholar applies them. Uncritical application of American methodology without cultural translation distorts the foreign experience.

## *II. Judicial Opinion as Performance and Conversation: U.S. Perspectives*

In his foreword to a recent *University of Chicago Law Review* symposium,<sup>20</sup> James Boyd White invited the reader to "imagine a legal world without the judicial opinion, . . . in which judges would never explain themselves . . . . They would simply decide the cases, issuing orders reflecting their judgment."<sup>21</sup> With the current trend toward decreasing publication of judicial opinions,<sup>22</sup> Professor White's invitation may be less a scholarly

18. *Id.* at 141.

19. HAROLD J. BERMAN, *JUSTICE IN RUSSIA: AN INTERPRETATION OF SOVIET LAW* pt. III (1950); see also Harold J. Berman, *The Educational Role of the Soviet Court*, 21 INT'L & COMP. L.Q. 81 (1972) [hereinafter Berman, *Educational Role*]; Harold J. Berman, *The Use of Law to Guide People to Virtue: A Comparison of Soviet and U.S. Perspectives* [hereinafter Berman, *Use of Law*], in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES* 75 (June Louin Tapp & Felice J. Levine eds., 1977).

20. See *Special Issue: Judicial Opinion Writing*, 62 U. CHI. L. REV. 1363-1519 (1995).

21. James Boyd White, *What's an Opinion For?*, 62 U. CHI. L. REV. 1363, 1363 (1995).

22. For a discussion of limited publication of U.S. decisions, see, e.g., Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757 (1995); Elizabeth M. Horton, Comment, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691 (1995); William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981); and William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996). For statistics on the U.S. Supreme Court's small percentage of written opinions, see *The Supreme Court, 1994 Term*,

thought experiment than a preview of the American future. This adds a certain urgency and poignancy to the question White asks in his title: "What's an Opinion For?"<sup>23</sup>

Professor White's response is that an opinion is more than a record of case outcome; it is also an important vehicle for the court to communicate with the parties, the legal community, and the lay audience. An opinion "translates" nonlegal language and experience into the "language of the law"<sup>24</sup> and, at the same time, makes legal language, texts, and acts "intelligible."<sup>25</sup> It is a "claim of authority" and "meaning" for the court, its vision of the world, its "invocation" of the past, and its modes of thought, expression, and reasoning.<sup>26</sup> Thus, White concludes that the form as well as result of an opinion are of critical importance since an opinion "deeply affects and shapes . . . the imaginations, minds, and feelings of those who live with the law."<sup>27</sup>

In his earlier work, Professor White has offered two metaphors to assist us in understanding how courts communicate through opinions. His first metaphor is judicial opinion as "performance," one that is political and ethical as well as legal in nature.<sup>28</sup> Under this view, the court/author creates

109 HARV. L. REV. 344, 344 (1995) (Table II Final Disposition of Cases reporting that Supreme Court issued written opinions in only 95 of 7131 cases).

23. White, *supra* note 21.

24. *Id.* at 1367.

25. *Id.* at 1367 n.3.

26. *Id.* at 1367-68.

27. *Id.* at 1368-69.

28. See WHITE, *supra* note 13, at ix ("Even when we think we are simply communicating information, or being rigorously and exclusively intellectual, or just talking, we are in fact engaged in performances, in relation to others, that are ethical and political in character and that can be judged as such."). For White's extension of "performance" metaphor to judicial opinions, see *id.* at 111-13. This notion of "performance" may be literary, dramatic, musical, or even terpsichorean. See *id.* at xii (describing "'language' as a kind of dance, a series of gestures or performances, measured not so much by their truth-value as by their appropriateness to context"); JAMES BOYD WHITE, ACTS OF HOPE: CREATING AUTHORITY IN LITERATURE, LAW, AND POLITICS 181 (1994) (characterizing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), as "drama," with justices defining "themselves as central actors"); JAMES BOYD WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 761-806 (1973) (comparing judicial opinions to poems); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 315 ("*Furman* . . . is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias."); James Boyd White, *Imagining the Law*, in THE RHETORIC OF LAW 29, 38 (Austin Sarat & Thomas R. Kearns eds., 1994) (referring to "dramatic system, a set of speakers and actors"); see also Irving Younger, *On Judicial Opinions Considered as One of the Fine Arts: The Coen Lecture*, 51 U. COLO. L. REV. 341 (1980) (comparing judicial opinions to music,



an elaborate cast of characters in lead and supporting roles. It "gives itself an ethos, or character, and does the same for both the parties to a case and for the larger audience it addresses — the lawyers, the public, and other agencies in government."<sup>29</sup> The court fashions complex, disparate facts and events into a coherent plot that leads to an inevitable denouement.<sup>30</sup> The vehicle may be a tragedy, comedy, farce, or "virtual morality tale."<sup>31</sup> The performance occasionally receives critical acclaim but more often than not plays to an empty house.<sup>32</sup>

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literature, and painting). I find the analogy to a dramatic performance most persuasive and, thus, have applied this notion of performance to Russian Judicial Chamber opinions. *See infra* Part IV.

29. WHITE, *supra* note 13, at 102. It should be noted that Professor White does not restrict this interpretation to the judicial opinion context. He argues that every writer of a literary or legal text "gives himself a character" and "defines roles" for his reader and others "about whom [he] speaks." WHITE, *supra* note 15, at 15, 17-18.

30. For an outstanding discussion of the "rhetoric of inevitability," see Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 213 (1990).

31. David Ray Papke, *Discharge As Denouement: Appreciating the Storytelling of Appellate Opinions*, 40 J. LEGAL EDUC. 145, 148 (1990). For similar discussions of the "moral teachings" and "moralizing discourse" of judicial opinions, see, e.g., Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983) ("[E]very narrative is insistent in its demand for its prescriptive point, its moral."); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 384 (1989) ("[O]nly in a fully realized story can we understand the moral teaching . . . . The narrative does not cause the teaching of morality; the narrative simply is, or becomes, moralizing discourse."); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1800 (1990) ("Each story ends with a 'moral' that legitimates a certain way of understanding sex segregation in the workplace."); and Mark L. Walters, *American Dreammasters v. The Cocaine Cowboys: Caplin, Monsanto, and the New Cold War*, 69 TEX. L. REV. 159 (1990) (providing detailed discussion of use of moral teachings and moralizing discourse in judicial narratives).

32. Several recent studies and commentaries reveal that most judicial decisions, including Supreme Court opinions, "attract neither media nor widespread public attention." DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 378 (3d ed. 1993); see Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1463 (1995) (stating "ordinary people simply do not read judicial opinions"); Mark Tushnet, *Style and the Supreme Court's Educational Role in Government*, 11 CONST. COMMENTARY 215, 215 (1994) ("Surveys indicate rather low levels of public knowledge about the Court's work in general, and even lower levels of knowledge about particular decisions."). Frederick Schauer has suggested that evolving technology, such as online computer research services, may make it increasingly rare for members of the legal community to read opinions in their entirety. Schauer, *supra*, at 1471-72. He also notes that even the law student audience typically reads opinions only in a "severely edited" form in casebooks. *Id.* at 1472.

White's second metaphor is judicial opinion as "conversation." Under this interpretation, an opinion is a "form of responsive discourse"<sup>33</sup> between judge/speaker and reader/listener. It creates through language and rhetoric a "discouring community" (of judge, reader, and other people discussed in the opinion)<sup>34</sup> with distinctive values and culture.<sup>35</sup> Each opinion is not an isolated conversation, however, but rather a "stage" in the larger conversation that we know as the law.<sup>36</sup> Thus, an individual opinion's "constitutive rhetoric"<sup>37</sup> and mode of engaging the reader in "law talk"<sup>38</sup> may have broader political, ethical, and legal implications.<sup>39</sup>

Invoking John Dewey's claim that "[d]emocracy begins in conversation,"<sup>40</sup> Professor White proposes a new standard for evaluating a judicial opinion: "Is this an invitation to a conversation in which democracy begins (or flourishes)? Or one in which it ends?"<sup>41</sup> In his application of this test to U.S. Supreme Court opinions, he finds "democratic" and "authoritarian" conversations.<sup>42</sup> A democratic conversation is one in which the judge addresses the reader as an equal and invites all to participate in an "open" dialogue about the law, premised on shared values and "human conditions" and in language accessible to every citizen.<sup>43</sup> An authoritarian conversation, in contrast, is one that "demands simple and total obedience of its reader"<sup>44</sup>

33. WHITE, *supra* note 13, at 100.

34. *Id.* at 101, 102 (reading opinion "as an act of expression that reconstitutes its own resources of language and in doing so constitutes a community, directly with its reader and indirectly with those others in the world about whom it speaks (or towards whom it invites its reader to take one attitude or another)").

35. *Id.* at 91, 141 (referring to values and culture).

36. *Id.* at 101 (describing opinion as "stage" in conversation). For a detailed exposition of White's view of law as conversation, see generally WHITE, *supra* note 15.

37. WHITE, *supra* note 13, at 215. For an earlier discussion of "constitutive rhetoric," see generally JAMES BOYD WHITE, *HERACLES BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985).

38. I borrow this term from Bruce A. Ackerman, *Foreword: Law in an Activist State*, 92 *YALE L.J.* 1083, 1084 (1983) ("law talk"). See also Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187, 190 (Peter Brooks & Paul Gewirtz eds., 1996) (discussing "constitutional law talk").

39. See WHITE, *supra* note 13, at xiv, xvi, 104, 202, 216, 223 (discussing political and ethical dimensions of judicial opinions and legal texts in general).

40. *DIALOGUE ON JOHN DEWEY* 58 (Corliss Lamont ed., 1959), cited in WHITE, *supra* note 13, at 91.

41. WHITE, *supra* note 13, at 102.

42. See *id.*

43. *Id.* at 157.

44. *Id.* at 101.

to the judge's characterization of fact and law. For White, such a conversation is "a system of discourse that hardly deserve[s] the name of law."<sup>45</sup> He warns that its "consequences are serious indeed."<sup>46</sup>

An impressive array of scholars and judges from across the ideological spectrum share White's view that judicial opinions perform essential communicative functions.<sup>47</sup> As a rapidly growing literature attests, White is also

45. *Id.* at 111.

46. *Id.* at 101.

47. The dominant image is that of the court as "teacher" providing through its opinions "a vital national seminar," Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952), in law, politics, and "public values," Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979). For a comprehensive discussion and review of the literature on the "educational" functions of the court and its opinions, see generally Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 962 (1992). Other commentators claim that an opinion serves as, *inter alia*, a "voice of the spirit reminding us of our better selves," ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 117 (1976), a vision of the future, *see, e.g.*, Felix Frankfurter, *The Judicial Process and the Supreme Court*, in *OF LAW AND MEN* 31, 39 (P. Elman ed., 1956) (stating role of Court is "[t]o pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time"), and at the same time, a mooring to the past, *see, e.g.*, RONALD DWORIN, *LAW'S EMPIRE* 413 (1986) ("Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past"), a "framework for social cooperation," JOHN RAWLS, *A THEORY OF JUSTICE* 235 (1971); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 53 (1981) (function of law is not "the accomplishment of a particular end result" but maintenance of a "structure within which individuals might pursue a variety of individual aims"), a "critic and reformer of the general culture," Nagel, *supra* note 14, at 212, an inspiration for "intelligent democracy," JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* 6 (1992), national identity, *see, e.g.*, Eisgruber, *supra*, political community, *see, e.g.*, Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation."* 58 S. CAL. L. REV. 551, 557 (1985) (noting that Supreme Court builds traditions of political community), and citizen dialogue and action, *see, e.g.*, ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992) (arguing Supreme Court opinions promote public dialogue and conflict resolution); Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147, 158 (1994) (criticizing recent Supreme Court opinions for "do[ing] little to contribute to our national dialogues over public policy"); Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 76-77 (1986) (emphasizing importance of judicial dialogue and "modelling of active self-government"), a protection of individual "rights in the face of societal opposition," *see, e.g.*, Robin West, *The Supreme Court, 1989 Term — Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 85 (1990), a "translator" of legal texts, *see, e.g.*, Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 234-37 (1980); *infra* note 67, and a source of "credibility" and "consistency" for legal actors, institutions, and processes, *see, e.g.*, Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1373 (1995) (discussing judicial "quests for credibility and consistency").

not alone in his concern for *how* as well as *what* a court communicates.<sup>48</sup> Armed with techniques borrowed from other disciplines (primarily linguistics and literary criticism),<sup>49</sup> U.S. academics, practitioners, and judges have produced a substantial body of work on the rhetoric, discourse, and style<sup>50</sup>

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48. Even White's harshest critic, Richard Weisberg, supports this view. See RICHARD WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE* 22 (1992) ("[T]he opinion speaks as much through its prose and its structure as through its affirmation or dismissal of a lower court's decision."). For an example of Weisberg's critical evaluations of White's work, see, e.g., *id.* at 224-50. See also Emily Fowler Hartigan, *From Righteousness to Beauty: Reflections on Poethics and Justice as Translation*, 67 TUL. L. REV. 455 (1992) (discussing Weisberg's "scathing account of White"). For other critical reviews of White's work, see, e.g., Sanford Levinson, *Conversing about Justice*, 100 YALE L.J. 1855 (1991); Mark V. Tushnet, *Translation as Argument*, 32 WM. & MARY L. REV. 105 (1990).

49. See RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 270-71 (1988) (discussing study of judicial opinions "from the standpoint of linguistics and rhetoric or from that of literary criticism — or perhaps from both standpoints, especially since they are merging"). The use of linguistics and literary criticism has gained wide currency among U.S. legal scholars. It has even spawned the new fields of "Law and Linguistics" and "Law and Literature." For a sampling of the literature, see generally SANFORD LEVINSON & STEVEN MAILLOUX, *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* (1988) [hereinafter *INTERPRETING LAW AND LITERATURE*]; WEISBERG, *supra* note 48, at 253 n.2; *Symposium on Law, Literature, and the Humanities: Outside the Tradition: Literature as Legal Scholarship: The Call to Stories*: 63 U. CIN. L. REV. 95 (1994); and *What is Meaning in a Legal Text? Northwestern University/Washington University Law and Linguistics Conference*, 73 WASH. U. L.Q. 769 (1995). For critical evaluations of the Law and Literature movement, see generally Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991); and Robin L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203 (1986). For a comprehensive study of law-as-literature and law-in-literature, see generally John Fischer, *Reading Literature/Reading Law: Is There a Literary Jurisprudence?*, 72 TEX. L. REV. 135 (1993). Some scholars have preferred a related interdisciplinary approach, that of "literary anthropology." Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1, 49 (1988); see Lisa A. Binder, *"With More than Admiration He Admired": Images of Beauty and Defilement in Judicial Narratives of Rape*, 18 HARV. WOMEN'S L.J. 265, 265-66 (1995) (applying Weisberg's approach of "literary anthropology" to rape cases and explaining that "literary component . . . lies in its focus on appellate opinions as texts rather than expositions of the current law of rape"). "The anthropological component, in turn, describes what this language reveals about the broader cultural assumptions at work in the context of violent crimes against women." *Id.* For a critical view of this "borrowing" from other disciplines, see generally Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 1991 DUKE L.J. 191, 195 (criticizing use of "humanistic theory," defined as "especially philosophical theory, but also literary, cultural, and social theory").

50. For a discussion of various definitions of these terms, see POSNER, *supra* note 49, at 268-72; and Richard A. Posner, *Judge's Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1421-26 (1995). See generally THE RHETORIC OF LAW, *supra* note 28 (pro-

of judicial opinions, with close attention to the use of language,<sup>51</sup> word order,<sup>52</sup> metaphor,<sup>53</sup> hyperbole,<sup>54</sup> tone,<sup>55</sup> and the like.

What has emerged in the process is a recognition of the important role of judicial "storytelling" or "narrative" as a communicative device.<sup>56</sup> This has

viding collection of essays exploring definition and use of "rhetoric" in law). The interest in judicial style is not solely a recent phenomenon. For example, in a 1925 essay Benjamin Cardozo insisted on the critical importance of the form as well as the substance of judicial opinions: "The strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of the substance. They are tokens of the thing's identity. They make it what it is." Benjamin N. Cardozo, *Law and Literature*, 14 YALE REV. 699, 700 (1924-25). For another important early examination of judicial writing, see generally Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915 (1961).

51. See, e.g., Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 U. CHI. L. REV. 506, 536-38 (1988) (analyzing Holmes' use of language, including first-person pronoun and possessives, in *Lochner v. New York* dissent); Marleen A. O'Connor, *How Should We Talk About Fiduciary Duty? Directors' Conflict-of-Interest Transactions and the ALI's Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 954, 962-83 (1993) (discussing "fiduciary" rhetoric and discourse); Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication*, in BILLY BUDD, SAILOR, *With an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 45-49 (1982) (discussing Justice Rehnquist's employment of language to "deneutralize" facts and law through, *inter alia*, use of adverb "concededly"); and Richard H. Weisberg, *Law, Literature, and Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283, 309-15 (1979) (praising Cardozo's style and use of language).

52. See, e.g., RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 51 (1990) (describing "Cardozo's rhetorically effective use of irregular word order").

53. See generally Binder, *supra* note 49 (discussing use of "beauty and the beast" metaphor in rape opinions); Bernard J. Hibbits, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229 (1994) (discussing visual and aural metaphors); Laura Krugman Ray, *The Figure in the Judicial Carpet: Images of Family and State in Supreme Court Opinions*, 37 J. LEGAL EDUC. 331, 332-33 (1987) (describing use of colorful metaphors in Michael Musmanno's opinions); HAIG BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* (1992); Steven L. Winter, *Death is the Mother of Metaphor*, 105 HARV. L. REV. 745 (1992).

54. See, e.g., Ferguson, *supra* note 30, at 216 (discussing use of hyperbole); Gerald B. Wetlauffer, *Rhetoric and its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1589-90 (1990) (discussing overstatement and overclaiming).

55. See generally Richard Delgado, *Scorn*, 35 WM. & MARY L. REV. 1061 (1994) (discussing use of "scornful humor" in Supreme Court opinions); Note, *Judicial Humor: A Laughing Matter?*, 41 HAST. L.J. 175 (1989) (pointing out damaging effects of judicial humor); Weisberg, *supra* note 28, at 353 (referring to Marshall's dissent in *Zant v. Stephens* as "full of the outrage of one who has been cheated and lied to. He speaks in disbelief . . . as one who has accepted the romantic due process account and now is bewildered as the Court reads it out of its own historical memory.").

56. But see Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989) (discussing limitations on "law as narrative" approach). Legal academics' interest in "storytelling" or "narrative" as a form

led to a new appreciation of the extent to which judges engage in fact-"spinning,"<sup>57</sup> "master narratives,"<sup>58</sup> and other storytelling techniques to make outcomes appear unavoidable,<sup>59</sup> to elicit empathy,<sup>60</sup> to organize precedent,<sup>61</sup> to

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of communication is by no means confined to the context of judicial opinions. As Richard Delgado has observed, "Everyone has been writing stories these days. And I don't just mean writing *about* stories or narrative theory, important as those are. I mean actual stories, as in 'once-upon-a-time' type stories." Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2411 (1989). For a sampling of the literature, see generally LAW STORIES (Gary Bellow & Martha Minow eds., 1996); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Jerome McCristal Culp, Jr., *Telling a Black Legal Story: Privilege, Authenticity, "Blunders," and Transformation in Outsider Narratives*, 82 VA. L. REV. 69 (1996); James R. Elkins, *A Bibliography of Narrative*, 40 J. LEGAL EDUC. 203 (1990); Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990); *Symposium on Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). For a critical review of the literature, see generally Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995); and Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993). Narrative analysis is used extensively by anthropologists as well as legal scholars. For a recent discussion of the literature, see generally Rebecca R. French, *Of Narrative in Law and Anthropology*, 30 LAW & SOC'Y REV. 417 (1996).

57. Wald, *supra* note 47, at 1386.

58. See generally Papke, *supra* note 31 (discussing role of master narratives in judicial opinions, especially in cases on consumer bankruptcy).

59. See, e.g., Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913, 1940 (1990) (finding "recreation and distortion" of facts is important part of Supreme Court's "judicial voice"); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2085-93 (1989) (discussing how construction of facts "lead[s] judgment in different directions"); Wald, *supra* note 47, at 1387-88 ("Judges decide outcomes, and then tell the story in a way that makes the outcome look like a perfectly logical and necessary consequence of the law, handed to us from above, as applied to the facts, handed to us from below.").

60. See, e.g., Ross, *supra* note 31, at 409-13 (claiming narrative can elicit empathy for suffering of people we find unfamiliar); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1, 39 (1990) (same). For broader discussions of empathy, see generally Lynn Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989); and Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA WOMEN'S L.J. 287 (1992).

61. See, e.g., RICHARD H. WEISBERG, *WHEN LAWYERS WRITE* 10-11 (1987) (discussing how appellate judges use narrative to "denigrat[e]" "[p]recedents *contra*"). See generally Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937 (1990) (arguing that judges and lawyers use narratives to take historical materials and develop coherent and relevant argument); Wald, *supra* note 47, at 1411 (describing judicial use of storytelling techniques to explain precedent).

humanize abstract legal theories and norms,<sup>62</sup> to palliate harsh results,<sup>63</sup> to reinforce the legal and moral authority of the decision and decisionmaker,<sup>64</sup> and to exclude alternative arguments, interpretations, and perspectives.<sup>65</sup>

This application of discourse and narrative analysis to judicial opinions has had considerable value. It has enabled scholars to go beyond examination of the merits and resolution of the case at hand and explore broader issues, such as how a court defines its own authority and mission, its relationship to its audience and external legal actors and texts, and the language, meaning, and reach of the law. In so doing, these approaches may also help shed light on the very nature of law itself. As Robert Cover observed in his seminal article *Nomos and Narrative*, "Once understood in the context of the narratives that give it meaning law becomes not merely a system of rules to be observed, but a world in which we live."<sup>66</sup> Moreover, if John Dewey is correct that democracy begins in conversation, then the study of the "conversation" between judge and reader that White urges may even provide signals about the overall status and prospects for democracy in a given society.

62. See, e.g., POSNER, *supra* note 52, at 43-45, 93 (explaining Cardozo's techniques of appealing to "lay understanding" of legal concepts); Ferguson, *supra* note 51, at 546 (discussing Holmes' efforts to "reach . . . for the largest audience" and "to reduce the most complex case to simple, manageable terms").

63. See, e.g., Posner, *supra* note 50, at 1441 (describing "padding of opinions" and stating that "[t]he unnecessary details and truisms that stud most judicial opinions create a soothing facade of facticity"); Wald, *supra* note 47, at 1398 ("When the writer realizes that a quick look at the result is likely to arouse apprehension in the reader, she will stress what the opinion is *not* holding, and what its reasoning is *not* based on.").

64. See, e.g., L. H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY 72-73 (1995) (describing how John Marshall's narrative in *McCulloch v. Maryland* gave judiciary authority by suggesting "judges are trustworthy because they act from duty, not desire . . . [and] stand above the fray and thus can bring peace"); Ferguson, *supra* note 30, at 205 (discussing judicial "self-dramatizing," "stressing the importance of the decision that only they can make"); Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543, 583 (1988) (noting potential for "discursive tyranny . . . through deceitful manipulation of plot").

65. See, e.g., Richard Delgado & Jean Stefancic, *Imposition*, 35 WM. & MARY L. REV. 1025, 1058-59 (1994) (describing judicial narrative of "imposition," which "view[s] outsiders as overstepping, as asking for more than they deserve, as imposing on our good natures and generosity" and serves "to deprive the reformer of legitimacy"); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 871 (1992) (discussing how "universalized narratives exclude alternative voices and perspectives"). See generally David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989) (contrasting "official" narrative of Supreme Court with "excluded" narrative of Martin Luther King); Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (discussing how categories of law can suppress outsiders' stories).

66. Cover, *supra* note 31, at 4-5.

Despite the potential contributions of discourse and narrative analysis, the techniques are seldom employed in comparative law scholarship on judicial opinions. This may in large part reflect the formidable challenge of linguistic and cultural translation.<sup>67</sup> As substantial U.S. literature reveals, legal scholars and practitioners find the problems they encounter within their own system daunting and humbling.<sup>68</sup> These difficulties are, of course, only magnified in the comparative law context.<sup>69</sup> Yet, the few scholarly efforts to negotiate these linguistic and cultural differences have confirmed the value of studying foreign as well as U.S. opinions through the prism of discourse and narrative analysis. For example, two recent articles published in the *Yale Law Journal* and *Wisconsin Law Review* used these techniques to debunk long-held comparative law perceptions of the French judiciary as

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67. See generally Talal Asad, *The Concept of Cultural Translation in British Social Anthropology*, in *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* 141 (James Clifford & George E. Marcus eds., 1986) (claiming that it is impossible to communicate any aspect of foreign culture without "cultural translation" that also conveys social context of that aspect).

68. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165, 1211, 1266 (1993) [hereinafter Lessig, *Fidelity in Translation*] (describing the task of translation as "despairingly difficult" and properly "conditioned by a constraint of humility"). For other superb work on law and "translation," see generally WHITE, *supra* note 13; Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 *CORNELL L. REV.* 1298 (1992); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 *MICH. L. REV.* 2459 (1989); Gilkerson, *supra* note 65; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395 (1995); and James Boyd White, *Translation as a Mode of Thought*, 77 *CORNELL L. REV.* 1388 (1992). In a recent provocative article, Jim Chen has called for a modification of the "translation" metaphor to emphasize "how one masters any language, much less the language of the law." Jim Chen, *Law as a Species of Language Acquisition*, 73 *WASH. U. L.Q.* 1263, 1272 (1995).

69. As Lawrence Lessig has aptly noted, "To translate we must speak another language . . . . 'Language' is more than words people use; it is their ideals, their hopes, their prejudices, their enlightenments — in short, it is their world. As the distance to that world increases, so too does the difficulty of the task of translation . . . ." Lessig, *Fidelity in Translation*, *supra* note 68, at 1266. The issue of "translation" has been a matter of central concern to comparative law scholars. For example, at a 1993 Chinese law conference at the University of British Columbia, we discussed at length our considerable "methodological anxiety" about the ethnographer's "paradox" we confront in our teaching and scholarship — the need to "render the foreign familiar and preserve its very foreignness at one and the same time." Vincent Crapanzano, *Hermes' Dilemma: The Masking of Subversion in Ethnographic Description*, in *WRITING CULTURE*, *supra* note 67, at 51, 52. For outstanding discussions of this problem of cultural translation in the Chinese law context, see generally Janet E. Ainsworth, *Categories and Culture: On the 'Rectification of Names' in Comparative Law*, 82 *CORNELL L. REV.* 19 (1996) [hereinafter Ainsworth, *Categories and Culture*]; and Janet E. Ainsworth, *Interpreting Sacred Texts: Preliminary Reflections On Constitutional Discourse In China*, 43 *HASTINGS L.J.* 273 (1992) [hereinafter Ainsworth, *Interpreting Sacred Texts*].



"passive applicator"<sup>70</sup> of code provisions and to offer new perspectives and approaches to hate speech based on a comparative study of Canadian and U.S. narratives.<sup>71</sup>

Thus far, scholarly attempts to apply discourse and narrative analysis in the comparative law context have tended to focus on established Western legal systems with familiar judicial organs and materials that are relatively accessible to the foreign observer. In post-Soviet Russia, this Article confronts a very different situation — a foreign legal system that is in flux, a quasi-judicial organ that defies categorization, and opinions that are published sporadically and are unavailable in translation. Perhaps, then, it is not surprising that when this Article asks questions developed in the U.S. context, it finds new answers, answers that can be explained only by the distinctive features of Soviet/Russian law.

### III. *Setting the Stage: The Author and Its Opinions*

On December 31, 1993, Boris Yeltsin issued a presidential decree establishing a permanent Judicial Chamber for Information Disputes.<sup>72</sup> The new body was the successor to the short-lived Information Arbitration Tribunal, a quasi-judicial organ instituted in October 1993 to monitor and ensure fair, full, and equal media coverage of Russia's fall 1993 election and constitutional referendum campaigns.<sup>73</sup>

70. Mitchel de S.-O.-I'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1385 (1995).

71. See generally Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425; see also WEISBERG, *supra* note 28 (using rhetorical and narrative analysis to examine law in Vichy France during World War II); Bernard Rudden, *Courts and Codes in England, France and Soviet Russia*, 48 TUL. L. REV. 1010 (1974) (comparing judicial "style" in England, France, and Russia); John W. Van Doren, *Things Fall Apart, or Modern Legal Mythology in the Civil Law Tradition*, 2 WIDENER J. PUB. L. 447 (1993) (using White's analysis of judicial style to study French, German, and U.S. abortion opinions); Jan M. van Dunné, *Narrative Coherence and Its Function in Judicial Decision Making and Legislation*, 44 AM. J. COMP. L. 463 (1996) (narrative analysis of Dutch law).

72. See Judicial Chamber Decree, *supra* note 6.

73. *Id.* arts. 1-2 (indicating Judicial Chamber based on "constructive activity" and "positive experience" of Information Arbitration Tribunal). For information on the Information Arbitration Tribunal, see generally Melissa Dawson, *Case Study in Media Regulation: The 1993 Elections and the Information Arbitration Tribunal*, POST-SOVIET MEDIA L. & POL'Y NEWSL., Sept. 10, 1994, at 10; and Melissa Dawson, *Free Speech and the Mass Media in Russia: Lessons from the December 1993 Election and Constitutional Referendum*, 13 CARDOZO ARTS & ENT. L.J. 881 (1995). Information Arbitration Tribunal documents are collected in INFORMATION ARBITRATION TRIBUNAL AND THE FIRST FREE ELECTIONS: COLLECTION OF NORMATIVE ACTS AND DOCUMENTS (Iu. M. Baturin ed., 1994).

The Judicial Chamber consists of a panel of seven media specialists under the chairmanship of law professor Anatolii Borisovich Vengerov. Judicial Chamber members represent a wide variety of professional backgrounds and communities — academic, legislative, administrative, and journalistic.<sup>74</sup> Five of the seven members served on the Information Arbitration Tribunal.<sup>75</sup>

The initial presidential decree and subsequent founding Statute<sup>76</sup> assign the Judicial Chamber sweeping and vaguely-defined responsibilities. The "main task" is to help the Russian President "exercise his constitutional powers as guarantor of rights, freedoms, and legitimate interests in the mass information sphere enshrined in the Russian Federation Constitution."<sup>77</sup> Other duties include guaranteeing objectivity, accuracy, equality, and pluralism in the mass media, protecting the moral interests of children and adolescents, resolving disputes about allocation of airtime between legislative factions, correcting factual errors in media reports, and providing mass media-related draft legislation, expert advisory opinions on application of statutes, and "rulings" on presidential decrees.<sup>78</sup>

The Judicial Chamber has authority to resolve "information disputes and other matters" involving norms established in the Russian Constitution, laws, and presidential edicts, "universally recognized principles and norms of international law," Russian Federation international treaties, "journalistic ethics," and "generally-accepted ethical norms."<sup>79</sup> Thus far, the Judicial Chamber has concentrated on two major issues — media dissemination of allegedly harmful materials and government interference with mass media activities.<sup>80</sup> There are only two express limitations on Judicial Chamber

74. The seven members are Anatolii Vengerov (law professor), Igor Eremin and Aleksandr Kopeika (members of the Mass Media Committee of the former Supreme Soviet), Viktor Monakhov (Chief of the Russian Federation Regional (Northwestern Russia) State Inspectorate for Defense of Freedom of the Press and Mass Information), Marina Paniarskaia (law student at Mass Communications School), Iurii Feofanov (legal affairs commentator for *Izvestiia* and editor of *Zakon*), and Igor Ivanov (chief specialist of the Central Electoral Commission's department for electoral arbitration and preparation of normative documents). See Peter Krug, *Information Tribunal Made Permanent Under President's Supervision*, POST-SOVIET MEDIA L. & POL'Y NEWSL., Jan. 27, 1994, at 1, 4.

75. The five are: Vengerov, Eremin, Kopeika, Monakhov, and Paniarskaia.

76. Statute on the Judicial Chamber, *supra* note 12.

77. *Id.* art. 2.

78. *Id.* arts. 4, 5, 9, 21; Judicial Chamber Decree, *supra* note 6, art. 3. Interestingly, the original presidential decree also authorizes the Judicial Chamber to issue warnings to the mass media. *Id.* art. 3, ¶ 8. This "function" is omitted in the Statute on the Judicial Chamber.

79. Statute on the Judicial Chamber, *supra* note 12, arts. 3, 8, 12.

80. A study of Judicial Chamber statements and recommendations suggests that there

competence. It cannot examine disputes that are "assigned by law to the jurisdiction of Russian Federation courts"<sup>81</sup> or those pertaining to information protected by law as a "state, commercial, or other secret."<sup>82</sup>

Despite its broad charter to monitor, implement, and create norms in the mass information sphere, the Judicial Chamber's prescribed enforcement powers are modest. According to the Statute on the Judicial Chamber, it has the authority to reprimand officials and journalists, to order rectification of factual errors, and to "raise" with the "appropriate" organs or personnel the need for more stringent remedies, such as written warnings, administrative or criminal proceedings, or termination of media outlets.<sup>83</sup> The Judicial

may be a third major category of claims emerging — those dealing with intellectual property issues. See, e.g., Statement No. 4 Against Political Ambitions (June 29, 1994), ROSS. GAZETA, July 13, 1994, at 3 (discussing Judicial Chamber conflict with State Duma over its determination that time schedules for television and radio programs are intellectual property of television-radio company); Recommendation No. 4 On the Legal Nature of ITAR-TASS Materials (Oct. 14, 1994), ROSS. GAZETA, Oct. 22, 1994, at 5 (involving ITAR-TASS General Director requesting clarification of copyright status of reports, commentaries, video and photographic materials, etc. disseminated to consumers of information). For a detailed description of the entire body of Judicial Chamber opinions, see generally Frances H. Foster, *Freedom with Problems: The Russian Judicial Chamber on Mass Media*, 3 PARKER SCH. J. E. EUR. L. 141 (1996).

81. Statute on the Judicial Chamber, *supra* note 12, art. 8.

82. *Id.* art. 9. The Judicial Chamber has consistently read these jurisdictional restrictions narrowly. For example, it has repeatedly claimed competence to hear disputes involving slander or libel of public officials, matters that arguably fall exclusively within the jurisdiction of Russia's ordinary court system. See, e.g., Decision No. 11 (48) On the Appeal by the Chairman of the GKAP of Russia, L. Bochin, Regarding E. Chernyi's Publication "Mysterious Pages from the Biography of a Member of Government" in the Newspaper "Izvestiia" on March 24, 1995 (Apr. 20, 1995), ROSS. GAZETA, May 13, 1995, at 5 [hereinafter Decision No. 48] (rejecting argument that suits for defense of honor and dignity belong in ordinary courts and are, thus, outside jurisdiction of Judicial Chamber). It has asserted jurisdiction on grounds that such cases are not purely private civil actions but also constitute "information disputes that have a public-legal character and social significance." Decision No. 30 On the Appeal to the Judicial Chamber by State Duma Chairman I. P. Rybkin Regarding the Publications in the Weekly "Sobesednik" Entitled "How Much is the Honor of 22 Female State Duma Deputies Worth?" [No. 37] and "Lie Down, the Court is Coming" [No. 36] (Oct. 25, 1994), ROSS. GAZETA, Nov. 1, 1994, at 4 [hereinafter Decision No. 30].

83. Statute on the Judicial Chamber, *supra* note 12, arts. 11-14. In actual practice, the Judicial Chamber has ranged well beyond the remedies stipulated in its Statute. For example, it has directed newspapers to dismiss editors-in-chief. See Decision No. 11 On the Publication in "Ekspress-gazeta," No. 5 (March 1994) of "Some People Know How to Live!" (Apr. 21, 1994), ROSS. GAZETA, Apr. 29, 1994, at 4 [hereinafter Decision No. 11] (proposing founders of *Ekspress-gazeta* dismiss editor-in-chief). *Rossiiskaia gazeta* immediately criticized this move as a violation of the Judicial Chamber's limited enforcement powers specified in the Statute on the Judicial Chamber. See Aleksandr Batygin, "They Ask the Press not to Worry," ROSS. GAZETA, Apr. 29, 1994, at 4, translated in F.B.I.S.-SOV, May 2, 1994, at

Chamber has the right to demand "necessary" materials from government agencies and media editorial offices and written explanations of unethical actions from editorial offices, officials, and journalists.<sup>84</sup> Judicial Chamber decisions are binding and not subject to appeal.<sup>85</sup> Government organs and personnel "to whom a decision is addressed" must report to the Judicial Chamber within two weeks on their compliance with the decision.<sup>86</sup>

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28. The Judicial Chamber has proposed that official bodies repeal legislation, decrees, and decisions. *See, e.g.*, Decision No. 29 On the Conflict between the Primorskii Krai Administration and the Editorial Office of "Krasnoe znamia" (Oct. 14, 1994), ROSS. GAZETA, Oct. 20, 1994, at 3 [hereinafter Decision No. 29] (proposing Primorskii krai government revoke edicts). In many opinions, the Judicial Chamber has also offered general recommendations and reforms inspired by the case at hand. These have included suggestions for new or amended legislation, *see, e.g.*, Decision No. 33 On the Appeal by the Editors of "Selskaia nov'" and "Udarnik" (Brianskaia oblast') Regarding the Obligation to Publish Materials Sent to Newspapers by Deputies of the State Duma and the Federation Council of the Russian Federation Federal Assembly (Nov. 25, 1994), ROSS. GAZETA, Dec. 29, 1994, at 4 [hereinafter Decision No. 33] (requesting State Duma clarify definition of "state mass media" in Law on the Status of Deputies); Decision No. 7 (44) On the Appeal to the Judicial Chamber for Information Disputes by the State Duma of the Russian Federation Federal Assembly Regarding the VGTRK Television Program "Newspaper Histories" ["Fascism in Russia. Who?"] of February 22, 1995 (Mar. 15, 1995), ROSS. GAZETA, Mar. 29, 1995, at 13 [hereinafter Decision No. 44] (calling for new legislation on the "struggle against Fascism") and "orderly" rules for accreditation and access of journalists, *see, e.g.*, Decision No. 37 On the Murmansk Oblast' Administration's Denial of Journalists' Access to Information (Dec. 27, 1994), ROSS. GAZETA, Jan. 11, 1995, at 4 [hereinafter Decision No. 37] (recommending Murmansk government adopt accreditation rules); Decision No. 2 (39) On Violation of the Professional Right of ITAR-TASS Journalist T.N. Zamiatina to Receive and Disseminate Information (Jan. 29, 1995), ROSS. GAZETA, Feb. 2, 1995, at 15 [hereinafter Decision No. 39] (recommending improvements in federal system for admitting journalists to official events). The Judicial Chamber has also admonished the press "to be more careful in verifying facts and information," Decision No. 6 (43) On the Appeal by N.E. Fonareva, Deputy Chairman of the Russian Federation State Committee for Antimonopoly Policy and Support of New Economic Structures (Feb. 21, 1995), ROSS. GAZETA, Mar. 23, 1995, at 5 [hereinafter Decision No. 43], and called for stricter government enforcement of mass media legislation, *see, e.g.*, Decision No. 21 On Mass Media Publications that Incite Social and Nationalist Intolerance (July 14, 1994), ROSS. GAZETA, Aug. 4, 1994, at 4 [hereinafter Decision No. 21] (expressing need to improve enforcement of mass media legislation). It has even offered advice regarding improvements in media content and coverage. *Id.* (suggesting that there is inadequate press coverage of procuratorial efforts to prevent violations of Law on the Mass Media).

84. Statute on the Judicial Chamber, *supra* note 12, arts. 18-19.

85. *Id.* art. 10.

86. *Id.* In addition, in cases where the Judicial Chamber has sent materials to an "appropriate" organ regarding a violation of mass information rights and freedoms, that organ must report the results of its examination to the Judicial Chamber within one month. *Id.* art. 13.

From the start, the status of the Judicial Chamber within the Russian legal system has been an open question. The Judicial Chamber formally operates within the presidential administration. Its staff is appointed by the President and its activities are financed out of the presidential budget.<sup>87</sup> Yet, according to its Statute, the Judicial Chamber is an "independent" and "impartial body."<sup>88</sup> As its Chairman Anatolii Vengerov often emphasizes, even the President himself cannot interfere in its activities.<sup>89</sup>

In addition, the Judicial Chamber does not fit neatly into any existing legal or institutional category. To a certain extent, it operates as a court. It examines written petitions from claimants<sup>90</sup> or brings proceedings on its

87. *Id.* arts. 1, 7, 24, 26, 31, 32.

88. *Id.* arts. 3, 28.

89. *See, e.g.*, Anatolii Vengerov, Remarks at Press Conference at the Russian-American Press and Information Center (Sept. 6, 1994), translated in POST-SOVIET MEDIA L. & POL'Y NEWSL., Oct. 15, 1994, at 3, 3 ("We are independent. Even the President cannot interfere in our activities.").

90. Claimants have included journalists, *see, e.g.*, Decision No. 16 On Violations of Legal and Ethical Norms in Conducting the Paid Game "05" with the Use of the Mass Media (June 2, 1994), ROSS. GAZETA, June 8, 1994, at 3 [hereinafter Decision No. 16] (journalist claiming she was defrauded by television lottery); Decision No. 39, *supra* note 83 (including ITAR-TASS journalist claiming that Kremlin guards' refusal to admit her to Public Chamber meeting violated her professional right to receive and disseminate information), newspaper editors, *see, e.g.*, Decision No. 33, *supra* note 83 (involving newspaper editors challenging the right of legislators to demand publication of submitted materials as violation of Law on the Mass Media), and media organizations, *see, e.g.*, Decision No. 2 On the Appeal by the Guild of Parliamentary Journalists (Feb. 17, 1994), ROSS. GAZETA, Feb. 23, 1994, at 4 [hereinafter Decision No. 2] (discussing Guild of Parliamentary Journalists protesting refusal of Russian Federation government to admit journalists into meetings). The Judicial Chamber has also received numerous petitions from government officials, *see, e.g.*, Decision No. 49, *supra* note 12 (regarding Press Committee Chairman claiming *Rossiiskaia gazeta* article defamed and discredited him as government leader and undermined professional reputation of Press Committee), parliamentary deputies, *see, e.g.*, Decision No. 25 On Unlawful Actions with Respect to the Editor-in-Chief of "Sovetskaia Kalmykiia" (Sept. 22, 1994), ROSS. GAZETA, Oct. 11, 1994, at 4 (involving State Duma deputy requesting that Judicial Chamber resolve conflict over unlawful firing of *Sovetskaia Kalmykiia's* editor-in-chief by one of newspaper's founders), and federal and regional legislative, judicial, and administrative bodies, *see, e.g.*, Decision No. 6 On I. Dement'eva's Article "War and Peace in the Prigorodnii Raion" Published in the Newspaper "Izvestiia" (Mar. 11, 1994), ROSS. GAZETA, Mar. 31, 1994, at 5 [hereinafter Decision No. 6] (Republic of North Ossetia Supreme Soviet Chairman and Plenipotentiary Representative claiming that *Izvestiia* article undermined normalization of relations between Republic of North Ossetia and Ingush Republic); Decision No. 14 On the Registration of "Al'-Kods" (May 19, 1994), ROSS. GAZETA, May 27, 1994, at 3 (involving Constitutional Court requesting that Judicial Chamber examine legality of registration of newspaper founded by foreign citizen); Decision No. 13 (50) On the Appeal by the State Duma of the Russian Federation Federal Assembly to the Judicial Chamber for Information Disputes Regarding S. Parkhomenko's Publication "We Must Choose Better" in the Newspa-

own initiative.<sup>91</sup> It holds open hearings<sup>92</sup> at which it considers evidence<sup>93</sup> and oral testimony from parties and/or their "representatives,"<sup>94</sup> expert witnesses,<sup>95</sup> and other concerned persons.<sup>96</sup> It evaluates factual and legal issues

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per "Segodnia" (May 11, 1995), ROSS. GAZETA, May 23, 1995, at 12 [hereinafter Decision No. 50] (regarding State Duma claiming that *Segodnia* article insulted deputies and voters). Occasionally, special interest groups, *see, e.g.*, Decision No. 5 On Violations of the Russian Federation Constitution's Norms on Equality of Women (Mar. 11, 1994), ROSS. GAZETA, Mar. 22, 1994, at 4 [hereinafter Decision No. 5] (considering Women's Union of Russia and Union of Lawyers protesting publication of advertisements for job openings limited to male applicants only), and ordinary citizens seek Judicial Chamber assistance as well, *see, e.g.*, Decision No. 21, *supra* note 83 (involving private citizens and social organizations requesting Judicial Chamber examination of racist, fascist, and subversive newspapers).

91. *See, e.g.*, Decision No. 7 On Violations of Legal and Ethical Norms in Publications in the Weekly "Novyi vzgliad" (Mar. 17, 1994), ROSS. GAZETA, Mar. 26, 1994, at 4 [hereinafter Decision No. 7] (Judicial Chamber on its own initiative examining "immoral," "offensive" publications in *Novyi vzgliad*).

92. For details on Judicial Chamber procedures for examining disputes, see generally Regulations of the Russian Federation Presidential Judicial Chamber for Information Disputes (Feb. 10, 1994), in JUDICIAL CHAMBER COLLECTION, *supra* note 12, at 13 [hereinafter Judicial Chamber Regulations].

93. As reported in Judicial Chamber opinions, the most common forms of evidence are newspaper articles, *see, e.g.*, Decision No. 15 On Violations of Legal and Ethical Norms in Publications in the Newspaper "Zavtra" (June 2, 1994), ROSS. GAZETA, June 8, 1994, at 3 [hereinafter Decision No. 15] (involving Judicial Chamber examination of content of *Zavtra* articles entitled "World Evil" and "Kremlin Secrets"), and videotaped television broadcasts, *see, e.g.*, Decision No. 32 On the Appeal to the Judicial Chamber by I.P. Rybkin, Chairman of the State Duma of the Russian Federation Federal Assembly, Regarding the VGTRK Television Program "Big Scandal" of November 1, 1994 (Nov. 25, 1994), ROSS. GAZETA, Dec. 17, 1994, at 4 [hereinafter Decision No. 32] (discussing Judicial Chamber examination of videotape of television program "Big Scandal"). Also frequently mentioned are any prior official rulings regarding the action or parties, *see, e.g.*, Decision No. 6, *supra* note 90 (considering prior enactment of North Ossetian legislature that condemned article at issue in case), media founding and registration documents, *see, e.g.*, Decision No. 29, *supra* note 83 (examining *Krasnoe znanie's* founding documents to determine authority of one of two co-founders to appoint new editor-in-chief), and unspecified materials submitted by the parties, *see, e.g.*, Decision No. 11, *supra* note 83 (noting Judicial Chamber studied additional materials submitted by the parties' representatives in deciding that *Ekspress-gazeta* article violated legal and ethical norms).

94. *See, e.g.*, Decision No. 48, *supra* note 82 (noting testimony by plaintiff's and defendant's "representatives").

95. *See, e.g.*, Decision No. 7, *supra* note 91 (noting Judicial Chamber heard opinions of "experts — Professor B.S. Polozhii and Candidate of Pedagogical Science, Honored Teacher M.B. Tsentsiper" regarding content of *Novyi vzgliad* publications).

96. *See, e.g.*, Decision No. 5 (42) On Ia. Mogutin's Publication "Chechen Knot. 13 Theses" in the Newspaper "Novyi vzgliad," No. 3, 1995 (Feb. 21, 1995), ROSS. GAZETA, Mar. 2, 1995, at 5 [hereinafter Decision No. 42] (noting Judicial Chamber heard testimony from representatives of Assembly of Chechen People of Russia "For Peace, Accord, and Revival").

with extensive reference to procedural history (if any),<sup>97</sup> governing Russian constitutional, statutory, presidential, and administrative provisions,<sup>98</sup> and international law norms and rules.<sup>99</sup> It resolves disputes, prescribes remedies after considering mitigating and aggravating factors,<sup>100</sup> and publishes most of its opinions.<sup>101</sup>

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97. See, e.g., Decision No. 35 On the State of Freedom of Mass Information in Primorskii Krai (Dec. 13, 1994), ROSS. GAZETA, Dec. 27, 1994, at 4 [hereinafter Decision No. 35] (discussing previous rulings by Judicial Chamber against Primorskii krai authorities). In some cases, the procedural history is split between the second and third sections. See, e.g., Decision No. 15, *supra* note 93 (noting previous actions against *Zavtra* by Judicial Chamber, Press Committee, and Procurator General).

98. Most commonly cited are the Russian Constitution, Law on the Mass Media, and Presidential Decree No. 2334 of December 31, 1993 On Additional Guarantees for Citizens' Right to Information. See, e.g., Decision No. 1 On Violation of the Right of "Maiak" Radio Station Journalists to Receive Socially-Significant Information (Feb. 17, 1994), ROSS. GAZETA, Feb. 25, 1994, at 7 (citing rights to receive information provided in Article 4 of Constitution, Article 39 of Law on the Mass Media, and Articles 3-4 of Presidential Decree No. 2334). Other cited statutes include the Law on the Status of Deputies, see, e.g., Decision No. 33, *supra* note 83, Fundamental Principles on Protection of Citizens' Health, see, e.g., Decision No. 43, *supra* note 83, and Labor Code, see, e.g., Decision No. 5, *supra* note 90.

99. See, e.g., Decision No. 5, *supra* note 90 (citing United Nations Convention of December 18, 1979 "On Elimination of All Forms of Discrimination Against Women").

100. See, e.g., Decision No. 2, *supra* note 90 (taking into consideration intention of Russian Government Press Service to improve accreditation, notification, and admission of journalists in future); Decision No. 15, *supra* note 93 (emphasizing fact that *Zavtra* "continued to publish materials that flagrantly violated legal ethical norms" despite prior rulings by Judicial Chamber, Press Committee, and Procurator General's Office). The Judicial Chamber also carefully notes any admissions of misconduct by the parties. See, e.g., Decision No. 8 (45) On the Krasnoiar'sk Krai Administration's Refusal to Allow Journalists of the "Afontovo" Television Company Access to an Accident Site (Mar. 23, 1995), ROSS. GAZETA, Mar. 31, 1995, at 5 [hereinafter Decision No. 45] (noting official admitted he gave order not to allow journalists access to airplane crash); Decision No. 11, *supra* note 83 (noting *Ekspress-gazeta* representatives admitted article not true or objective); Decision No. 44, *supra* note 83 (noting "readiness of VGRK to correct its admitted mistake" in using inaccurate information regarding the ownership of "Sirena" corporation).

101. The Judicial Chamber issues opinions in the form of decisions, recommendations, statements, and expert conclusions. Statute on the Judicial Chamber, *supra* note 12, arts. 21, 30. Unfortunately, there is no statutory definition of the structure or content of these four types of opinions. According to the Statute on the Judicial Chamber, as amended, there is mandatory publication of all recommendations and the "most important decisions" in *Rossiiskaia gazeta*. See *supra* note 12. Occasionally, the Judicial Chamber also orders or recommends publication of an opinion in a claimant's or defendant's newspaper. See, e.g., Decision No. 30, *supra* note 82 (requiring publication in *Sobesednik*); Decision No. 37, *supra* note 83 (suggesting publication in *Poliarnaia pravda* and *Murmanskii vestnik*). In 1995, the Judicial Chamber published a complete collection of opinions with commentary and documents. See JUDICIAL CHAMBER COLLECTION, *supra* note 12.

Yet, as its opinions reveal, the Judicial Chamber actually performs an amalgam of functions. It acts as court, Constitutional Court, legislative body, government agency, prosecutor, and media ethics board.<sup>102</sup> Even in its most formal decisions, the Judicial Chamber is not merely an arbiter of fact and law; it is an engaged and emotional participant in the process. The Judicial Chamber expresses its views of the parties and their conduct in strong, often colorful language.<sup>103</sup> It uses a specific case or controversy as a springboard for a general discussion of legal and moral principles, rights, and responsibilities.<sup>104</sup> It makes a conscious effort to guide and educate as well as decide and discipline.<sup>105</sup> Thus, Chairman Vengerov may have captured the essence of the Judicial Chamber best when he described it as "unfamiliar, unusual, and somewhat juridically exotic."<sup>106</sup>

Since its inception, the Judicial Chamber has been widely criticized as extraconstitutional and ineffective.<sup>107</sup> It has even been labeled a successor to the notorious communist revolutionary tribunals, censorship bodies, and agitation and propaganda organs.<sup>108</sup> It is routinely pilloried in the press,

102. See Krug, *supra* note 74; Nikita Vainonen, *Will Things Be Any Easier for the Reader? The President Is Concerned About the Right to Information, the Premier About the Newspapers' Survival*, ROSS. VESTI, Jan. 10, 1994, at 1, translated in F.B.I.S.-SOV, Jan. 10, 1994, at 40 (describing judicial, administrative, and legislative powers of Judicial Chamber). Its very name — *Sudebnaia palata po informatsionnym sporam pri Prezidente Rossiiskoi Federatsii* (Russian Federation Judicial Chamber for Information Disputes) — reveals the multifaceted nature and ambiguous position of the Judicial Chamber. *Sudebnaia* expresses its role as a court. *Palata*, however, is a term more commonly associated with a legislative "chamber" or "house" or governmental "board." "*Pri*" *Prezidente* adds to the confusion further by designating the Judicial Chamber as a body "under" or "attached to" the president.

103. See *infra* notes 283-84 and accompanying text.

104. See, e.g., Statement No. 3, *supra* note 9 ("Freedom of mass information is a necessary condition for democracy . . . Freedom of expression is the key to all other human rights. Therefore, any attempt to restrict it also threatens all remaining rights.").

105. See *infra* notes 314-27 and accompanying text.

106. A.B. Vengerov, *The Judicial Chamber in the Information Space of Russia (Polemical Notes)*, in JUDICIAL CHAMBER COLLECTION, *supra* note 12, at 136, 140.

107. See, e.g., Aleksandr Ababkov, *But We Still Live in Poverty Today*, ROSS. GAZETA, May 13, 1995, at 6 (describing Judicial Chamber as "illegitimate body" and concluding that "there is no need for it"); Aleksandr Danilov, *Sisyphian Labor*, ROSS. GAZETA, May 13, 1995, at 6 (labelling Judicial Chamber's work as fruitless "Sisyphian labor" and calling for "self-dissolution"); Klimov, *supra* note 12, at 1, 6 (describing Judicial Chamber as ineffective and unconstitutional). For replies to such charges, see Vengerov, *supra* note 106, at 140-43; and Statement No. 4, *supra* note 80.

108. See, e.g., Batygin, *supra* note 83, at 29 (accusing Judicial Chamber of "taking on the 'best' punitive traditions of agitprop"); Klimov, *supra* note 12, at 6 (analogizing Judicial



ignored by defendants, and threatened with extinction.<sup>109</sup> Its future is uncertain. Nonetheless, its current contribution is considerable. As the author of more than one hundred opinions, the Judicial Chamber provides invaluable insights into evolving post-Soviet approaches to law.

#### IV. Judicial Chamber Performance: The Harmful Speech Opinions<sup>110</sup>

Judicial Chamber opinions paint a dismal picture of a public bombarded with false, offensive, and dangerous information, yet deprived of even the

Chamber to Stalinist "troika" tribunals); Leonid Nikitinskii, *Judicial Chamber for Information Disputes: Censorship or Promotion of Free Speech?*, IZVESTIIA, Feb. 4, 1994, at 3 (suggesting Judicial Chamber is "very similar to a censorship organ").

109. For a sampling of media criticism of the Judicial Chamber, see commentaries published under the general title: *Do We Challenge the Judicial Chamber for Information Disputes?*, ROSS. GAZETA, May 13, 1995, at 6. See also Anna Politkovskaia, "Vox Populi" Conquers the Capital, But the Capital Staunchly Resists, OBSHCHAIA GAZETA, Mar. 2-8, 1995, at 12, translated in F.B.I.S.-SOV, Mar. 20, 1995, at 25 (describing how *Novyi vzgliad* editor-in-chief "showered Judicial Chamber with insults" at hearing). Judicial Chamber opinions often report that defendants refused to attend hearings despite "timely and repeated invitations," see, e.g., Decision No. 49, *supra* note 12 (discussing nonappearance by *Rossiiskaia gazeta* editor-in-chief and author), and/or failed to comply with earlier Judicial Chamber rulings, see, e.g., Decision No. 15, *supra* note 93 ("The *Zavtra* editorial office ignored the Judicial Chamber's statement of April 4, 1994 and continued to publish materials that flagrantly violated legal and ethical norms."). For a discussion of moves to declare the Judicial Chamber unconstitutional, see Klimov, *supra* note 12, at 6; and Statement No. 4, *supra* note 80.

110. The following description of plots and characters applies to all but one Judicial Chamber harmful speech opinion published in *Rossiiskaia gazeta*. The exception is Statement No. 2, in which the Judicial Chamber upheld *Obshchaia gazeta*'s publication of the so-called coup "Version No. 1" despite its dubious veracity and potentially inflammatory and destabilizing effect. Statement No. 2 On Publication in "Obshchaia gazeta" of the So-called "Version No. 1" (Apr. 4, 1994), ROSS. GAZETA, Apr. 9, 1994, at 4 [hereinafter Statement No. 2]. The Judicial Chamber emphasized the fact that the newspaper explicitly stated in writing that it could not vouch for the reliability of the report. *Id.* Most importantly, the Judicial Chamber decided that publication actually "defused the political atmosphere," noting that "[w]orld history has known of cases when a leak of information has prevented state upheaval, but disregard of information has led to tragedy." *Id.* Another arguably anomalous case is Decision No. 44, in which the Judicial Chamber, on a similar rationale, ruled that a television exposé of fascism in Russia did not constitute harmful speech because it "alarmed the public and became grounds for urging authorities to take action." Decision No. 44, *supra* note 83. Nonetheless, the Judicial Chamber did not allow the authors to emerge unscathed. It reprimanded them for "insufficiently verified and inaccurate information." *Id.* It should also be noted that the Judicial Chamber's "official interference" cases, which are not the subject of this article, present a far more sympathetic view of the media. These opinions depict journalists and publishers as public-spirited crusaders for the truth, blocked at every turn by state personnel and bodies. For a description of the entire body of Judicial Chamber opinions, see generally Foster, *supra* note 80.

most basic facts about its government's policies and actions. These cases cover a wide range of topics, from media dissemination of ethnic slurs to seductive cigarette advertisements. Despite the significant variation in content, there are marked continuities in the Judicial Chamber's depiction of the characters, issues, values, and legal principles involved. Thus, these cases provide a useful vehicle for studying the message the Judicial Chamber conveys to the reader about legal norms and discourse in post-Soviet Russia.

### A. The Plots<sup>111</sup>

More than two-thirds of its published opinions concern publications and broadcasts that the Judicial Chamber deems harmful for Russian society. There are six recurrent plots. The first and most prevalent involves media dissemination of information that "incites" ethnic, social, and religious "intolerance," "hatred," or "tension."<sup>112</sup> The prototypical case is *Decision No. 42*, an examination initiated by the Judicial Chamber of Ia. Mogutin's controversial *Novyi vzgliad* article "Chechen Knot. 13 Theses."<sup>113</sup> The article rejected the official account of the ongoing conflict in Chechnia as a Russian military effort to defeat armed rebellion by Chechen separatists and restore constitutional order in a Russian Federation Republic.<sup>114</sup> The author argued instead that the Chechen war was the natural result of "ethnic incompatibility" and "zoological," "genetic" animosity of superior, Christian Russians for inferior, Moslem Chechens.<sup>115</sup> He claimed that Chechens were "semi-savage," were famous "only for their barbarism and sullen anger," and "had made absolutely no contribution to the world other than international terrorism and the drug trade."<sup>116</sup> Mogutin attacked opponents of his views. He "insulted" religious leaders, castigated intellectuals for their "anti-Russian" and "unpatriotic attitudes," and accused "democrats" of "wanting to shrink the borders of the Russia they hate."<sup>117</sup>

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111. The inspiration for this structure is Moran, *supra* note 71, at 1430-34, 1438-51, 1484-85, 1486-93. Like Moran, I describe the "plots" and "characters" of Judicial Chamber opinions. Moran focuses on "the state" and "the speaker" of U.S. and Canadian hate speech cases. I identify several additional characters in the Russian context.

112. *See, e.g.*, *Decision No. 6*, *supra* note 90.

113. *Decision No. 42*, *supra* note 96.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* The Judicial Chamber held that Mogutin's article violated the Constitution, Law on the Mass Media, and ethical norms. It sent its decision to the Russian Press Committee (the registering body) with instructions to suspend or terminate *Novyi vzgliad* and to the procurator's office to determine whether or not to press criminal charges.

A central theme in recent opinions is media dissemination of fascist and anti-Semitic materials.<sup>118</sup> In the words of the Judicial Chamber, it "has addressed this subject often."<sup>119</sup> For instance, in January 1995, the Judicial Chamber made a special expert assessment of publications in the Volgograd newspaper *Kolokol* as "abuses of freedom of mass information."<sup>120</sup> *Kolokol* articles blamed Russia's current ills on "purposeful destruction by Zionist groups of the West and a fifth column of Zionists in Russia," characterized Jews as enemies of the Russian people who controlled "all key positions in Russia," and even "tested" the family names of local leaders for possible Jewish origins.<sup>121</sup>

The second major plot concerns media dissemination of information that "discredits"<sup>122</sup> state institutions, personnel, and legislation. The Judicial Chamber has examined and censured publications and broadcasts ridiculing the federal legislature as a "farce" and its deputies as "clowns" and "buffoons."<sup>123</sup> It has denounced materials accusing government officials of corruption, abuse of power, and falsification of educational and military credentials.<sup>124</sup> President Yeltsin has also figured prominently in Judicial Chamber opinions. Indeed, in April 1994, the Judicial Chamber was moved to issue a special statement condemning a *Zavtra* journalist for attempting to "discredit, diminish, and injure the Russian Federation president with profoundly immoral and malicious speculations on the subject of his health in an effort . . . to introduce into the public consciousness the impression that the chief of state is an incapable and incapacitated politician."<sup>125</sup>

118. See, e.g., Decision No. 44, *supra* note 83.

119. *Id.*

120. Expert Conclusion No. 5 On the Legal Assessment of Publications in the Newspaper "Kolokol" (Volgograd) in 1994 (Jan. 20, 1995), ROSS. GAZETA, Feb. 2, 1995, at 15 [hereinafter Expert Conclusion No. 5].

121. *Id.*

122. See, e.g., Decision No. 20 (57) On the Appeal by State Duma Deputy Chairman A. Chilingarov Regarding Publication of "Should the Icebergs Be Sold?" in "Moskovskaia pravda" on June 16, 1995 (July 13, 1995), ROSS. GAZETA, July 28, 1995, at 5 [hereinafter Decision No. 57] (upholding claim that publication "discredits" Duma Vice Chairman's political, social, and professional reputation and "authority of legislative power").

123. Decision No. 50, *supra* note 90.

124. See, e.g., Decision No. 43, *supra* note 83 (reporting accusations that drafters of advertising law were trying to "line their own pockets"); Decision No. 48, *supra* note 82 (noting *Izvestiia* article claiming official falsified credentials); Decision No. 49, *supra* note 12 (regarding *Rossiiskaia gazeta* article contending Press Committee abused control over subsidies).

125. Statement No. 1 On I. Andronov's Publication in "Zavtra" (Apr. 4, 1994), ROSS. GAZETA, Apr. 13, 1994, at 4 [hereinafter Statement No. 1].

In addition, the Judicial Chamber has focused on another form of information that subverts the Russian political process — "improper" media coverage of election campaigns. It has identified several negative media practices. These include "premature"<sup>126</sup> dissemination of election campaign literature and speeches; publication and broadcasts of offensive, slanderous, and inflammatory statements by candidates; incomplete, unreliable, and unobjective commentary; and "clear political preferences" and support for candidates that go "beyond the bounds of the permissible."<sup>127</sup>

Judicial Chamber decisions also deal with materials that "disparage"<sup>128</sup> Russian legislation. The most notable of these is *Decision No. 43*, an action brought against several central Moscow newspapers for their "inaccurate," "tendentious," and "unobjective" critiques of the draft advertising law.<sup>129</sup> The Judicial Chamber supported the claimant's contention that these articles discredited individual statutory provisions and their conceptual basis, insulted the drafters, and undermined public support for enactment of the law.<sup>130</sup>

The third plot involves media dissemination of information that discriminates on the basis of gender. *Rossiiskaia gazeta* has published two key Judicial Chamber decisions on the topic, *Decision No. 5* and *Decision No. 30*. The first case declared unconstitutional newspaper publication of advertisements for job openings limited to male applicants only.<sup>131</sup> The second case dealt with a very different type of discriminatory publication — articles that targeted female legislators for "disrespect" and "humiliation."<sup>132</sup> At issue were two *Sobesednik* articles that allegedly insulted and discredited the professional activity of female deputies through the use of sexual innuendo and other "inappropriate" methods.<sup>133</sup> For example, one article contended

126. Decision No. 21 (58) On the Appeal by Moscow Oblast' Duma Deputy R. Ia. Murashkovskaia Regarding the Legality of the "Klin Television" TOO's Activity in Preparing and Disseminating Information that was Preelectoral in Nature (July 13, 1995), ROSS. GAZETA, July 20, 1995, at 6 [hereinafter Decision No. 58].

127. Statement No. 3 (14) On Several Cases Involving Violation of Election Campaign Rules (Dec. 9, 1995), ROSS. GAZETA, Dec. 14, 1995, at 6 [hereinafter Statement No. 14].

128. See, e.g., Decision No. 50, *supra* note 90.

129. Decision No. 43, *supra* note 83.

130. *Id.*

131. Decision No. 5, *supra* note 90.

132. Decision No. 30, *supra* note 82, at 4, 4. The Judicial Chamber issued an earlier decision, which was not published in *Rossiiskaia gazeta*, condemning one of these *Sobesednik* articles. See Decision No. 18 On the Publication in the Weekly "Sobesednik" No. 17 (1994) of "Women in Russia: Abstinence Until Victory" (June 15, 1994), in JUDICIAL CHAMBER COLLECTION, *supra* note 12, at 49.

133. Decision No. 30, *supra* note 82.

that the "Women of Russia" parliamentary faction had called upon Russian women to withhold sex from "their husbands and boyfriends until order is restored in Russia."<sup>134</sup> Another article's title asked "How Much is the Honor of 22 Female State Duma Deputies Worth?"<sup>135</sup>

The fourth recurrent plot concerns information that undermines public morality. A prime illustration is *Decision No. 7*, the Judicial Chamber's determination that several *Novyi vzgliad* articles constituted a threat to the moral interests of Russian children and adolescents.<sup>136</sup> *Novyi vzgliad* had published grotesque accounts of "pathological" criminal and sexual "perversions" under such provocative titles as "Cannibal-Lover," "Breasts in a Pastry," and "Serial Murders."<sup>137</sup> Because of lax distribution policies, *Novyi vzgliad* apparently had reached the tender eyes of Russian adolescents and had become a topic of wide discussion among schoolchildren.<sup>138</sup>

In a similar vein, a much-publicized recent decision ruled that the "Wild Field" television program "disseminat[ed] . . . information [that] weakens moral principles and has the potential to cause moral injury and destroy family relations."<sup>139</sup> The broadcast, an exposé of allegedly rampant lesbianism in Russian prisons, contained close-up shots of women prisoners who had not consented to being filmed.

The fifth plot concerns media dissemination of information that causes physical harm. The best example is *Recommendation No. 1*, issued by the Judicial Chamber in May 1994.<sup>140</sup> This opinion, entitled "On Advertisements Disseminated by the Mass Media that are Hazardous to Life and Health," provided a critical analysis of newspaper and television advertisements that encourage public consumption of alcoholic beverages and tobacco products. It also denounced media advertising and "propagandizing" of unapproved medicinal remedies and uncertified practitioners of "nontraditional methods of treatment."<sup>141</sup> Recent opinions suggest that advertisement

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134. *Id.*

135. *Id.*

136. *Decision No. 7, supra* note 91.

137. *Id.*

138. *Id.*

139. *Decision No. 32 (69) On Violations in A.G. Nevzorov's June 30, 1995 "Wild Field" Program of the Constitutional Rights of Convicts Imprisoned in Institution US-20/2 (Oct. 19, 1995), ROSS. GAZETA, Oct. 31, 1995, at 6 [hereinafter Decision No. 69].*

140. *Recommendation No. 1 On Advertisements Disseminated by the Mass Media that are Hazardous to Life and Health (May 5, 1994), ROSS. GAZETA, May 14, 1994, at 4 [hereinafter Recommendation No. 1].*

141. *Id.*

of "unhealthy" products remains a serious problem despite stiff new legal prohibitions against it.<sup>142</sup>

The sixth and final plot concerns information that causes financial harm to citizens. The key case is *Decision No. 16*, the Judicial Chamber's ruling against the allegedly fraudulent, illegal, and unlicensed television lottery Game "05."<sup>143</sup> One of the founders, a television journalist, advertised the lottery on his Sunday television program. Game "05" organizers promised TV viewers large sums of money for telephoning in the correct answers to "relatively simple questions."<sup>144</sup> They neglected to mention, however, the expense of each telephone call. As a result, most callers received for their efforts the taped message "your number has not been chosen by the computer" and a high telephone bill.<sup>145</sup> In all, the Moscow telephone company sent out 600 million rubles worth of bills to Game "05" participants.<sup>146</sup>

Several subsequent Judicial Chamber opinions have only confirmed the threat of "unscrupulous," "misleading," and "concealed" advertisements to Russian consumers.<sup>147</sup> For example, in a June 1995 decision,<sup>148</sup> the Judicial Chamber targeted the "deceptive" and "unfair" practices of the Federal Investment Fund for Social Protection. Even though it was a purely commercial entity, the Fund had included in its television advertisements shots of Russian legislative buildings, sessions, and chairman as well as pictures of the state flag and state emblem. According to the Judicial Chamber, the goal was to lure potential investors with the false promise that the Fund was

142. See Decision No. 14 (51) On the Appeals by the Newspaper "Vecherniaia Ufa's" Editorial Board and Editor-in-Chief Ia. B. Khusainov Regarding the Legality of Advertisements Published in the Newspaper (May 25, 1995), ROSS. GAZETA, June 1, 1995, at 6 [hereinafter Decision No. 51].

143. Decision No. 16, *supra* note 90, at 3, 3. *Rossiiskaia gazeta* published an abridged version of this decision. See Decision No. 16 On Violations of Legal and Ethical Norms in Conducting the Paid Game "05" with the Use of the Mass Media (June 2, 1994), in JUDICIAL CHAMBER COLLECTION, *supra* note 12, at 45 (providing complete text).

144. Tamara Ivanova, *Russian Judicial Chamber Rules TV Show to Be Illegal* (ITAR-TASS broadcast, June 2, 1994).

145. *Id.*

146. *Id.* As a result of the Judicial Chamber decision, 140 million rubles were restored to citizens. See Vengerov, *supra* note 106, at 3.

147. See, e.g., Decision No. 51, *supra* note 142; Recommendations of the Russian Federation Presidential Judicial Chamber for Information Disputes and the Union of Russian Journalists On the Freedom of Mass Information and the Responsibility of Journalists (June 15, 1995), ROSS. GAZETA, July 11, 1995, at 6 [hereinafter Joint Recommendations].

148. Decision No. 17 (54) On the Appeal by the Chairman of the Committee for Organization of the State Duma's Work, V.A. Bauer, Regarding Federal Investment Fund Advertisements in the Mass Media (June 29, 1995), ROSS. GAZETA, July 5, 1995, at 6 [hereinafter Decision No. 54].

a state organization, backed by the full faith and credit of the Russian legislature.

### B. The Characters

Judicial Chamber opinions feature a large and varied cast of characters. Those with recurring roles are society, the speaker, the publisher, the audience, the target, the state, and, of course, the Judicial Chamber itself.

#### 1. Society

The dominant image in Judicial Chamber opinions is that of a fragile post-Soviet "democratic" society and reform process. Their fate hangs by a thread. "Irresponsible"<sup>149</sup> journalism threatens to rend the moral fabric of society and destroy the already tenuous credibility and legitimacy of Russia's "young institutions of statehood."<sup>150</sup> Conditions are so precarious that even the most minor media deviation from legal or ethical principles could trigger a "social explosion"<sup>151</sup> and plunge Russia into anarchy, chauvinism, and immorality.

Judicial Chamber rhetoric underscores the gravity and sensitivity of the situation. The watchword of Judicial Chamber opinions is "danger." Dissemination of "extremist views" poses a "high degree of social danger."<sup>152</sup> Fascism is a "real social danger."<sup>153</sup> Seductive advertisements for cigarettes and alcoholic beverages are "dangerous for life and health."<sup>154</sup> Dramatic adjectives, such as "serious," "alarming," "destructive," "provocative," and "pernicious," reinforce this view of a Russian society in peril.<sup>155</sup> Use of superlatives and modifying adverbs only heightens the sense of urgency. For example, one opinion described publications "fraught with the most ruinous consequences."<sup>156</sup> Another condemned an author's "sharply destructive position."<sup>157</sup>

149. See, e.g., Joint Recommendations, *supra* note 147.

150. See, e.g., Decision No. 50, *supra* note 90.

151. Joint Recommendations, *supra* note 147.

152. Decision No. 44, *supra* note 83.

153. *Id.*

154. See, e.g., Recommendation No. 1, *supra* note 140.

155. See Decision No. 32, *supra* note 93 ("serious"); Recommendation No. 1, *supra* note 140 ("alarming"); Statement No. 1, *supra* note 125 ("destructive"); Decision No. 42, *supra* note 96 ("provocative"); Joint Recommendations, *supra* note 147 ("pernicious").

156. Joint Recommendations, *supra* note 147.

157. Statement No. 1, *supra* note 125.

References to warfare pervade Judicial Chamber opinions. "Aggressive" "enemies" menace Russian society.<sup>158</sup> Publications "propagandize war," incite paramilitary armed groups, and provide recipes for Molotov cocktails and other weapons.<sup>159</sup> The Judicial Chamber proposes new or improved legislation in the "battle" against fascism and abuses of the mass media.<sup>160</sup>

Words of balance and weight convey the impression of a Russian society poised on the brink of disaster. The Judicial Chamber has called upon journalists to "weigh every word"<sup>161</sup> and has warned of the dangers of even the "slightest imbalance" in analysis of interethnic conflicts.<sup>162</sup> In its joint recommendations with the Union of Russian Journalists, the Judicial Chamber made its most extensive use of the metaphor yet. It proclaimed that media coverage of interethnic relations and interactions between federal and local authorities "must be carefully weighed on pharmacist's scales since a mistake in the dosage can make a publication a poison rather than a medicine."<sup>163</sup>

## 2. *The Speaker*

The speaker, be it journalist, advertiser, or editorial staff, is generally the principal villain of the piece. In the most dramatic Judicial Chamber opinions, the speaker has deliberately set out to destroy the Russian state and incite social and ethnic discord. These opinions emphasize the fundamentally evil character of the speaker and his message. They also highlight the intentional nature of the act. Words such as "deliberately," "knowingly," and "intentionally" appear often.<sup>164</sup> At the same time, the Judicial Chamber attempts to isolate the speaker and undercut the credibility of the message. It does so by depicting the speaker as mentally unbalanced and the message as "extremist" or "absurd."<sup>165</sup>

158. See, e.g., Decision No. 21, *supra* note 83; Expert Conclusion No. 5, *supra* note 120.

159. See, e.g., Decision No. 15, *supra* note 93; Decision No. 21, *supra* note 83.

160. See, e.g., Decision No. 21, *supra* note 83 (noting "battle against abuse of freedom of mass information"); Decision No. 44, *supra* note 83 (recognizing "battle against fascism").

161. Statement No. 11 On Defense of Freedom of Mass Information in Connection with the Events in Chechnia (Dec. 26, 1994), ROSS. GAZETA, Dec. 30, 1994, at 4 [hereinafter Statement No. 11].

162. Joint Recommendations, *supra* note 147.

163. *Id.*

164. Decision No. 42, *supra* note 96.

165. See, e.g., *id.* (describing author's "delirious fabrications" and arguing that author took notion of enmity between Chechens and Russians "to the point of absurdity"); Decision No. 11, *supra* note 83 (describing "absurd suppositions" in *Ekspress-gazeta* publication); Decision No. 21, *supra* note 83 (characterizing as "extremist" positions of *Zavtra* author).



Other Judicial Chamber opinions paint the speaker as unscrupulous and duplicitous. These cases involve journalists or advertisers who take advantage of public naiveté and glitches in the Russian legislative and government system for financial, reputational, or political self-aggrandizement.<sup>166</sup> These speakers "do not spurn the basest methods"<sup>167</sup> to sell their stories, schemes, and products. Their stock in trade is deception. The Judicial Chamber brings this point home by providing a detailed list of "tricks"<sup>168</sup> employed by journalists and advertisers. These include falsification of data, deliberate omission or misstatement of unsupportive facts, use of quotations out of context, reference to "worthless" sociological polls, and hidden advertisements.<sup>169</sup>

Another concern of Judicial Chamber opinions is the disrespectful attitude of Russian speakers toward state organs and personnel. Speakers repeatedly "slander," "libel," "mock," "deride," and "maliciously insult" even the highest leaders and government bodies.<sup>170</sup> Moreover, as a June 1995 decision revealed, advertisers do not hesitate to appropriate the most sacred symbols of Russian statehood to hock their wares.<sup>171</sup>

In a number of opinions, speakers appear as sloppy and inexperienced. They fail to verify facts and rumors,<sup>172</sup> make numerous mistakes in their

166. See, e.g., Decision No. 16, *supra* note 90 (involving advertisement of lottery by journalist); Decision No. 58, *supra* note 126 (regarding broadcast of political messages to encourage viewers to vote for television company director); Statement No. 1, *supra* note 125 (castigating author for inventing stories for self promotion); Joint Recommendations, *supra* note 147 (criticizing journalists for publications "concocted for ratings" or intended "to inflate authority or to discredit political rivals").

167. Statement No. 1, *supra* note 125.

168. Decision No. 49, *supra* note 12.

169. See Decision No. 30, *supra* note 82 (noting "worthless sociological poll"); see also Decision No. 48, *supra* note 82 (discussing fabricated biography); Decision No. 43, *supra* note 83 (citing deliberate misstatements and omissions regarding draft advertising law); Decision No. 49, *supra* note 12 (noting author "concealed" fact that she used 1995 statistics to support allegation of misuse of subsidies by Press Committee in 1994); Decision No. 51, *supra* note 142 (regarding hidden advertisement); Statement No. 1, *supra* note 125 (considering use of quotations out of context).

170. See, e.g., Decision No. 11, *supra* note 83 (stating *Ekspress-gazeta* article "libels," "mocks," "humiliates," and "derides" Duma deputies); Decision No. 50, *supra* note 90 (stating *Segodnia* article insulted Duma deputies and voters and disparaged legislation).

171. Decision No. 54, *supra* note 148 (stating Federal Investment Fund advertisements included shots of seats of federal legislative, executive, and presidential power, and pictures of Russian Federation state flag and state emblem in attempt "to create in citizens the notion that a commercial organization — the Fund — was a state organization and, what is more, acting under the aegis of the State Duma").

172. See, e.g., Decision No. 49, *supra* note 12 (noting author failed to verify facts

reporting of legal texts and issues and use of legal terminology,<sup>173</sup> write in a "crude," "unidimensional and primitive fashion"<sup>174</sup> about complex social and political problems, and are "elementarily ignorant and mistaken."<sup>175</sup> Even a rare Judicial Chamber harmful speech ruling in favor of journalists, *Decision No. 44*, criticized authors of the television exposé "Newspaper Histories" ("Fascism in Russia. Who?") for their "use of insufficiently verified and inaccurate information."<sup>176</sup>

Thus, the speaker emerges in Judicial Chamber harmful speech decisions as a "negative"<sup>177</sup> influence on Russian society and democratic reform process. Whether by accident or design, authors of harmful materials repeatedly violate professional ethics, moral principles, and citizens' legal rights, interests, honor, and dignity. They insist on "unbridled"<sup>178</sup> freedom of speech but are "insufficiently responsible about the possible consequences."<sup>179</sup> In the final analysis, the speaker is a figure that deserves minimal protection and respect.

### 3. *The Publisher*

The Judicial Chamber reserves its harshest invective for the publisher of harmful materials. In some cases, it characterizes publishers as open and dedicated enemies of Russia. It uses the strongest possible language to condemn newspapers such as *Zavtra*, *Novyi vzgliad*, and *Al'-Kods* for inciting social and national hatred, discrediting Russian officials and institutions, and undermining public morality.<sup>180</sup> The Judicial Chamber has spoken of full-scale campaigns by some mass media organs to destroy Russia's political and social establishments,<sup>181</sup> including "all-out persecution of prominent

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through official interview or meeting with Press Committee leaders).

173. See, e.g., *Decision No. 30*, *supra* note 82 (declaring that *Sobesednik* articles on Women of Russia faction included comments that were "full of errors" on several legal issues); *Decision No. 43*, *supra* note 83 (stating that articles on draft advertising law contained "unreliable information about the text of the draft law and individual provisions" and "used legal terms improperly").

174. *Decision No. 42*, *supra* note 96.

175. *Decision No. 11*, *supra* note 83.

176. *Decision No. 44*, *supra* note 83.

177. *Decision No. 21*, *supra* note 83.

178. *Joint Recommendations*, *supra* note 147.

179. *Decision No. 6*, *supra* note 90.

180. See, e.g., *Decision No. 7*, *supra* note 91 (ruling against *Novyi vzgliad*); *Decision No. 21*, *supra* note 83 (condemning newspapers, including *Zavtra* and *Al'-Kods*, that incite social and nationalist intolerance).

181. *Expert Conclusion No. 5*, *supra* note 120.

politicians and officials.<sup>182</sup> It has attacked publishers of this ilk for using fraudulent means to obtain registration certificates,<sup>183</sup> ignoring legal and administrative publication procedures,<sup>184</sup> and persisting in their "dangerous," "impermissible" activity despite warnings from the Judicial Chamber and law enforcement organs.<sup>185</sup> According to the Judicial Chamber, these publishers "flagrantly"<sup>186</sup> "flout"<sup>187</sup> Russian legal and ethical norms, yet remain unrepentant and intransigent. They are beyond appeal to reason or conscience.<sup>188</sup>

In other cases, the Judicial Chamber focuses on publishers that place profit motive ahead of legal and ethical duties. In these opinions, publishers deliberately "distort" information for "sensation" and "popularity."<sup>189</sup> They disseminate remunerative advertisements that are illegal, dangerous, deceptive, and libelous<sup>190</sup> and allow major advertisers to control the content of publications and programming.<sup>191</sup> Such publishers make no attempt to supply morally uplifting materials, but instead cater to the basest tastes of their audience.<sup>192</sup> Moreover, they routinely exploit loopholes in the law and inadequate law enforcement for financial gain.<sup>193</sup>

182. Joint Recommendations, *supra* note 147.

183. *See, e.g.*, Decision No. 42, *supra* note 96; Expert Conclusion No. 5, *supra* note 120.

184. *See, e.g.*, Decision No. 21, *supra* note 83.

185. *See, e.g.*, Decision No. 15, *supra* note 93 (*Zavtra* ignored warnings from Press Committee and Judicial Chamber).

186. Decision No. 5, *supra* note 90.

187. Joint Recommendations, *supra* note 147.

188. *See* Statement No. 1, *supra* note 125 ("The Judicial Chamber realizes that, of course, it is futile to reason with or appeal to the conscience of editorial offices of newspapers of the 'spiritual opposition'").

189. *See id.* (claiming author fabricated stories for "publicity" purposes); Joint Recommendations, *supra* note 147 ("Even reputable publishers commit violations with unverified reports and deliberate distortion of factual material for the sake of sensational presentation. They do so by hushing up unprofitable facts and overemphasizing sensational facts.").

190. *See, e.g.*, Recommendation No. 1, *supra* note 140 (noting "hazardous" advertisements for cigarettes, alcohol, and unlicensed medical treatments); Decision No. 5, *supra* note 90 (noting illegal advertisements for job openings limited by gender); Decision No. 51, *supra* note 142 (uncovering "hidden" advertisements that "disinformed" readers about activities of Bashkir Special Commodities-Raw Materials Exchange); Decision No. 54, *supra* note 148 (reporting "deceptive" advertisements for Federal Investment Fund).

191. Joint Recommendations, *supra* note 147 (stating advertisements are so lucrative that "they have begun to dictate the subject matter of publications in many cases").

192. *Id.*

193. *See* Statement No. 1, *supra* note 125 (regarding media "taking advantage of fact that government press services do not always cover in a timely fashion the work and state of health of Russia's highest government officials and do not promptly refute various instructions in these areas"); Joint Recommendations, *supra* note 147 (stating "many publications 'skillfully' exploit legislative norm regarding the right not to disclose sources of information").

A constant theme in Judicial Chamber opinions is the irresponsibility of Russian publishers. They make little effort to verify published information or to supervise employees.<sup>194</sup> They disseminate harmful materials and "pay no regard to the pernicious effect on the morality of society"<sup>195</sup> or stability of the Russian state. When called to account for their actions, publishers either deny responsibility altogether or attempt to shift liability to authors or subsidiary units.<sup>196</sup> In several cases, publishers proffer disingenuous excuses for their actions. They plead poverty, ignorance, youth, and the inexorable demands of capitalist competition.<sup>197</sup> They frequently refuse to participate in Judicial Chamber sessions or they provide evasive, unconvincing answers and explanations.<sup>198</sup>

Finally, publishers appear as "unprincipled and inconsistent"<sup>199</sup> hypocrites. Mass media organs "speak endlessly about human rights [but] with ease and extraordinary irresponsibility trample on these rights."<sup>200</sup> They laud *glasnost*' and citizens' constitutional right to receive information yet "avoid

194. See Decision No. 5, *supra* note 90 (stating publishers need to verify that published advertisements conform with Constitution and legislative acts); Decision No. 16, *supra* note 90 (recommending mass media editorial offices and television companies take measures to prevent abuses by journalists of professional status to advertise "ethically questionable and illegal" commercial projects); Decision No. 43, *supra* note 83 (admonishing publishers "to be more careful in verifying facts and information in the preparation and publication of materials that evaluate drafts of normative, legal acts").

195. Joint Recommendations, *supra* note 147.

196. See, e.g., Decision No. 5, *supra* note 90 (involving *Ekonomika i zhizn'* editorial office disclaiming responsibility for content of discriminatory advertisement); Decision No. 50, *supra* note 90 (regarding *Segodnia* editor-in-chief denying responsibility for article published in so-called "author's column"); Decision No. 42, *supra* note 96 (considering *Novyi vzgliad* editor-in-chief attempting to relieve himself of liability by stating article was "just one point of view" and "evidence of pluralism"); Joint Recommendations, *supra* note 147 (noting that "heads of many mass media organs arbitrarily expand [the] category" of publications for which they are not liable "to include author's columns, special pages, and individual contributions . . . [and] shift liability for the content to authors personally or to subsidiary editorial offices").

197. See, e.g., Decision No. 11, *supra* note 83 (involving *Ekspress-gazeta* representatives defending publication of sensational, inaccurate, and insulting story about State Duma on grounds that their newspaper was "young" and had to "get on its feet" and "defeat its rivals"); Recommendation No. 1, *supra* note 140 (discussing media justifying dissemination of dangerous advertisements due to "financial hardship"); Decision No. 58, *supra* note 126 (discussing television channel director pleading ignorance of electoral requirements for pre-election agitation).

198. See Decision No. 11, *supra* note 83 (stating *Ekspress-gazeta* editor-in-chief "deliberately and without valid reasons refused to participate in the [Judicial Chamber] hearing"); Decision No. 49, *supra* note 12 (noting *Rossiiskaia gazeta* editor-in-chief provided "groundless" excuses to avoid participation in hearing and delay examination of case).

199. Decision No. 57, *supra* note 122.

200. Joint Recommendations, *supra* note 147.

open and public discussion" and substantiation of their own "untruthful and unobjective" stories.<sup>201</sup> Worst of all, mass media organs complain of "*diktat* of authorities" at the very same time that they themselves are attempting to establish "*diktat* of the press."<sup>202</sup>

#### 4. *The Audience*

In sharp contrast is the Judicial Chamber depiction of the media audience. Russian readers, viewers, and listeners are sympathetic but pitiable characters. They are naive and gullible, easily defrauded and duped by unscrupulous journalists, advertisers, politicians, and publishers.<sup>203</sup> They are indiscriminating consumers of information, unable to distinguish fact from fiction or beneficial from harmful information.<sup>204</sup> Their tastes are crude and unsophisticated. They have an insatiable appetite for scandal, sensation, hyperbole, pornography, and perversion.<sup>205</sup>

In Judicial Chamber opinions, the audience is not an independent actor but a passive victim of outside forces. It is susceptible to any external influence, including those that seek to exacerbate ethnic, social, and religious divisions and to undermine public confidence in democratic institutions, officials, and legislation.<sup>206</sup> Judicial Chamber language conveys this sense of passivity. Several opinions describe the audience as "led astray," "deceived," or "disinformed" by a speaker or publisher.<sup>207</sup> Others refer to attempts to "introduce into the public consciousness"<sup>208</sup> a certain idea, to "cause"<sup>209</sup> readers to have a negative attitude, impression, or stereotype,

201. See Decision No. 57, *supra* note 122.

202. Joint Recommendations, *supra* note 147.

203. See Decision No. 16, *supra* note 90 (noting television viewers defrauded by lottery).

204. See Recommendation No. 1, *supra* note 140 (noting adverse impact on public of "dangerous" advertisements).

205. See Joint Recommendations, *supra* note 147.

206. See Decision No. 21, *supra* note 83 (describing destabilizing effect of racist, extremist, and "unobjective" information as well as "crude and unsubstantiated attacks" against Russian President, Government, and other "institutions of Russian statehood").

207. Decision No. 54, *supra* note 148 ("led astray"); Decision No. 51, *supra* note 142 (stating that hidden advertisements "promoted the communication of disinformation to readers"); Decision No. 58, *supra* note 126 (discussing possible disinformation and deception of voters by Klin television's dissemination of political speeches).

208. Statement No. 1, *supra* note 125; see also Decision No. 54, *supra* note 148 (stating that Federal Investment Fund advertising campaign was "designed to create in citizens the notion that a commercial organization . . . was a state organization").

209. Decision No. 43, *supra* note 83; see also Expert Conclusion No. 5, *supra* note 120 (claiming *Kolokol's* anti-Semitic publications could "create a corresponding ethnic negativism in readers").

or to "create insufficient public support"<sup>210</sup> for specific officials or legislation.

This depiction of the naive, credulous audience has important implications for Judicial Chamber treatment of harmful speech. It suggests the need for some sort of preliminary filter or protective device (whether it is media self-restraint, moral codes, or government supervision) to ensure dissemination of only information that benefits Russian audience and, ultimately, society.

### 5. *The Target*

The target of harmful speech appears in two guises — as complainant and as "absence."<sup>211</sup> Several Judicial Chamber decisions involve claims by government or legislative personnel or groups that were allegedly defamed, humiliated, and discredited by mass media publications or broadcasts.<sup>212</sup> In these opinions, the target is in the foreground, the initial impetus and focus of Judicial Chamber attention. The target is important, however, not as an individual but as the personification of his/her office. In each of these cases, the sole concern of the Judicial Chamber is the injury to state and society rather than individual. For example, in April 1995, the Judicial Chamber ruled that *Rossiiskaia gazeta's* article "The Thief's Hat is on Fire," which accused Press Committee Chairman S.P. Gryzunov and his organization of illegal use of subsidies and budgetary funds, constituted "an abuse of the mass media and violation of legal and ethical norms."<sup>213</sup> The Judicial Chamber defined the injury as "discredit[ing Gryzunov] as a leader of the federal administration," "undermin[ing] the professional reputation of a government institution," and "infring[ing] the rights and legal interests of citizens, especially the receipt of reliable information of social significance."<sup>214</sup>

In other opinions, the target is strikingly absent from the text. Numerous cases deal with mass media dissemination of hate speech, especially ethnic slurs.<sup>215</sup> Yet, there is no discussion of the actual or potential effect of such materials on the target groups or their members. Instead, the focus is

210. Decision No. 43, *supra* note 83.

211. I borrow this term from Binder, *supra* note 49, at 287 (describing contrasting views of women in rape cases as "absence" and "prosecutrix").

212. See, e.g., Decision No. 11, *supra* note 83 (noting claim from Legal Department of State Duma); Decision No. 43, *supra* note 83 (noting claim from Deputy Chairman of Russian Federation State Committee on Antimonopoly Policy and Support of New Economic Structures).

213. Decision No. 49, *supra* note 12.

214. *Id.*

215. See, e.g., Decision 21, *supra* note 83; Decision No. 42, *supra* note 96.

exclusively on the societal implications. To the Judicial Chamber, the harm of hate speech is that it undermines government efforts to "normalize tragic interethnic conflict,"<sup>216</sup> foments ethnic discord and intolerance,<sup>217</sup> and deepens societal cleavages.<sup>218</sup>

Thus, the target emerges in Judicial Chamber opinions as, at best, a minor character. The real victim is society. The combined portrayal of target as "complainant" and "absence" only reinforces the Judicial Chamber's construction of harmful speech as nothing less than a serious threat to Russia's future.

### 6. *The State*

In the abstract, the state is idealized and sanctified. The Judicial Chamber speaks in respectful tones of the "institutions of Russian statehood"<sup>219</sup> and exalts Russian legislators as "the people's representatives."<sup>220</sup> It proclaims the "federal organs of power" (defined in capital letters as Russian Federation President, State Duma, and Government)<sup>221</sup> off limits to media ridicule, humiliation, and attack. It is appalled by a commercial advertiser's irreverent use of "state symbols and attributes."<sup>222</sup>

At a more immediate level, however, a very different picture of the Russian state emerges. The Judicial Chamber portrays actual legislative, administrative, judicial, and presidential personnel and bodies as inept, inexperienced, and overburdened. They appear fundamentally incapable of meeting the challenge of harmful speech.

Several Judicial Chamber opinions emphasize the failure of Russia's parliament to create an adequate legislative "base" to battle mass media abuses. They highlight significant gaps in such areas as dissemination of fascist materials, production of "dangerous" advertisements, and departures from registration certificates and broadcast licenses.<sup>223</sup> Despite these glaring deficiencies in the lawmaking process, some legislators and legislative committees are unwilling to tolerate constructive criticism of their efforts.

216. Decision No. 6, *supra* note 90.

217. See Decision No. 21, *supra* note 83.

218. See Decision No. 42, *supra* note 96.

219. See Decision No. 50, *supra* note 90.

220. Decision No. 11, *supra* note 83.

221. See Decision No. 54, *supra* note 148.

222. *Id.*

223. See Decision No. 44, *supra* note 83 (noting need for new legislation against fascism); Recommendation No. 1, *supra* note 140 (noting gaps in advertising regulations); Decision No. 21, *supra* note 83 (noting deficiencies in registration procedures and legislation to prevent abuse of mass media).

For example, the State Duma's Committee on Information Policy responded to Judicial Chamber "critical assessments" of its mass media-related drafts with an angry, public denunciation of the Judicial Chamber as "extraconstitutional."<sup>224</sup>

The Judicial Chamber depicts the state as equally ineffective in enforcing the minimal law that does exist. Several opinions cite in particular the "insufficient control"<sup>225</sup> of the mass media by government registration and procuratorial bodies. In Judicial Chamber opinions, state organs command little respect from the mass media. Publishers and authors of harmful materials act with impunity, ignoring official warnings from law enforcement authorities.<sup>226</sup> To compound the problem, Russia's court system is clogged with citizens' libel and slander suits against the media.<sup>227</sup>

Finally, Judicial Chamber opinions suggest that the state, in fact, contributes to the harmful speech problem. It does so by "covering up"<sup>228</sup> information and denying journalists access to government meetings and personnel. The Judicial Chamber identifies as especially egregious in this regard the conduct of administrative and presidential agencies; these bodies are "more closed than former party committees."<sup>229</sup> In the end, this inaccessibility of government disserves Russian state and society. It discourages proper verification of sources and leads to publication of unreliable, incomplete, and inaccurate information, bribery of officials, and outright "fabrication and conjecture."<sup>230</sup>

### *C. Judicial Chamber Self-Definition*

Thus, Judicial Chamber harmful speech opinions portray a country out of control, fast approaching social explosion and anarchy. With its gullible public, irresponsible media, and impotent state, Russia appears headed inevitably to its doom. Only immediate and decisive intervention can reverse this course. Since Russian leaders and official institutions are unable to perform this critical function, the Judicial Chamber must step into the brink as Russia's last hope. This notion of "compelled performance"<sup>231</sup> is the basis for Judicial Chamber self-definition and authority.

224. See Statement No. 4, *supra* note 80.

225. Decision No. 21, *supra* note 83.

226. See Expert Conclusion No. 5, *supra* note 120.

227. See Joint Recommendations, *supra* note 147.

228. *Id.*

229. *Id.*

230. *Id.*

231. Ferguson, *supra* note 30, at 206.



### 1. Compelled Performance

The Judicial Chamber portrays itself first and foremost as a reactive institution, one that is set into motion only in response to some external stimulus. It underscores this point by beginning each opinion with direct reference to a specific triggering agent, event, or circumstance. In most cases, it cites a formal complaint or appeal from a named individual, legislative body, or government agency.<sup>232</sup> Even where the Judicial Chamber itself initiated the opinion, it takes care to identify some outside impetus. For example, in its statement approving *Obshchaia gazeta's* publication of a fictitious coup plot, it opened with a description of widespread public concern and pleas for the Judicial Chamber "to express its attitude" toward the publication and to clarify "whether this case represented an exercise of freedom of speech or, on the contrary, an abuse of freedom of mass information."<sup>233</sup>

Although the Judicial Chamber often refers to relevant Russian legislation, it defines its rulings and remedies (especially those that are most controversial) as fundamentally dictated by necessity and/or moral imperative. Thus, in its first statement, the Judicial Chamber announced that it was "necessary" to issue a formal condemnation of mass media use of unsubstantiated rumors, stories, and reports, which "fuel tragic interethnic conflict," "overt immorality," "defamation" of government institutions, and "destabilization of the sociopolitical situation."<sup>234</sup> It focused particular attention on a *Zavtra* article entitled "Kremlin Secrets." It acknowledged that its denunciation of this article would have no legal or practical impact.<sup>235</sup> Nonetheless, the Judicial Chamber felt obligated to speak because it would be "wrong" to allow such an "odious publication" "to remain unheeded and unassessed."<sup>236</sup>

The Judicial Chamber conveys this image of compelled performance most powerfully through its presentation of facts. In each case, it constructs the facts in a way that makes a comprehensive response by the Judicial Chamber appear both unavoidable and essential to the future of Russia. The Judicial Chamber typically starts the facts section of its opinions with a detailed and dramatic description of the allegedly harmful material at issue. It does not merely characterize the publication or broadcast as, for instance, "pornographic" or "subversive" or recapitulate the content in moderate, judicious language. Instead, it sets out the subject matter in colorful, even

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232. See *supra* note 90.

233. Statement No. 2, *supra* note 110.

234. Statement No. 1, *supra* note 125.

235. *Id.*

236. *Id.*

gory detail. It cites graphic and offensive titles and reproduces provocative and outrageous excerpts from texts and videotapes.<sup>237</sup>

The Judicial Chamber makes no attempt to present the facts in a neutral fashion and to invite the reader to determine if the material is harmful or innocuous. It injects its own evaluations of publications, broadcasts, and parties throughout its opinions in blunt, unequivocal language. For example, in one decision, it introduced the facts section thus: "The publication 'Chechen Knot. 13 Theses' is obviously provocative in nature."<sup>238</sup> It then proceeded to castigate a *Novyi vzgliad* author for "delirious fabrications," "absurdity," "insulting, vile epithets," "unidimensional and primitive" style, and "misanthropic ideology."<sup>239</sup>

In its construction of facts, the Judicial Chamber also makes a conscious effort to place each individual case into a broader context.<sup>240</sup> It redefines the specific publication or program at issue as part of an overall harmful speech crisis that threatens Russian society, state, and democratic reform process. In so doing, it suggests that even the smallest transgression can lead to disastrous consequences. By recasting the individual harmful publication or broadcast as part of the larger threat to Russia rather than an isolated incident, the Judicial Chamber establishes a claim of authority for both decision and decision maker. The Judicial Chamber strengthens this claim in many opinions by tracing the misconduct under examination and the general harmful speech problem, in part, to official inaction.<sup>241</sup> As a result, the Judicial Chamber appears to have no alternative but to respond. Anything else would be irresponsible and unthinkable.

The language, voice, and tone of Judicial Chamber opinions reinforce this impression of inevitability and compelled performance. Judicial Cham-

237. See Decision No. 7, *supra* note 91 (listing provocative titles of *Novyi vzgliad* publications); Expert Conclusion No. 5, *supra* note 120 (reproducing numerous quotations from *Kolokol* articles).

238. Decision No. 42, *supra* note 96.

239. *Id.*

240. See Decision No. 58, *supra* note 126 (using Klin Television case to show that "ignorance of the rules for preelection agitation can result in disinformation of the populace, deception of potential voters regarding the dates and procedure for nomination and registration of deputy candidates and their participation in the election campaign" and to emphasize "the great social-political significance of rigorous compliance by the mass media with election legislation").

241. See Decision No. 15, *supra* note 93 (noting that "[u]nfortunately, . . . the Russian Press Committee did not take any measures prescribed by law against the newspaper *Zavtra*" after Judicial Chamber issued statement condemning earlier publication by newspaper); Decision No. 69, *supra* note 139 (reporting "intolerable inaction" by prison employees to stop illegal filming of convicts).

ber opinions feature extensive use of words of obligation and necessity.<sup>242</sup> Moreover, all published opinions are written in a univocal (or "monologic"<sup>243</sup>) third person singular. They are signed by Chairman Vengerov, not by individual judges.<sup>244</sup> There are no separate dissenting or concurring opinions that might suggest other readings of facts and law.<sup>245</sup> The tone is engaged, emotional, and judgmental. Opinions exude "concern,"<sup>246</sup> "regret,"<sup>247</sup> and, above all, "righteous indignation"<sup>248</sup> about the case at hand and the general state of affairs in Russia. These factors combine to create a sense of unanimity and certitude. They send a clear message to the reader: There is only one possible interpretation of the facts and it is an interpretation that demands immediate and decisive action.

A prime illustration of these techniques is *Decision No. 21*, the Judicial Chamber's broad-scale attack on "mass media publications that incite social and nationalist intolerance."<sup>249</sup> Although the Judicial Chamber was the formal initiator of the opinion, it began its decision with the statement that

242. See *Decision No. 35*, *supra* note 97 (noting Judicial Chamber was "forced to intervene"); *Decision No. 58*, *supra* note 126 (stating Klin Television leadership and journalists were "obliged to consider legislative requirements" on preelection canvassing in preparation of broadcasts); *Expert Conclusion No. 5*, *supra* note 120 (stating Judicial Chamber "deems it necessary" to send opinion to Procurator General and Russian Press Committee for further action and to prepare draft amendments to Law on the Mass Media, and "deems it advisable" to publish opinion in *Rossiiskaia gazeta*).

243. Ferguson, *supra* note 30, at pt. II.

244. In contrast, the Judicial Chamber Regulations call for the signature of Judicial Chamber members. *Judicial Chamber Regulations*, *supra* note 92, point 26.

245. According to the Statute on the Judicial Chamber and the Judicial Chamber Regulations, decisions are adopted by a majority of the total number of Judicial Chamber members (as are statements, recommendations, and expert conclusions). *Statute on the Judicial Chamber*, *supra* note 12, art. 30; *Judicial Chamber Regulations*, *supra* note 92, point 25. Reprimands and proposals to terminate media activity or to issue warnings to media founders or editorial staffs, however, must be approved by a "consensus" of Judicial Chamber members. *Id.* The *Judicial Chamber Regulations* specifically provide that a member "who disagrees with the majority opinion can state in writing his separate opinion, which is attached to the case." *Id.* No such opinions have been published thus far either in *Rossiiskaia gazeta* or the Judicial Chamber's own collection of opinions.

246. *Decision No. 44*, *supra* note 83 ("The Judicial Chamber shares the concern of the public . . . about the spread of fascism in Russia today.").

247. *Decision No. 50*, *supra* note 90 ("The Judicial Chamber also notes with regret that S. Parkhomenko's article turned out to be only one in a series of publications, which often appear in the mass media, that are unobjective and insulting to the young institutions of statehood of democratic Russia.").

248. Lasser, *supra* note 70, at 1385.

249. *Decision No. 21*, *supra* note 83.

it had "received many appeals from social organizations and individuals"<sup>250</sup> about such publications. The Judicial Chamber proceeded to provide a detailed description of specific racist, fascist, and anti-governmental articles with direct citation to titles and text. For example, it reproduced the title of a *Zavtra* article, "Yeltsinism-Hilterism," as evidence of that newspaper's "utter refusal to accept legitimate authority."<sup>251</sup> It quoted a *Narodnoi stroi* article's call for creation of an empire dedicated to "preservation and cultivation of the Aryan element . . . as first among Russians."<sup>252</sup>

Throughout *Decision No. 21*, the Judicial Chamber emphasized the general societal implications of such publications. According to the Judicial Chamber, "crude and unsubstantiated attacks against . . . institutions of Russian statehood" promote "social intolerance."<sup>253</sup> Publications that "create negative ethnic stereotypes" constitute a "social danger."<sup>254</sup> They inspire "nationalist radicals" and "extremists" and "supply an "ideological base" for fascist armed groups."<sup>255</sup>

The Judicial Chamber also made a point of noting the futile efforts of governmental authorities to control media "abuse of freedom of mass information."<sup>256</sup> It castigated registration bodies, the Russian Press Committee, the procuracy, and the legislature for their inadequate responses to this critical societal problem. This led the Judicial Chamber to the inescapable conclusion that it must step to the fore and take action. In the words of the Judicial Chamber, "It is impossible to tolerate any longer this abnormal and socially dangerous situation in which mass media publications incite social and nationalist hatred."<sup>257</sup> With this claim of authority grounded in dire necessity, the Judicial Chamber concluded *Decision No. 21* with a series of strikingly comprehensive proposals. It did not confine its remedies to the specific publications at issue, but rather, provided a blueprint for overall systemic reform, with the Judicial Chamber as architect, guide, and overseer. Thus, the notion of "compelled performance" is ultimately transformed into a rationale, indeed an imperative, for a highly activist Judicial Chamber.

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250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

## 2. Judicial Chamber Roles

The Judicial Chamber, then, assumes the mantle of Russia's savior, a position not chosen for itself but thrust upon it by sheer force of circumstances. In this capacity, it sets for itself an agenda that ranges far beyond that stipulated in its founding documents. Under the Judicial Chamber's self-fashioned program, it must do more than resolve information disputes and correct infractions of mass media legislation. It must also communicate the enormity of the harmful speech problem to spur official and public concern, identify the root causes of the problem, and offer constructive solutions.

In its least controversial role, the Judicial Chamber portrays itself as adjudicator of disputes. It is a trier of fact and applier of law. It considers evidence, evaluates party testimony and arguments, and applies existing domestic and international law norms and rules to specific fact situations.<sup>258</sup> The Judicial Chamber also speaks as a stern but fair disciplinarian. It reprimands offenders, metes out punishment, weighs mitigating factors, and when necessary, calls for further corrective action.<sup>259</sup> Moreover, in several cases, the Judicial Chamber appears as special guardian of the weak and powerless. It makes particular efforts to protect the young and naive from corruption, fraud, and deception.<sup>260</sup>

In addition, the Judicial Chamber often figures as investigator and prosecutor. It scrutinizes publications and broadcasts for possible infringement of constitutional and mass media legislation and institutes proceedings on its own initiative against violators.<sup>261</sup> Similarly, the Judicial Chamber independently uncovers and censures governmental misconduct in the mass media sphere.<sup>262</sup>

The Judicial Chamber also speaks as dramatic raconteur. It conveys to the reader of its opinions the crisis proportions of Russia's harmful speech threat. Through the use of powerful language and imagery, it recasts each case as a morality play, part of the Manichean struggle between the forces of good and evil for control of Russia's soul and destiny.<sup>263</sup>

258. See *supra* notes 92-99 and accompanying text.

259. See *supra* notes 83, 100 and accompanying text.

260. See Decision No. 7, *supra* note 91 (condemning *Novyi vzgliad* publications as "serious threat to the moral interests of children and adolescents"); Decision No. 16, *supra* note 90 (ruling against fraudulent television lottery); Recommendation No. 1, *supra* note 140 (condemning dissemination of dangerous advertisements).

261. See Decision No. 7, *supra* note 91 (noting Judicial Chamber on its own initiative examined and condemned "immoral," "offensive" publications in *Novyi vzgliad*).

262. See Joint Recommendations, *supra* note 147 (criticizing officials for threatening newspapers, terrorizing journalists, impeding media access to information, and accepting bribes).

263. See *supra* notes 149-63 and accompanying text.

Moreover, the Judicial Chamber portrays itself as objective and constructive outside critic of Russia's mass media system.<sup>264</sup> As such, it appears uniquely qualified to conduct the full and impartial examination required to determine the sources of and contributors to Russia's harmful speech problem. In this capacity of diagnostician, the Judicial Chamber highlights fundamental systemic and attitudinal defects — a flawed and inadequate legislative base; haphazard enforcement by the state and the mass media; adverse, unintended effects of recent political, economic, and institutional reforms; and above all, the failure of Russian government, media, and public alike to "understand" the proper role of a "free press" in a post-Soviet democracy.<sup>265</sup>

Finally, the Judicial Chamber defines itself as both architect and executor of an effective response to Russia's harmful speech challenge. In these functions, it assigns itself a variety of roles and responsibilities. It views itself as law creator, formulating statutory and regulatory schemes to address legislative gaps and defects in such critical areas as media registration, dissemination of fascist materials and deceptive advertisements, and media access to state personnel, meetings, and documents.<sup>266</sup> The Judicial Chamber also assumes the position of economic and institutional reformer. It recommends adoption of economic policies to "strengthen" the press and limit dependence on government and commercial sponsors.<sup>267</sup> Moreover, it calls for an overhaul of federal, regional, and local government procedures and bodies to improve the institutional machinery for enforcement of media rights and responsibilities.<sup>268</sup>

For the Judicial Chamber, its most important and contested role is that of teacher and moral guide of Russian society.<sup>269</sup> Since its inception, the Judicial Chamber has launched a massive campaign to train and educate Russian government, press, and citizenry about the appropriate status, rights, and responsibilities of a post-Soviet democratic press. It self-consciously

264. See Statement No. 4, *supra* note 80 (describing objective criticism by Judicial Chamber, which threatened the "comfortable existence" of media and government organizations).

265. For an extended discussion of these points, see Foster, *supra* note 80, at pt. II.

266. See Decision No. 21, *supra* note 83 (regarding registration); Decision No. 44, *supra* note 83 (regarding fascist materials); Recommendation No. 1, *supra* note 140 (regarding advertisements). See generally V.N. Monakhov, *Judicial Chamber — Creator of Law or Lawlessness?*, in JUDICIAL CHAMBER COLLECTION, *supra* note 12, at 162 (describing "law creation functions" of Judicial Chamber).

267. See Joint Recommendations, *supra* note 147.

268. See *supra* notes 225-29 and accompanying text.

269. For an example of press criticism, see Klimov, *supra* note 12 (expressing "doubt and concern" about Judicial Chamber's role as teacher).

directs its opinions toward the outside reader as well as the parties. It uses each dispute as a point of departure to interpret and explain broad constitutional and legal guarantees of speech, press, and information freedom and their legal and ethical limits.

A good example of this didactic role of the Judicial Chamber appears in *Decision No. 69*, the ruling against A. G. Nevzorov's television exposé of Russian women's correctional facilities.<sup>270</sup> The Judicial Chamber took care to explain to the reader that "in general" media coverage of Russian penitentiaries "deserves support."<sup>271</sup> It emphasized that "openness" of the prison system to the mass media and thus public opinion has practical value and explicit statutory basis.<sup>272</sup> Such coverage is an "essential condition" to ensure observance of "generally-accepted principles and norms"<sup>273</sup> within prisons. Moreover, "[t]he right of a journalist to collect and disseminate information, including information about the penitentiary system and its actual problems, is recognized and guaranteed by Russian legislation."<sup>274</sup> The Judicial Chamber then proceeded to clarify that the media's right to information is not absolute: "However, realization of this right must not become the grounds and excuse for infringing the constitutional rights of citizens, including prisoners, to inviolability of private life."<sup>275</sup> It concluded that by filming convicts without their consent, Nevzorov "flagrantly violated" constitutional, statutory, and ethical norms.<sup>276</sup>

As the above example indicates, the Judicial Chamber speaks as moral arbiter as well as teacher. The Judicial Chamber, whose task consists of reminding Russian government, press, and public of the serious ethical principles and values at stake in harmful speech cases, is the conscience of the community. In virtually every opinion, it defines media infractions as violations of both law and "generally-recognized ethical norms."<sup>277</sup> It conducts a public trial of the moral character and conduct of parties. It excoriates media and government defendants, holding them up as object lessons for public ridicule and censure.<sup>278</sup> It also makes a point of communi-

270. *Decision No. 69, supra* note 139.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *See Decision No. 7, supra* note 91 (reprimanding *Novyi vzgliad* editor-in-chief for violations of "legal and generally-recognized ethical norms").

278. *See Decision No. 11, supra* note 83 (describing *Ekspress-gazeta* editorial office and

cating any mitigating factors, evidence of repentance, or other positive attitudes or behavior by parties.<sup>279</sup> Throughout its opinions, the Judicial Chamber stresses the need to supplement legal methods with extralegal techniques. It calls upon parties to find "civilized" and "acceptable" means to settle information disputes and remedy losses informally.<sup>280</sup> It urges self-regulation by professions, internal control by media and state organizations, and personal "self-restraint" by journalists.<sup>281</sup> It favors extensive use of publicity as a sanction and deterrent.<sup>282</sup>

The Judicial Chamber's concerted effort and directive to combine legal and moral norms and techniques is the most notable and controversial aspect of its opinions and its charter for the future.<sup>283</sup> This blended approach is also the key feature of the Judicial Chamber's distinctive "conversation" about law, a topic that will be explored in Part V of this Article.

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their publications as "elementarily ignorant," "confused," "absurd," "indecent," "malicious," and "insulting").

279. See Decision No. 44, *supra* note 83 ("tak[ing] into consideration the readiness of VGTRK to correct its admitted mistake regarding the 'Sirena' corporation").

280. See Decision No. 16, *supra* note 90 ("commend[ing]" telephone company for independently reimbursing participants in television lottery); Decision No. 35, *supra* note 97 (noting "many of the problems involved in realization of freedom of mass information in Primorskii krai are the result of the krai authorities' inability or unwillingness to establish an equal, civilized dialogue with the press").

281. See Decision No. 54, *supra* note 148 (urging advertising community to develop scheme of self-regulation to prevent production and dissemination of illegal and improper advertisements); Decision No. 35, *supra* note 97; Decision No. 37, *supra* note 83; Joint Recommendations, *supra* note 147.

282. See Bychkova, *supra* note 8, at A7 (citing Vengerov); Anatolii Vengerov, Comments at Press Conference (Sept. 6, 1994), in *POST-SOVIET MEDIA L. & POL'Y NEWSL.*, Oct. 15, 1994, at 3, 4 ("Sometimes public censure is serious, very serious."). The Judicial Chamber has recommended extensive media coverage of "abuses of freedom of mass information," prime offenders, and responses by law enforcement organs. See Decision No. 21, *supra* note 83. It orders media to retract or "rectify" false, inaccurate, misleading, and libelous stories and often requires publication of its own critical evaluations of texts and authors. See Decision No. 30, *supra* note 82 (ordering *Sobesednik* to publish Judicial Chamber ruling against newspaper); Decision No. 27 (64) On the Appeal by Russian Federation Federal Assembly State Duma Deputy V.N. Lysenko Regarding Inaccurate Information Broadcast on the "Vremia" Program (ORT) (Sept. 22, 1995), *ROSS. GAZETA*, Sept. 30, 1995, at 4 [hereinafter Decision No. 64] (ordering ORT to "rectify" in future broadcast "inaccurate" references to Deputy V.N. Lysenko).

283. A revealing example of this "blended" approach appeared in Statement No. 1: "A legal barrier should be erected against insolent, shameless, and groundless attacks on the institutions of Russian statehood, their leaders and representatives and here, ethical values should be used." Statement No. 1, *supra* note 125.



### 3. Self-Limitations

The Judicial Chamber has received little appreciation for its efforts to rescue the Russian society, state, and democracy from the harmful speech challenge. Critics commonly depict the Judicial Chamber as an extraconstitutional body that dispenses "justice" on an *ad hoc* basis in accordance with its own notions of law and morality.<sup>284</sup> The Judicial Chamber's self-portrait is markedly different. It views its decision making and authority as subject to real procedural, factual, and legal constraints. Throughout its opinions, it makes a point of emphasizing and reassuring the reader of these limitations.

In its opinions, the Judicial Chamber conveys the impression that it operates within defined procedural and institutional parameters. It acts upon receipt of formal petitions from plaintiffs and considers counterclaims by media and government defendants.<sup>285</sup> After due notice to parties,<sup>286</sup> it holds "judicial hearings," in which designated "representatives" of parties participate.<sup>287</sup> It acknowledges limits on its jurisdiction to hear cases. For example, in *Decision No. 51*, the Judicial Chamber expressly declined to provide a "legal evaluation" of a republic presidential decree, liability of a newspaper editorial office, "other questions of a property nature," and contributory actions by nonparty organizations on grounds that such matters fell outside its competence.<sup>288</sup>

Similarly, the Judicial Chamber indicates qualified authority to remedy violations of mass media legislation. Often it confines itself to reprimanding

284. See Oleg Revenko, *Has an Administrative Body Been Created?*, ROSS. GAZETA, May 13, 1995, at 6 (stating Judicial Chamber authority violates Constitution); Dmitrii Shteinberg, *I am for the Judicial Chamber, But . . .*, ROSS. GAZETA, May 13, 1995, at 6 (criticizing Judicial Chamber for its "disrespectful and insulting" language that is "inconsistent with law and ethics," its arbitrary and "peculiar" interpretation of statutes, its lack of concern for due process, and its unconstitutional powers).

285. See Decision No. 48, *supra* note 82 (considering formal petition from the Chairman of Russian Federation State Committee for Antimonopoly Policy and Support of New Economic Structures regarding *Izvestiia* publication and counterclaim by *Izvestiia's* representative that Judicial Chamber lacked competence to hear case).

286. See Decision No. 16, *supra* note 90 (noting defendant was "informed of . . . Judicial Chamber hearing . . . in a timely manner"). But see Shteinberg, *supra* note 284 (criticizing Judicial Chamber for providing *Rossiiskaia gazeta* inadequate notice of time and date of hearing).

287. See Decision No. 11, *supra* note 83 (involving participation in hearing by representatives of State Duma's Legal Affairs Department and of *Ekspress-gazeta*).

288. Decision No. 51, *supra* note 142. But see *supra* note 82 (discussing Judicial Chamber's assertion of expansive jurisdiction to new cases involving slander or libel of public officials).

offenders and issuing nonbinding "proposals" for further action against defendants.<sup>289</sup> It forwards case materials to the proper governmental and media channels and personnel "for adoption of measures stipulated by law."<sup>290</sup> In many opinions, the Judicial Chamber reinforces this concern for procedural regularity by requiring formal publication in the official source for Judicial Chamber documents — *Rossiiskaia gazeta*.<sup>291</sup>

Judicial Chamber treatment of evidence and testimony points to another important constraint on decision making. It suggests that the Judicial Chamber can render judgment only after a thorough consideration of all facts, viewpoints, and circumstances. Opinions contain lengthy lists of documents and experts consulted by the Judicial Chamber.<sup>292</sup> They also record the names of speakers at formal hearings (the parties, their representatives, and interested third persons).<sup>293</sup> In several opinions, the Judicial Chamber discusses presentations by claimants and defendants, noting strengths and, especially, weaknesses in both sides' arguments.<sup>294</sup> In addition, the Judicial Chamber often explicitly draws on expert or party testimony and materials to support its arguments and conclusions. For instance, in its recommendation condemning dissemination of dangerous advertisements, it cited "extensive data" supplied by the Ministry of Health, "revealing that smoking has become an alarming problem in Russia and showing the increase in fatalities from smoking and the rise in numbers of teenaged and women smokers (including pregnant women)."<sup>295</sup>

Judicial Chamber opinions call attention to the legal as well as factual bases of decisions. The message is that all rulings are grounded in and even dictated by law, not personal whim or subjective determination. The Judicial Chamber takes care to support its conclusions with direct citation to govern-

289. See Decision No. 32, *supra* note 93 (reprimanding author of television program and proposing that All-Russian State Television and Company leadership "bring disciplinary proceedings against the people responsible for broadcasting" program).

290. Decision No. 7, *supra* note 91.

291. See *supra* note 101.

292. See *supra* notes 93, 95.

293. See *supra* notes 94-96 and accompanying text.

294. For example, in Decision No. 11, the Judicial Chamber rejected *Ekspress-gazeta's* argument that because it was a "young" newspaper it had to employ a sensationalistic style to "get on [its] feet" and "defeat [its] rivals." Decision No. 11, *supra* note 83. The Judicial Chamber stated that it was "impermissible to assert that one can use cheap sensations, publish untrue and insulting materials, and mock the institutions of Russian statehood for the sake of winning in the newspaper market." *Id.*; see also Decision No. 50, *supra* note 90 (rejecting *Segodnia* argument that publication of materials in so-called "author's column" relieves author and editor-in-chief from liability for abuse of mass information).

295. Recommendation No. 1, *supra* note 140.

ing domestic and international law norms and rules. For example, in its ruling against media dissemination of discriminatory employment advertisements, the Judicial Chamber quoted verbatim guarantees of gender equality set forth in the Russian Constitution and Labor Code and the United Nations Convention on Elimination of All Forms of Discrimination Against Women.<sup>296</sup> Moreover, in every opinion, the Judicial Chamber prefaces its holdings, statements, and recommendations with explicit reference to authorizing provisions in its Statute or Regulations and, occasionally, other Russian legislation.<sup>297</sup>

Finally, the Judicial Chamber makes an effort throughout its opinions to persuade the reader that its approach to harmful speech cases is reasonable and balanced. For instance, in *Statement No. 2* the Judicial Chamber reported that it had "refrained from hasty conclusions about the accuracy of the publication" at issue.<sup>298</sup> This was due to the fact that there was an ongoing criminal investigation of the case, "the results of which [were] still unknown."<sup>299</sup> The Judicial Chamber also conveys a sense of cautious, balanced decision making by emphasizing the positive as well as negative aspects of media dissemination of information. Thus, it will pledge its support for such general principles as "pluralism" and "professional creative freedom of journalists" in the same opinion that it denounces a specific case of media "abuse of freedom of mass information."<sup>300</sup>

An excellent illustration of this technique appears in *Decision No. 43*, the Judicial Chamber's ruling against "unreliable," "inaccurate," and "insulting" critiques of Russia's draft advertising law.<sup>301</sup> In this opinion, the Judicial Chamber applauded "legitimate and constructive" media criticism of the bill.<sup>302</sup> According to the Judicial Chamber, such publications were "justified" and could potentially "contribute to improvement of the draft law."<sup>303</sup> The Judicial Chamber expressed its sensitivity to the "understandable" press "concern" about the content of the law and its implications for economic reform, the market economy, and "formation of an economic base for independence of the mass media."<sup>304</sup> It then meticulously distinguished the

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296. Decision No. 5, *supra* note 90.

297. *See, e.g.*, Decision No. 64, *supra* note 282 (citing Articles 4, 9, and 10 of Statute on the Judicial Chamber and Article 19 of Civil Code).

298. Statement No. 2, *supra* note 110.

299. *Id.*

300. Decision No. 32, *supra* note 93.

301. Decision No. 43, *supra* note 83.

302. *Id.*

303. *Id.*

304. *Id.*

materials before it from exemplary "objective, reliable, and professional" critiques.<sup>305</sup> In so doing, the Judicial Chamber communicated that its decision should not be read as an arbitrary, blanket condemnation of all media critique but, rather, as a reasonable, narrow ruling against publications that misstated, distorted, and discredited the substance and goals of the draft advertising law.<sup>306</sup>

### V. *Judicial Chamber Conversation*

In the final analysis, the Judicial Chamber defines itself as, above all, a legal institution.<sup>307</sup> According to its members, it is "guided by principles of law"<sup>308</sup> and subject to the "high ethical demands"<sup>309</sup> of law. It defends and upholds "legal principles" even in the face of official, media, and public opposition.<sup>310</sup> Its mission is not only to apply law but also to "explain," "reveal," and "create" law.<sup>311</sup> Thus, Judicial Chamber opinions are as much a "conversation" about law as a "performance." They communicate to parties, legal and journalistic communities, and lay audience alike the Judicial Chamber's vision of law in post-Soviet Russia.

#### A. *General Parameters: Law, Democracy, and Mass Media*

The starting point for any Judicial Chamber conversation about law is the 1993 Russian Constitution. According to the Judicial Chamber, the Constitution is Russia's first step toward a democracy ruled by law. Unlike ceremonial dead letter constitutions of the past, this Constitution is a "living," "working" document.<sup>312</sup> It is the fundamental guarantee of Russian democracy, human rights, and irreversibility of the reform process. It is the

305. *Id.*

306. *Id.* For a critical reaction to this opinion, see Boris Piliatskin, *Antimonopoly Committee Wants Monopoly Control of Advertising and Is Trying To Take the Press in Hand*, IZVESTIYA, Mar. 21, 1995, at 5, translated in F.B.I.S.-SOV, Apr. 7, 1995, at 57.

307. Iu. V. Feofanov, *The Fifth Item in the Crime Questionnaire*, in JUDICIAL CHAMBER COLLECTION, *supra* note 12, at 169, 172 ("[T]he Judicial Chamber considers itself, first and foremost, a legal institution").

308. *Id.*

309. Vengerov, *supra* note 106, at 142.

310. Feofanov, *supra* note 307, at 172.

311. Monakhov, *supra* note 266, at 165.

312. Report of the Russian Federation Presidential Judicial Chamber for Information Disputes On the State of Affairs in the Russian Federation with Respect to Observance of Freedom of Mass Information in 1994 (Jan. 10, 1995) [hereinafter Report], in JUDICIAL CHAMBER COLLECTION, *supra* note 12, at 173, 176 ("[T]he Constitution lives and works.").

"ultimate defense against the tyranny of officials"<sup>313</sup> and the "poisonous weeds"<sup>314</sup> of fascism, separatism, anarchy, and immorality that threaten to strangle the young "sprouts"<sup>315</sup> of Russian democracy and legality. The Constitution establishes guiding principles for all spheres of activity — political, economic, social, spiritual, as well as legal. It deserves utmost respect and deference from Russian government authorities, and citizenry.

The Judicial Chamber emphasizes, however, that the Constitution is only a broad charter. It must be fleshed out and concretized by Russian legislation. Admittedly, Russia's current legislative base is incomplete, imperfect, and underenforced.<sup>316</sup> Nonetheless, even in its rudimentary form, Russian legislation is beginning to develop into a source of "powerful legal protection"<sup>317</sup> for the Russian Constitution and reform process.

The central question for the Judicial Chamber, then, is how to translate the evolving post-Soviet "law on the books" into reality. One response is widespread popularization, extension, and penetration of law throughout Russian state and society. As the Judicial Chamber often emphasizes in its opinions, ignorance of law is no defense.<sup>318</sup> Indeed, it may actually impede Russia's advance toward democracy and the rule of law. For the Judicial Chamber, however, knowledge and mastery of relevant constitutional and statutory rules is only part of the answer. What is essential as well is a shared societal understanding and internalization of the ethical values and principles that infuse and animate legal provisions.<sup>319</sup> According to the Judicial Chamber, the crucial task of the present transitional stage is to instill in Russian society a knowledge and respect for both the spirit and letter of the law. In short, Russia must develop a new legal culture, one that will speed its progress from its totalitarian "rule of man" past to its democratic "rule of law" future.

The Judicial Chamber traces many of the current problems in the mass media sphere to this very lack of legal culture. It argues that media, government, and public do not appreciate the full legal and ethical dimensions of new constitutional guarantees of press, expressive, and information free-

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313. *Id.* at 177.

314. *Id.* at 175.

315. *Id.* at 185.

316. *See supra* notes 223-27 and accompanying text.

317. Report, *supra* note 312, at 178.

318. *See, e.g.*, Decision No. 58, *supra* note 126 (dismissing television channel director's argument that he should be relieved from liability due to his ignorance of electoral law requirements for pre-election canvassing).

319. *See supra* notes 277-83 and accompanying text.

doms. In particular, it cites the general failure to understand that rights come with responsibilities. For the Judicial Chamber, the highest legal and ethical duty of every Russian citizen — journalist, publisher, government official, and media consumer alike — is to exercise rights "responsibly" with due consideration for the interests of Russian society.<sup>320</sup>

## B. *What Kind of Conversation?*

### 1. *Rejection of White's Democratic and Authoritarian Typologies*

The Judicial Chamber's conversation is a conversation about democracy yet is not "democratic" as defined by Professor White in the U.S. context. Clearly, this is not a conversation among equals.<sup>321</sup> Throughout its opinions, the Judicial Chamber stakes out a position of dominance vis-à-vis its reader. Whether in the capacity of judge, teacher, moral arbiter, or disciplinarian,<sup>322</sup> it claims a superior understanding of the form, substance, and goals of Russia's evolving legal system. Moreover, unlike White's democratic conversation,<sup>323</sup> the Judicial Chamber explicitly excludes some individuals from participation — those journalists and publishers that are so evil or incorrigible as to be beyond redemption or appeal.<sup>324</sup>

The Judicial Chamber's conversation diverges from the democratic model in other crucial aspects. The Judicial Chamber does not draw on shared values or understandings of such fundamental concepts as democracy or the rule of law.<sup>325</sup> It seeks to create and inculcate such values. The Judicial Chamber also does not attempt to engage the independent judgment or critical reasoning of the reader and invite him to apply law to complex fact situations on his own.<sup>326</sup> Instead, it guides and teaches the reader how to do so. Furthermore, the Judicial Chamber does not "hol[d] up its own efforts to [audience] scrutiny and criticism."<sup>327</sup> It asserts and defends its

320. See Joint Recommendations, *supra* note 147.

321. See WHITE, *supra* note 13, at 157, 172 (discussing equality and openness of democratic conversation).

322. See *supra* Part IV.C.2.

323. See WHITE, *supra* note 13, at 154-57 (using Brandeis opinion in *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting), to illustrate inclusive aspects of democratic conversation).

324. See *supra* notes 165, 188 and accompanying text.

325. See WHITE, *supra* note 13, at 157.

326. See *id.* at 101 (noting democratic conversation defines reader "as a free agent — who in reading the text is encouraged to activate these capacities" and "invite[s] the use of mind and judgment in its readers").

327. *Id.* at 172.

authority as legal and moral actor.<sup>328</sup> Indeed, it often appears hypersensitive to outside criticism.<sup>329</sup>

The Judicial Chamber does not adopt the democratic format because it cannot do so. Such a conversation requires all participants to know, accept, and share basic notions of law and legality as well as a common commitment to and definition of democracy and the rule of law. With the low level of legal culture in Russia today, the Judicial Chamber addresses an audience that lacks familiarity and respect for legal norms and rules. Moreover, as repeated political and ethnic crises underscore, it speaks to an audience deeply divided by cultural, ethnic, and ideological differences, with sharply divergent views regarding Russia's past, present, and future. Thus, at this point in Russian history, a democratic conversation about law would appear to be both premature and futile.

At first glance, the Judicial Chamber's conversation seems to fit the authoritarian model identified by White in U.S. opinions. The Judicial Chamber "reduces difficulty to simplicity."<sup>330</sup> It often characterizes facts and law with a "blunt and unquestioning finality"<sup>331</sup> and "demands simple and total obedience"<sup>332</sup> of its reader to those interpretations. It claims for itself the authority, even the obligation, to "remake" constitutional and statutory language at will.<sup>333</sup> It repeatedly rejects "legalistic argumenta-

328. See *supra* Part IV.C.

329. See Vengerov, *supra* note 106, at 142-44; Statement No. 4, *supra* note 80.

330. WHITE, *supra* note 13, at 147.

331. *Id.* at 145.

332. *Id.* at 101.

333. The Judicial Chamber views Russia's skeletal legislative base as creating a dangerous vacuum, which facilitates widespread violations of citizens' constitutional rights and freedoms. It sees itself as obligated to fill this gap in practice. Accordingly, it independently remakes constitutional and statutory language to ensure full legal coverage of specific fact patterns and problems. For example, a common technique is to insert adjectives to modify constitutional provisions. Thus, the Judicial Chamber often restates the constitutional right to receive information as the right to receive "reliable" or "objective" information. See Statement No. 11, *supra* note 161 (noting constitutional "right of citizens to receive reliable and objective information"); Decision No. 2, *supra* note 90 (noting citizens' right to receive "reliable and prompt information"). Another approach is to expand existing statutory categories and definitions. For instance, in a number of opinions, it unilaterally extends the concept of "abuse of freedom of mass information," set out in Article 4 of the Law on the Mass Media, to cases involving media critique of government officials and institutions. See Decision No. 48, *supra* note 82 (stating *Izvestiia* story about government official "represented an abuse of freedom of mass information"); Decision No. 11 (94) On the Appeal by R.F. Minister of Construction, E.V. Basin, Regarding Iu. Kalinina's Publication "The Golden Calf" of the Chechen Republic" in Issue No. 2 of the Journal "Itogi" (June 27, 1996), ROSS. GAZETA, July 10, 1996, at 6 [hereinafter Decision No. 94] (noting *Itogi* critique of Ministry

tion"<sup>334</sup> in favor of vague, often unarticulated ethical principles and standards.<sup>335</sup> The most powerful argument to the Judicial Chamber is framed not in terms of a reasoned discussion of legal norms and rules but rather in accordance with the Judicial Chamber's notions of responsibility and benefit to Russian society.<sup>336</sup> Like White's authoritarian judge, the Judicial Chamber thus emerges as a "wise judge, entitled to act as the 'conscience' of the community."<sup>337</sup> It "assert[s]" "the power of the moral, aesthetic, and civilized actor over the language and categories of the law."<sup>338</sup>

Yet, as I explain in detail in the next section, the Judicial Chamber's conversation is not authoritarian in the strictest sense. The essential difference is that the Judicial Chamber does not seek to impose a vision on its audience. Instead, it makes a real effort to guide, persuade, and train its reader. In essence, its goal is to prepare its reader for participation at some future date in a genuinely open and free democratic conversation.

The Judicial Chamber rejects the authoritarian model because it too is incompatible with current Russian conditions. First, such a format would likely be ineffective in achieving the Judicial Chamber's principal objective — creating the new legal culture needed for a full-fledged Russian democracy ruled by law. It is impossible to change long-standing popular attitudes and customs — let alone develop a legal culture from scratch — overnight by mere fiat. Second, an authoritarian conversation would lack theoretical and popular legitimacy. Resort to authoritarian techniques would suggest historical associations with Russia's discredited Tsarist and Soviet totalitarian past and would likely generate popular resistance. Third, from a purely practical institutional standpoint, such an approach would be problematic. The Judicial Chamber has minimal enforcement powers to back up its commands.<sup>339</sup> Moreover, as a new body, it is unable to draw on an historical track record or reservoir of popular respect for and compliance with its rulings. To make matters worse, because of its uncertain status in

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of Construction constituted "abuse of freedom of mass information"). This permits the harshest possible penalties against offenders. For a critique of this expansion of "abuse of freedom of mass information," see Shteinberg, *supra* note 284 (discussing Judicial Chamber's "very peculiar interpretation of the Law on the Mass Media" and arguing that "one would have to indulge in sheer fantasy" to take Judicial Chamber's position that "The Thief's Hat is on Fire" constituted "abuse of freedom of mass information").

334. WHITE, *supra* note 13, at 109.

335. See *supra* notes 196-97 and accompanying text.

336. See *supra* note 110.

337. WHITE, *supra* note 13, at 111.

338. *Id.* at 109.

339. See *supra* notes 83-86 and accompanying text.



the Russian political, legal, and constitutional structure,<sup>340</sup> it cannot even rely on more established government organs to implement its decisions. The Judicial Chamber without legal or practical authority could be authoritarian in name only.

Thus, neither the "democratic" or "authoritarian" models proposed by Professor White in the U.S. context adequately describe the Russian Judicial Chamber's conversation about law. As I will demonstrate in the next section, the best analytical framework for understanding Judicial Chamber opinions is the "parental" model originated by Harold Berman in 1950.

## 2. Parental Conversation

### a. Berman's Parental Law Model

In his pathbreaking study *Justice in Russia: An Interpretation of Soviet Law*,<sup>341</sup> Professor Berman introduced the concept of parental law to explain the distinctive features of the evolving Soviet Russian legal system. The cornerstone of the parental model is its emphasis on the "nurturing" or "upbringing" role of law.<sup>342</sup> This leads to a new definition of the relationship between law and the people it addresses. Law is a "parent" and "teacher" and the "subject of law" is a "child or youth to be trained, guided, disciplined, protected."<sup>343</sup> The parental model views the individual primarily in terms of his/her membership in the group. It defines the legal person not as an "independent possessor of rights and duties" but as a "dependent member of the collective."<sup>344</sup> As a result, the parental model places heavy emphasis on cooperation and responsibility for group welfare.<sup>345</sup> It subordinates individual rights to collective interests, regarding such rights as, in essence, "conferred in trust"<sup>346</sup> for society as a whole.

Another important feature of the parental model is its view of the transitional, embryonic nature of society, state, and law. Just as the legal person is "young," so too is the system in which he is located. Each citizen is part of a "growing, unfinished, still immature society, which is moving toward a new and higher phase of development."<sup>347</sup>

340. See *supra* notes 87-106 and accompanying text.

341. BERMAN, *supra* note 19.

342. The Russian term is *vospitatel'naia rol' sovetskogo prava*. See Berman, *Use of Law, supra* note 19, at 77.

343. BERMAN, *supra* note 19, at 205.

344. *Id.* at 204.

345. See HAROLD J. BERMAN, *JUSTICE IN THE U.S.S.R.: AN INTERPRETATION OF SOVIET LAW* 285 (rev. ed., 1963); Berman, *Use of Law, supra* note 19, at 82.

346. Berman, *Use of Law, supra* note 19, at 80.

347. BERMAN, *supra* note 19, at 205.

Law in the parental model has several basic goals. At the most immediate level, it seeks to "protect" the individual "against the consequences of his own ignorance."<sup>348</sup> Its broader and more ambitious objective is to create the appropriate internal conditions to advance society to the next stage of development.<sup>349</sup> Accordingly, under the parental model, law must help "unite and organize and educate" society.<sup>350</sup> It must mold the thinking and law-consciousness of each citizen to instill a genuine belief in and respect for official legal values.<sup>351</sup> At the same time, law must promote the moral education of society. It must "guide the people to virtue."<sup>352</sup> In short, the parental model calls for the use of law to accomplish nothing less than the transformation of every citizen into the "new person" required for the establishment of a more advanced order.<sup>353</sup>

The parental model relies primarily on "communication" and "example" to achieve these goals. It envisions widespread "propagandizing"<sup>354</sup> of law, that is, a concerted effort by legal institutions and personnel to "circulate information about law"<sup>355</sup> to the general populace. It also features "persuasion" and "suggestion" as tools of legal communication and socialization.<sup>356</sup> Thus, in trials, it directs judges and counsel to "pay special attention to the educational effect" of court proceedings on parties, courtroom spectators, and the public at large.<sup>357</sup> This includes identifying and explaining the overall "social and political aspects of the case"<sup>358</sup> in order to convince immediate and outside audiences that statutory provisions are properly applied to the specific facts at issue.

The parental model also turns to "example" as a technique to make abstract legal and moral values accessible to the public. It calls for extensive use of publicity. It presents concrete role models for public approbation and emulation and "exposes" the "shame of offenders."<sup>359</sup> Similarly, the parental

348. *Id.* at 204.

349. BERMAN, *supra* note 345, at 282.

350. BERMAN, *supra* note 19, at 205.

351. *Id.* at 282 ("[T]he main purpose of official law is to shape and develop that unofficial law-consciousness, so that people will actually think and feel what the state, through official law, prescribes").

352. Berman, *The Use of Law*, *supra* note 19, at 80.

353. *Id.* at 77.

354. *Id.*

355. *Id.*

356. *Id.* at 82.

357. *Id.* at 80. See generally Berman, *Educational Role*, *supra* note 19.

358. Berman, *Use of Law*, *supra* note 19, at 80.

359. *Id.* at 82.

model "induces" offenders to confess, repent, and undergo public re-education in order to inculcate and reinforce approved norms and patterns of behavior in both offenders and society as a whole.<sup>360</sup>

*b. Application to the Judicial Chamber*

The Judicial Chamber defines the participants in its conversation about law in a way that is markedly similar to that under Berman's parental model. In its opinions, the Judicial Chamber converses with an audience of youths. It speaks to the "young institutions of Russian statehood,"<sup>361</sup> still shaky, immature, and fundamentally unprepared to govern a post-Soviet democracy. It addresses media recently liberated from the shackles of censorship, which in their youthful exuberance commit excesses and abuses of their new-found rights and freedoms.<sup>362</sup> It converses with media consumers, who are naive and unsophisticated and require constant outside vigilance and protection "against the consequences of their own ignorance."<sup>363</sup> It speaks to litigants' representatives and legal personnel with only a rudimentary knowledge of law, who elevate the letter of the law over its spirit and mistake legal rights for a license to act without constraint.<sup>364</sup> Finally, it addresses the public at large, unversed in democratic and legal values and in need of careful guidance, teaching, and training.

The tone of the Judicial Chamber's conversation is distinctly parental. It is loving, protective, and educative, yet also stern, moralistic, and disciplinary. Like an overwrought parent, the Judicial Chamber at times reaches the point of utter frustration with its audience's slow pace of learning and continuing misbehavior despite repeated correction. It expresses this impatience in bursts of intemperate language and occasionally retreats to lecturing rather than guiding its reader.<sup>365</sup>

360. *Id.* In some cases, the court's role "is reduced to that of making the accused an object lesson for others, attempting to humiliate him and to make him suffer." Berman, *Educational Role*, *supra* note 19, at 92-93.

361. Decision No. 50, *supra* note 90.

362. See Feofanov, *supra* note 307, at 172 (discussing problems with "today's mass media, which have broken loose from the vise of censorship").

363. BERMAN, *supra* note 19, at 204; see *supra* Part IV.B.4.

364. See Recommendation No. 1, *supra* note 140 (noting media representatives citing gaps in Russian legislation and "corrective" administrative acts to justify dissemination of "improper" advertisements).

365. See Decision No. 11, *supra* note 83 (describing *Ekspress-gazeta* editorial office and their publications as "elementarily ignorant," "confused," "absurd," "indecent," "malicious," and "insulting"); Decision No. 50, *supra* note 90 (featuring repeated use of word "intolerable" to describe media conduct).

The basic goal of the Judicial Chamber's conversation is identical to that of the parental model. It is to create the requisite conditions for Russia to progress to the next, higher stage of development, in this case a democracy ruled by law.<sup>366</sup> Through its opinions, the Judicial Chamber endeavors to raise popular law-consciousness. It attempts to familiarize the reader with the existing legal framework. It sets out applicable constitutional and statutory provisions and meticulously explains their scope and limits.<sup>367</sup> It demonstrates proper application (and nonapplication) of general legal principles and rules to specific fact patterns with concrete illustrations.<sup>368</sup> It also outlines necessary reforms and improvements in Russia's legal system.<sup>369</sup>

As under the parental model, the Judicial Chamber seeks to give its reader a moral as well as legal education through its conversation about law. It too attempts to "guide people to virtue,"<sup>370</sup> to create a new post-Soviet democratic citizenry that appreciates moral responsibilities as well as legal rights. Throughout its opinions, the Judicial Chamber exalts "civility," "decency," "fairness," and other "generally-recognized ethical principles" that are not set in stone or law, but are known to all right-minded citizens.<sup>371</sup> It emphasizes collective welfare over individual rights. As under the parental model, it views constitutional freedoms of expression, press, and information as held in trust for the good of society as a whole.<sup>372</sup>

The Judicial Chamber also makes a real effort through its opinions to "unite and organize"<sup>373</sup> society. It attempts to create a sense of community by identifying, isolating, and excommunicating outsiders.<sup>374</sup> It appeals to public patriotism and pride in Russia's victory over "German Fascism" and Soviet communism.<sup>375</sup> It encourages shared commitment to the defense and further development of post-Soviet democracy. The Judicial Chamber calls

366. See Monakhov, *supra* note 266, at 162 (describing Russia as "only on the path to becoming lawful").

367. See Decision No. 33, *supra* note 83 (explaining and discussing conflicting provisions of Law on the Mass Media and Law on the Status of Deputies).

368. See Recommendation No. 1, *supra* note 140 (applying Russian legislation to media dissemination of "improper" advertisements).

369. See *supra* notes 266-68 and accompanying text.

370. Berman, *Use of Law*, *supra* note 19, at 80.

371. See *supra* notes 277-82 and accompanying text.

372. See Joint Recommendations, *supra* note 147.

373. BERMAN, *supra* note 19, at 205.

374. See *supra* notes 164-65, 188 and accompanying text.

375. Report, *supra* note 312 (lauding Russia's victory over its "totalitarian past" and over "German Fascism"); see also A.K. Kopeika, *Errors of Youth?*, in JUDICIAL CHAMBER COLLECTION, *supra* note 12, at 158, 158 (praising "achievements" of "democratic movement in Russia").

upon all elements of Russian society to join in a common struggle against the forces that threaten the Russian state, society, and reform process — fascism, immorality, ethnic separatism, antigovernmental propaganda, and the like.<sup>376</sup> It enlists the Russian government, professional associations, and the general public in the battle against media dissemination of harmful speech.<sup>377</sup> The Judicial Chamber strives to make democracy and the rule of law the common cause and unifying bond of Russian society.

As under the parental model, the Judicial Chamber relies heavily on communication and example to achieve its objectives. In communicating legal and moral norms and rules, it puts a premium on simplicity and accessibility to the reader. It recasts complex fact situations in simple, unambiguous terms.<sup>378</sup> There are no gray areas or possible alternative interpretations of the facts. Similarly, in its treatment of law, the Judicial Chamber tends to paraphrase, summarize, and recapitulate statutory provisions in language accessible to the lay reader.<sup>379</sup> It often removes potential uncertainties, contradictions, or inconsistencies in statutory provisions.<sup>380</sup> A prime example is its approach to one of the thorniest constitutional issues worldwide — the apparent conflict between the journalist's right to speak and the audience's right not to be harmed by that speech. The Judicial Chamber dissolves this conflict by redefining the constitutional right at issue as a collective right of the citizenry to receive information rather than an individual right of the journalist to free expression.<sup>381</sup> It thus reduces each harmful

376. See Report, *supra* note 312 (outlining threats to Russian democratic development and need for broad resistance).

377. See *supra* notes 278-82 and accompanying text. The Judicial Chamber calls for similar collective action to defend media rights against official interference. See Statement No. 3, *supra* note 9 (discussing need for "all citizens" to "understand" importance of freedom of mass information and calling upon "all parties" to resolve problems relating to Russian Press House); Statement No. 11, *supra* note 161 ("call[ing] on citizens and Russian military forces" in Chechnia "to observe strictly the rights and legitimate interests of journalists and to render them maximum assistance in fulfillment of their professional duty").

378. See *supra* notes 237-48 and accompanying text (discussing Judicial Chamber treatment of facts).

379. See Decision No. 7 (90) On the Publications by E.V. Limonov (Savenko) "Hand Grenade at Croats" and "Black List of Peoples" in the Newspaper "Limonka," Nos. 13 and 16 (1995) (Apr. 4, 1996), ROSS. GAZETA, Apr. 11, 1996, at 6 [hereinafter Decision No. 90] (summarizing provisions of Constitution, criminal law, Law on Rehabilitation of Repressed Peoples, and Law on the Mass Media).

380. In some opinions, however, the Judicial Chamber deliberately points to problems in statutory language and suggests needed reforms. See *supra* note 266 and accompanying text.

381. Interestingly, the Judicial Chamber generally defines the official interference cases as well as infringements of the constitutional right of citizens to receive information rather

speech case to a simple question: Was the information disseminated by the media beneficial or detrimental to the interests of Russian society as a whole? In so doing, it avoids the use of complex, multi-factored or pronged tests to balance individual and collective rights. It also eliminates the need for direct evidence and evaluation of the actual impact of a publication or broadcast on the immediate audience. The Judicial Chamber's sole concern is whether the material in question has the potential to promote or undermine public welfare in the broadest sense.

The Judicial Chamber also follows the parental model in its emphasis on persuasion and suggestion as communicative devices. It self-consciously constructs its opinions with an eye to convincing the reader of the propriety, even necessity, of its action in the case at hand. As has been discussed above,<sup>382</sup> it uses a variety of techniques for this purpose. These include depiction of parties' attitudes and misconduct in stark, dramatic language, verbatim reproduction of offensive media titles and material, and extensive use of dicta. Furthermore, as under the parental model, the Judicial Chamber attempts to persuade the reader by highlighting the larger context and implications of each case.<sup>383</sup> It explains the social, political, economic, and ideological causes of Russia's harmful speech problem and underscores its threat to Russian society, state, and the democratic reform process.

Finally, in conformity with the parental model, the Judicial Chamber regards "example" as a particularly effective technique to tutor its audience in new, democratic notions of law and morality. It crafts its opinions as virtual morality plays, featuring positive and negative role models.<sup>384</sup> It uses party attitudes and conduct as concrete object lessons to make abstract, unfamiliar values and rules accessible to the reader.<sup>385</sup> It emphasizes shame, repentance, confession, and reform. To achieve maximum educational and demonstration effect, the Judicial Chamber reprimands and corrects behavior that is not in strict violation of the law but, nonetheless, detrimental to the overall interests of Russian society.<sup>386</sup> Moreover, it does not confine its

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than of expressive and press freedoms. See Decision No. 2, *supra* note 90 (defining exclusion of media from government meeting as restricting citizens' right to receive information). This reinforces the image of Russian press as representative or trustee of society rather than independent actor.

382. See *supra* Part IV.C.1.

383. See *supra* notes 240, 253-55 and accompanying text.

384. See *supra* Part IV.B.

385. See *supra* notes 278-82 and accompanying text.

386. See Decision No. 6, *supra* note 90 ("recogniz[ing]" that author "violated the requirements of generally-accepted ethical norms and was not sufficiently responsible as to the possible consequences of her publication").

inquiry to the specific litigants before it. It holds nonparties as well as parties up as examples for public edification and guidance.<sup>387</sup>

The Judicial Chamber's choice of the parental format is a natural and understandable response to Russia's distinctive conditions. Parental law is a familiar approach, deeply rooted in Russian history. It seems ideally suited to the current transitional period. It recognizes the embryonic nature of Russian democracy and legality and the need for gradual change and development. It appropriately calls for revolution from below rather than above. It seeks to create a new legal culture by nurturing and transforming popular law-consciousness over time through education, persuasion, and guidance.

At the same time, the parental model's protective emphasis also fits today's Russia. It offers a theoretical framework for safeguarding the Russian citizenry and state from the inevitable dislocations and crises of the transitional era. In particular, it provides a rationale for swift, decisive action against those who would exploit gaps in changing legal and political structures to harm the Russian public, government, and reform process.

Yet, despite these advantages, the Judicial Chamber's parental conversation has not thus far met with an enthusiastic reception. Its intended audience has often balked at participation. Media and government officials have routinely resisted the Judicial Chamber's guidance and correction and have challenged its very legitimacy and authority to act.<sup>388</sup> The parental tone of Judicial Chamber opinions appears to alienate many readers.<sup>389</sup> Indeed, there is some empirical evidence that contemporary Russians tend to react with intense hostility and "passionate anger" to texts they consider patronizing and demeaning to their intellect.<sup>390</sup> The Judicial Chamber's blending of legal and ethical norms and techniques, which is such a central feature of the parental model, seems to be another source of sensitivity and concern. For many in post-Soviet Russia, this approach raises the specter of a return to the "dark era" of extralegal tribunals and censorship bodies.<sup>391</sup> As a result, some argue that the one redeeming feature of the Judicial Chamber is its very lack of enforcement powers.<sup>392</sup>

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387. See Decision No. 69, *supra* note 139 ("not[ing] the intolerable inaction" by several prison employees during illegal filming of convicts).

388. See *supra* notes 107-109 and accompanying text.

389. See Batygin, *supra* note 83; Klimov, *supra* note 12.

390. See Richard D. Anderson, Jr. et al., *Words Matter: Linguistic Conditions for Democracy in Russia*, 54 SLAVIC REV. 869, 893-94 (1995).

391. See Nikitinskii, *supra* note 108 (arguing that Judicial Chamber's broad jurisdiction and powers, including enforcement of "generally-recognized ethical norms," creates potential for it to become censorship organ).

392. But see Nikita Vainonen, *There Is a Court, But Where Is the Case?*, ROSS. VESTI, Mar. 23, 1995, at 2, translated in F.B.I.S.-SOV, Apr. 7, 1995, at 35 (criticizing Judicial Chamber's

Nonetheless, the Judicial Chamber continues to receive appeals and petitions from Russian media representatives, government officials, and citizens. It issues and publishes opinions on a wide variety of mass media-related topics. It remains the most consistent source of interpretation of constitutional provisions on expressive, information, and press freedoms. The Judicial Chamber has even seen its jurisdiction expanded recently to include resolution of disputes arising from media coverage of national election campaigns.<sup>393</sup> Thus, it may be too early to rule out the Judicial Chamber and its ultimate impact on Russian legal culture.

The critical challenge for the Judicial Chamber today, then, is to persuade the Russian public at large to accept its "invitation" to engage in a parental conversation about law. It cannot compel participation. At the very least, it must establish its own credentials to serve as parent and teacher. This task could be made considerably easier if the Judicial Chamber could point to formal constitutional recognition and clarification of its status in the Russian political and legal systems.

Even more profoundly, the Judicial Chamber must demonstrate to its intended audience the legitimacy and viability of the parental approach for post-Soviet Russia. To do so, it must present arguments that are both backward- and forward-looking. It must establish, even "invent,"<sup>394</sup> linkages with positive traditions of the Russian past and, at the same time, show value for the Russian future. In short, the Judicial Chamber must make a concerted effort to secure widespread public support, understanding, and involvement. Otherwise, its conversation about law will be a soliloquy.

## *VI. Concluding Remarks on Comparative Law Translation of Methodology*

Comparative law has long been the orphan of legal academia, its practitioners dismissed as mere translators of foreign legal phenomena and its

lack of enforcement powers).

393. See Instructions on the Procedure of the Allocation to Candidates for the Office of President of the Russian Federation, Electoral Associations, and Voters' Action Committees of Air Time on Channels of State Television and Radio Companies and the Publication of Campaign Material in Periodical Print Publications 4.5-4.6 (Apr. 5, 1996), ROSS. GAZETA, Apr. 17, 1996, at 5, translated in F.B.I.S.-SOV, Apr. 23, 1996, at 14, 21 (assigning Judicial Chamber authority to hear disputes related to media coverage of presidential election campaign); *Media Court Swamped with Complaints about Election Broadcasts* (ITAR-TASS broadcast, Nov. 17, 1995), translated in BBC Summary of World Broadcasts (BBC Broadcast, Nov. 19, 1995) (discussing Judicial Chamber's functions during parliamentary elections).

394. For a discussion of how nations "invent" or "rediscover" a history or culture, see generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983); *THE INVENTION OF TRADITION* (E.J. Hobsbawm & T. Ranger eds., 1983); and A.D. SMITH, *THEORIES OF NATIONALISM* (1983).



scholarly product tagged with the lethal label of "descriptive."<sup>395</sup> The result today is considerable "methodological anxiety"<sup>396</sup> in the field as comparative law scholars search for the grand theory,<sup>397</sup> paradigm, or model that will at long last secure respect and acceptance of their work. Not surprisingly, many scholars have turned directly to mainstream U.S. legal literature for inspiration. Recent articles on comparative and foreign law topics have applied law and economics,<sup>398</sup> critical race theory,<sup>399</sup> rhetorical analysis,<sup>400</sup> feminist jurisprudence,<sup>401</sup> and systems analysis<sup>402</sup> with mixed success. This Article is no exception.

395. See William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995) (setting out critiques of comparative law scholarship and resulting "malaise" and "lack of confidence" in field).

396. Crapanzano, *supra* note 69, at 51.

397. For an outstanding discussion of the danger of this quest, see generally William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986).

398. See Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996) (providing law and economics approach to Russian corporate law); Jonathan R. Macey & Geoffrey P. Miller, *Corporate Governance and Commercial Banking: A Comparative Examination of Germany, Japan, and the United States*, 48 STAN. L. REV. 73 (1995) (discussing law and economics analysis of German, Japanese, and U.S. systems); Paul B. Stephan III, *Toward a Positive Theory of Privatization — Lessons from Soviet-Type Economies*, 16 INT'L REV. L. & ECON. 173 (1996) (applying law and economics to privatization of Soviet-type economies).

399. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341-48 (1989) (discussing "emerging acceptance of the victim's story" in international and foreign prohibitions against hate speech); Adrien Katherine Wing & Eunice P. De Carvalho, *Black South African Women: Toward Equal Rights*, 8 HARV. HUM. RTS. J. 57 (1995) (applying critical race theory to South Africa).

400. See Moran, *supra* note 71 (providing rhetorical analysis of Canadian and U.S. hate speech opinions); Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: "A Miracle for Breakfast,"* 33 VA. J. INT'L L. 433 (1993) (using rhetorical analysis of international economic rights provisions).

401. See Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An)other Vision*, 23 COLUM. HUM. RTS. L. REV. 249 (1991-92) (taking feminist approach to study female infanticide in China); Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5 (1994) (providing feminist analysis of rape in Bosnia); Margaret Y. K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and the Liberal State*, 42 EMORY L.J. 143 (1993) (using feminist analysis of women's rights in China and U.S.).

402. See Todd R. Benson, *Taking Security in China: Approaching U.S. Practices?*, 21 YALE J. INT'L L. 183 (1996) (providing systems analysis of secured transactions in China); Lynn M. LoPucki & George G. Triantis, *A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies*, 35 HARV. INT'L L.J. 267 (1994) (applying systems approach to U.S. and Canadian reorganizations).

In this Article, I used two methodologies developed by U.S. legal scholars for the study of U.S. judicial opinions — narrative analysis and discourse analysis — to examine Russian Judicial Chamber opinions. Through narrative analysis, I sought to identify the recurring plots and characters in the stories told by the Judicial Chamber about media dissemination of harmful speech. Narrative analysis revealed a disturbing portrait of post-Soviet Russia as a society out of control, a naive citizenry under constant assault from irresponsible media yet largely unprotected by a young, inexperienced government.<sup>403</sup> It presented the Judicial Chamber as the reluctant savior of Russia, compelled by dire necessity to serve as the last line of defense against the barrage of subversive, immoral, deceptive, and dangerous materials that threaten the future of post-Soviet democracy.<sup>404</sup>

Through discourse analysis, I sought to identify the Judicial Chamber's techniques for communicating with parties, the legal community, the media, the government, and the general public. This analysis focused on the type of conversation between the Judicial Chamber and the reader of its opinions. Initially, my goal was to choose between the two types of conversation presented by White in the American context — "democratic" or "authoritarian."<sup>405</sup> I ultimately concluded, however, that neither described the Judicial Chamber's conversation nearly as well as the "parental" model developed by Berman in 1950 to explain the distinctive Russian approach to law.<sup>406</sup>

In the process of applying narrative analysis and discourse analysis, I discovered some of the rewards and risks of importing U.S. legal methodology into the comparative law field. On the positive side, I found that at least two of these methodologies can be valuable tools for communicating foreign legal phenomena to lay and expert audiences alike. Both narrative analysis and discourse analysis proved successful as techniques for bringing foreign judicial opinions to life. They revealed subtle nuances, unstated premises, and larger context in a format accessible to even the nonspecialist American reader. In so doing, these methodologies furthered a central ethnographic mission of the comparative law scholar — to "render the foreign familiar."<sup>407</sup>

I learned that application of U.S. methodology can yield new insights for the foreign law expert as well. Specifically, narrative analysis and discourse analysis highlighted aspects of Judicial Chamber policy and practice that more conventional research and analytical techniques might have missed — aspects that the Judicial Chamber seldom expresses explicitly in

403. See *supra* Part IV.A-B.

404. See *supra* Part IV.C.

405. See *supra* Part V.B.1.

406. See *supra* Part V.B.2.

407. Crapanzano, *supra* note 69, at 52.

its opinions and commentaries. These include the Judicial Chamber's definition of itself, its relationship with its audience, its place in the post-Soviet political and legal systems, and its "blended" solution to Russia's "free press" problems.<sup>408</sup> Focusing on the tone, language, and style of Judicial Chamber opinions was particularly useful in identifying potential tensions and conflicts in the Judicial Chamber's practice and in understanding public resistance and criticism of its efforts.<sup>409</sup>

More generally, application of narrative analysis and discourse analysis to Judicial Chamber opinions helped shed light on the overall progress of post-Soviet legal reform. The Judicial Chamber's harmful speech stories proved to be a rich source of information on Russia's concrete successes and continuing problems in implementing its new post-Soviet Constitution and legislation. In highlighting institutional, procedural, and attitudinal impediments, these stories also pointed to possible directions for future reform of the legal system.<sup>410</sup> A narrative analysis of Judicial Chamber opinions offered insights as well into changing definitions and relationships between citizen, state, and media in the post-Soviet era. It suggested that Russia is still only in the early stages of transition toward its ideal democracy founded on the rule of law.<sup>411</sup>

Analysis of Judicial Chamber discourse may ultimately yield even more fundamental lessons for the Russian law specialist about post-Soviet legal reform efforts. By focusing on *how* rather than *what* the Judicial Chamber communicates in its opinions, this approach revealed a surprising but consistent pattern of "parental" conversation about law between the Judicial Chamber and the reader.<sup>412</sup> Discourse analysis in turn may provide important signals of how Russia's current leadership proposes to address the critical problem of creating a legal culture. Indeed, preliminary research suggests that the re-emergence of "parental law" is by no means confined to the Judicial Chamber context. For example, as I have discussed elsewhere,<sup>413</sup> the Russian president and legislature have already adopted what can only be described as a parental theory of information rights. Thus, Berman's parental model may also offer the Russian law specialist the best framework for studying the evolving post-Soviet legal reform process as a whole.

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408. See *supra* Part IV.C.

409. See *supra* Part V.B.2.a.

410. See *supra* notes 265-83 and accompanying text.

411. See *supra* Part V.A.

412. See *supra* Part V.B.2.

413. Foster, *supra* note 7, at pt. IV.

On a more sobering note, however, analysis of Judicial Chamber discourse and narrative also revealed the very real dangers in applying U.S. methodology to foreign legal systems. I discovered that use of such methodology can exacerbate the comparative law scholar's already "despairingly difficult"<sup>414</sup> "problem of translation."<sup>415</sup> It can entail multiple layers and forms of translation, each rife with possibilities for distortion. My experience illustrates the types of translations and associated problems that a scholar may confront in using U.S. methodology in a foreign context.

In applying discourse analysis and narrative analysis to Judicial Chamber opinions, I encountered five distinct translations, each of which presented theoretical and practical difficulties. "Every act of communication . . . is an act of translation."<sup>416</sup> Thus, the first translation I confronted was the central topic of this Article — the Judicial Chamber's communication with its audience through harmful speech opinions and the audience's reception of that communication. This process of communication and reception constituted a classic example of a translation within a single language and community.<sup>417</sup> What was problematic was my role as analyst of this translation. In essence, my task was to evaluate how a Russian judicial body communicated through Russian-language texts with a Russian audience and the likely response of that audience. Yet, my vantage point was that of an outside observer, at a vast spatial, linguistic, and cultural distance from both the author and reader of Judicial Chamber opinions.

Only compounding these difficulties was the Article's second translation — the translation of American methodology to Russian context. This translation required the use of methodologies that had been developed for the study of U.S. judicial opinions but never tested in or adapted for specific Russian conditions. Thus, there was a real risk that application of U.S. discourse and narrative techniques would yield an inaccurate, incomplete, or even distorted picture of Russian legal phenomena. One concern was that use of these methodologies might lead me to read into Judicial Chamber opinions implicit meanings or patterns that were in fact unwarranted.<sup>418</sup>

414. Lessig, *supra* note 68, at 1266.

415. Asad, *supra* note 67, at 142. For discussion of comparative law problems of translation, see generally Ainsworth, *Categories and Culture*, *supra* note 69; and Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1 (1991).

416. Lessig, *supra* note 68, at 1190.

417. See GEORGE STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION* 47, 414 (1975) (discussing relationship between translation and "the process of communication and reception" and concluding that "inside or between languages, human communication equals translation").

418. For a discussion of this "tendency to read the *implicit* in alien cultures," see Asad,

Another potential danger was that I might become so locked into methodology that I could miss key points or lessons of cases.<sup>419</sup> At worst, I might unconsciously distort Russian reality to fit pre-existing American methodology.<sup>420</sup>

I confronted a third translation when I attempted to record the findings of my analysis of Judicial Chamber discourse and narrative. My task at this stage was to translate a peculiarly Russian experience into a language and format accessible to an American audience. As a preliminary matter, I sought to make Judicial Chamber opinions available to a non-Russian-speaking audience. This entailed two additional translations — linguistic and cultural. I had to translate Russian-language texts into English and at the same time convey discrete cultural meanings and "modes of thought."<sup>421</sup> Many scholars have justly described this effort at linguistic and cultural translation as "impossible."<sup>422</sup> As James Boyd White has warned, "[i]t requires . . . an attempt to be perfectly at home in two worlds, an attempt

*supra* note 67, at 160-63. See also Paul Bohannon, *Ethnography and Comparison in Legal Anthropology*, in *LAW IN CULTURE AND SOCIETY* 401, 414-15 (Laura Nader ed., 1969) (discussing problem of "implying" that ideas and analyses from ethnographic literature "are in the subject culture").

419. For similar concerns about the narrative format, see Lawrence Stone, *The Revival of Narrative: Reflections on a New Old History*, 85 *PAST & PRESENT* 1, 3 (1979) (claiming narrative format focuses on the "single cell" at expense of social and political context).

420. For superb discussions of the distortions caused by application of Western frameworks to non-Western legal systems, see generally Ainsworth, *Categories and Culture*, *supra* note 69; Ainsworth, *Interpreting Sacred Texts*, *supra* note 69; William P. Alford, *The Inscrutable Occidental: Implications of Roberto Unger's Use and Abuse of the Chinese Past*, 64 *TEX. L. REV.* 915 (1986); William P. Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 *CAL. L. REV.* 1180 (1984); James A. Fanto, *The Absence of Cross-Cultural Communication: SEC Mandatory Disclosure and Foreign Corporate Governance*, 17 *NW. J. INT'L L. & BUS.* 119 (1996); Stanislaw Pomorski, *The Pitfalls of Cross-Cultural Research*, 7 *CRIM. L.F.* 229 (1996); and Kim Lane Scheppele, *The History of Normalcy: Rethinking Legal Autonomy and the Relative Dependence of Law at the End of the Soviet Empire*, 30 *LAW & SOC'Y REV.* 627 (1996).

421. Godfrey Lienhardt, *Modes of Thought*, in *THE INSTITUTIONS OF PRIMITIVE SOCIETY* 95 (E.E. Evans-Pritchard et al. eds., 1954). See generally Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in *CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167, 167-234 (1983) (discussing importance of cultural translation in comparative cross-cultural study).

422. See WHITE, *supra* note 13, at 235 (describing "the impossibility of 'translation'"); J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 *MICH. L. REV.* 1131, 1158 (1994) ("But translations are always imperfect. They never fully convey the sense of the original. Hence the very necessity of translation renders it impossible fully to speak in the language of the Other."); Edmund R. Leach, *Ourselves and Others*, *TIMES LITERARY SUPP.*, July 6, 1973, at 771, 772 (stating "perfect translation is usually impossible").

that must always fail.<sup>423</sup> There is always substantial risk that "connotations" will be "added" or "lost" in the process of linguistic and cross-cultural translation.<sup>424</sup> In the case of Judicial Chamber materials, translation proved particularly challenging because of the extensive use of idiomatic expressions rooted in Russian history and culture.<sup>425</sup> Often, there were no satisfactory English-language equivalents to capture the rich texture and range of meanings of the original Russian-language phrases.

Translation of Russian experience into the stories told in this Article also proved to be problematic. I now had to become storyteller as well as observer and translator. This new role carried with it its own potential dangers and distortions. These included the temptations to embellish or exaggerate for dramatic effect<sup>426</sup> and to use material selectively to ensure a coherent storyline or uniform depiction of characters.<sup>427</sup> My major concern was that by recasting the Russian experience as stories I might leave the American audience with an unintended negative impression of the Judicial Chamber and its approach to law.<sup>428</sup> Use of the narrative format might also trivialize this body's significant accomplishments and contributions to the Russian legal reform process. In my capacity as storyteller, I became conscious as never before of the comparative law scholar's dual responsibil-

423. James Boyd White, *Judicial Criticism*, in INTERPRETING LAW AND LITERATURE, *supra* note 49, at 393, 404.

424. Ainsworth, *Interpreting Sacred Texts*, *supra* note 69, at 279 ("[T]ranslation cannot provide exactly equivalent terms . . . [because] connotations are invariably added and lost in translation").

425. Idiomatic, even obscene phrases appear most often in the Judicial Chamber's direct quotations of material from newspaper articles or broadcast videotapes. See *supra* note 237 and accompanying text.

426. For a related discussion of the dangers of the narrative format and "the use and abuse of descriptive rhetoric," see Renato Rosaldo, *From the Door of His Tent: The Fieldworker and the Inquisitor*, in WRITING CULTURE, *supra* note 67, at 77, 81.

427. See *supra* note 110 (discussing cases that did not fit general patterns).

428. See Ernest Gellner, *Concepts and Society*, in RATIONALITY 18, 27 (B.R. Wilson ed., 1970) (discussing unintended negative connotations or bad impressions that may occur in process of cultural translation). The stories told by the Judicial Chamber, of course, are not necessarily true. In attempting a comparison, one must, as Walter Weyrauch has pointed out, compare myth with myth and reality with reality. Walter Otto Weyrauch, *Oral Legal Traditions of Gypsies and Some American Equivalents (Gypsy Law Symposium)*, 45 AM. J. COMP. L. 407, 412 (1997) ("Myths should be compared with myths, and realities with realities."). Hence, it would not be appropriate to compare the stories told by the Russian Judicial Chamber with the reality of contemporary American law. At the same time, it is important to remember that focusing on U.S. judicial opinions is itself problematic. Due to limited publication of U.S. opinions, see *supra* note 22, narrative and discourse analyses of U.S. decisions may produce a distorted picture of American reality as well.

ity to audience and foreign legal system. This responsibility weighed particularly heavy in this case where most of the audience had no access to the original Russian-language sources and, hence, no means to verify or challenge my rendition of Judicial Chamber theory and practice.

In conclusion, my experience suggests that U.S. methodologies can be useful tools for examining foreign legal systems, but that they must be applied with flexibility, caution, and, above all, sensitivity to context.<sup>429</sup> The ultimate lesson of this Article is that the scholar must be prepared for the unexpected — the divergences from usual patterns, the spontaneous adaptations of methodology to a foreign environment, the new answers to questions formulated in the American context. Comparative law translation of methodology, thus, may do more than render the foreign familiar. It may render the familiar foreign as well.

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429. This sensitivity to context, however, may have its own dangers. See BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW* 72 (1990) ("The dilemma is this: the more we try to catch the foreign law in all its individuality, as we must, the more we appreciate its cultural and societal context, the less possible it seems to compare it with others.").

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# SYMPOSIUM

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