Special Issue – *Law's Pluralities*

Introduction: Mapping the Pluralist Character of Cultural Approaches to Law

By Greta Olson[*]

Abstract

This introduction explains the title of this special issue as a call for transdisciplinary and culturally-oriented research on law in Germany. In an initial overview of pluralism, the text asserts that a German discussion of the pluralistic nature of legal authority predates the twentieth-century one within legal anthropology, legal theory, and political philosophy. The first part of the text reviews the early discussion of legal pluralism in the context of debates about state formation and an appropriate balance of forms of normative authority. This discussion points to the inherent plurality and affectivity of law. The second part of the introduction, in turn, is devoted to an argument in favor of the culturally-embedded and -mediated nature of legal phenomena made through an analysis of images relating to the so-called refugee crisis. On the basis of this analysis, it is posited that critical cultural methods and concepts are needed to comprehend current processes such as the so-called *Europeanization* of law, the increasing heterogeneity of legal systems and cultures, and to critically bracket the idea of "legal culture" in and of itself. The last part of the introduction offers an overview of the essays in this special issue. On the one hand, each essay contributes to the thesis that law is pluralistic and has to be investigated interdisciplinarily, using a plurality of methods. On the other hand, all of the contributions make a different kind of claim for how law transpires and is transported through theatrical, visual means, narratives, and affects.

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"Law's Pluralities: Arguments for Cultural Approaches to Law" as a Program of Research[1]

The title of this special issue references two interrelated arguments about the law. By "the law," I refer in the first case to state-made and state-centered law and legal processes and not to the frequent metaphorical uses of "law" to stand in for justice, civility, authority, or the state. *Law's Pluralities* conveys the argument that law is pluralistic; it refers to discussions of legal pluralism and of legal comparativism as well as to analyses of the multiple ways in which law interacts with other forms of human activity. Law, as theorists like Rudolf von Jhering were early to point out, is experienced and expressed with a high level of affectivity. Not only is law hybridic, but legal phenomena need to be understood as cultural-political processes that are made sense of, and disseminated through, culturally specific performances, narratives, topoi, and images. The subtitle *Arguments for Cultural Approaches to Law* in turn suggests that methods and insights borrowed from cultural analysis and critical theory are needed to comprehend the pluralistic nature of law. This pluralism is caused, on a general level, by law's being one normative ordering system among others and, on a specific level, by the increasingly heterogeneous quality of individual legal systems and legal cultures—such as the German and putative European ones. The purpose of this special issue is to contribute to interdisciplinary critical legal studies within Germany and to make the resultant interdisciplinary discussions available to a non-German-speaking audience. These are developments that, for instance, Justice Susanne Baer has recently called for.[2]

A. Pluralism Unpacked

Law's Pluralities is a loose derivative of legal pluralism—a concept that many historical accounts trace back to early twentieth century debates in legal anthropology concerning colonial and post-colonial contexts. These debates revolved around the question of how best to think about and refer to non-Western and non-state centered forms of normative authority. Yet this introduction offers an alternative history of pluralism from a distinctly German legal-philosophical perspective before it very briefly rehearses later developments. This earlier discussion of legal pluralism serves to highlight the importance of hybridity and affect in law and looks forward to points that are generally attributed to much later discussions in legal anthropology and legal and political theory.

[1] I am grateful to Franz Reimer, Birte Christ, and Frans-Willem Korsten for their critical readings of this text. The infelicities that remain are purely of my own making. Franz Reimer and I also wish to thank sincerely Maren Walinski, Lisa Beckmann, Madeline Kienzle, and Stefanie Rück for their assistance in bringing this special issue to completion.

[2] Justice Susanne Baer, in her closing remarks at the conference "Autonomie des Rechts" (The Autonomy of Law), which was held in Frankfurt (Mar. 5, 2016).

The title *Law's Pluralities* opens up a broad field of possible objects and methods of inquiring into law. Naming some of these avenues of research helps to uncover why law is pluralistic and why cultural approaches to the law are needed to comprehend this pluralism. Commencing with a philological approach to the subject, etymological and historical definitions of pluralism stress the lexeme, *pluralism's* historical uses to denote a clergy person's holding more than one office at the same time and the general opposition to "monolithic state power" and "toleration of diversity [and multiple sources of authority] within a society or state."[3] Furthermore, the term is used epistemologically to denote the conviction that reality is multiply composed. It also signals a political philosophy that supports the simultaneous flourishing of heterogeneous ethnic, religious, and social groups and their practices in a given society.[4] The present author's play with the compound noun to build *pluralities* is an expansion of the denotation of the state of being multiple that recalls the religious and politically tolerant uses of the term *pluralism* as well as the potentially subversive nature of its use to describe the advocacy of anti-centralist forms of power and anti-monolithic notions of knowledge and the acknowledgement of multiple sources of normativity and authority. As used in this special issue, the term *pluralities* keys into the call for a transdisciplinary approach to law, legal processes, and legality that understands them to be cultural-political phenomena that need to be comprehended with methods extending beyond those developed in more traditional forms of legal scholarship.

Given the context in which the contributions to this special issue emerged, namely a conference on "Law's Pluralities: Cultures/Narratives/Images/Genders" held at the University of Giessen and the Neuer Kunstverein in May 2015 in cooperation with the Rudolf von Jhering Institute,[5] and given the purview of the *German Law Journal*, it is important to point out discussions of legal pluralism that took place in the German language before central codification in the German Civil Code of 1896 became effective in 1900. By way of introducing this discourse, I wish to highlight Boaventura de Sousa Santos' point that legal philosophies that countered the development of "state legal centralism and exclusivism" were, in general, reactions to the development of Western constitutional states and the enforcement of centralized state power through law. At the time, advocates of pluralism contended that "[r]ather than being ordered by a single legal system, modern societies are regulated by a plurality of legal orders, interrelated and socially distributed in the social field in different ways."[6] What de Sousa Santos highlights is that during moments of codification,

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[3] Oxford English Dictionary Online, *pluralism, n.*, (September 2006), http://www.oed.com/view/Entry/146193?redirectedFrom=pluralism#eid.

[4] *Id.* and Merriam-Webster Dictionary, *pluralism*, (n.d.), http://www.merriam-webster.com/dictionary/pluralism.

[5] And which was generously supported by the Justus-Liebig-University Giessen, International Graduate Centre for the Study of Culture.

[6] BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE (2002).

state formation, and centralization, fundamental debates about the locus of legal authority occur and defenses of more pluralistic understandings of normative authority are made. Put more pointedly, calls for legal pluralism directly counter the "centralist ideology" of legal monism.[7]

This was also the case with what eventually became the German nation state in 1871, with its ensuing process of implementing a centralized civil code. Preceding this, a long series of legal-philosophical debates had occurred regarding the appropriate basis for a common German law, which had gone on since before the end of Napoleon's occupation of Germanic territories in 1815 and the establishment of the German Confederation. This confederation consisted of variously employed adaptations of Roman law, Germanic common law traditions, and the remnants of Napoleon's *Code civil*. Nationalistic debates about the desirable unification of the German states took place within the larger framework of the *Vormärz*—the pre-revolutionary period in the German territories between 1815 and 1848. This period was marked by the conflict between German aristocrats, who sought to restore the feudal relationships that had been the status quo before the American and French revolutions, and members of liberal and nationalist movements, who wished to establish a constitution and institute parliamentary representation. The socially conservative and aristocratic law professor Friedrich Carl von Savigny called for the development of a supposedly organic law based on the heuristics of the historical school of Roman law in his "On the Vocation of Our Age for Legislation and Jurisprudence." By contrast, his former student, Jacob Grimm—the philologist, folklore specialist and more democratically-inclined legal historian—argued for the inherent pluralism and anti-rationality of Germanic customary legal tradition in his *Von der Poesie im Recht* ("On the Poetry in Law"). There, Grimm makes an argument for the viability of specific, folkish, or common law legal traditions, rejecting the idea of generalized legal concepts derived from Roman law.

In his essay, Grimm insists on the proximity and common history of literature and law. As he writes: "That law and poetry once arose with one another from out of one bed is not hard to believe." This programmatic statement deconstructs the dichotomous separation of law as factual and poetry as fictional. The insistence on the power of the poetic in German common law, on the one hand, anticipates Percy Bysshe Shelley's later thesis that poets are legislators of authority. On the other hand, Grimm's description of poetry's "cheerfulness" in the following passage is also an argument against narrow legalism and a plea for cultural embedding and contingency. It is also a call for greater democratic freedoms and less centralized authority.

[7] Ambreena S. Manji, *Imaging Women's 'Legal World': Towards a Feminist Theory of Legal Pluralism in Africa*, 8 SOC. & LEGAL STUD. 435, 435–37 (1999).

> I have to finally account for the evidence of poetry's being in the old [Germanic common] law: its cheerfulness; in this I understand the tendency to not set up everything in advance for people and to not measure everything so that they can see everything from far away just exactly as it will happen.[8]

In Grimm's time, echoes of customary law could be found in the enforcement of local procedural rules in various German principalities, despite the fact that the study of Roman law at German universities was virtually exclusive. Remnants of Germanic common law traditions can still be found in expressions like *Schöffen* and *Schöffengericht*. Once describing local medieval law-finders, *Schöffen* now name the lay participants in criminal cases, who vote on the outcome of a case with the professional judges. In arguing that Germanic common law traditions are connected to the creative power of language and poetry, Grimm was making an early call for legal pluralism. This understanding of law and legal reasoning is not based exclusively on one code or one set of mutually self-reinforcing legal norms.

Moving forward in time—but still before general codification had taken place—the legal theorist Rudolf von Jhering developed the notion of feeling for law/justice in *Der Kampf um's Recht* (1872) (*The Struggle for Law*) to describe the relationship between individual feeling and the workings of law. This short manifesto-like text was first delivered as a lecture to the Viennese Jurist Society (Wiener Juristische Gesellschaft) and on its basis, Jhering aimed to counter two dominant tendencies in contemporary German legal philosophy and jurisprudence. The first involved the romanticism and quasi-naturalization of law that had been inherent in the leading legal scholar[9] Savigny's argument that law emerges organically out of the spirit of a given people; that is, out of that people's "common conviction" and "kindred consciousness"—even if this "spirit" had to be interpreted through a highly rule-bound and abstract set of principles, an interpretation that only legal theorists such as Savigny himself might perform. Jhering was also reacting to the abstractionism involved in the contemporary theoretical emphasis on legal principles, which was derived from Roman law. This was to the detriment of an awareness of the social issues with which law interacts. Jhering argues that violent social struggle is integral to law and that an individual's *Rechtsgefühl* informs her conflicts with others as well as her relationship to the state.

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[8] JACOB GRIMM, VON DER POESIE IM RECHT (ON THE POETRY IN LAW) 65 (1816). Translations from the German are mine. The original reads: *„Ich musz endlich noch zum beweis der poesie, die in dem alten recht, rechnen. seine vergnügtheit; worunter ich die neigung verstehe, den leuten nicht gerade zu alles und jegliches fest vorzustecken und auszumessen, so dasz sie alles gerade so wie es sich ereignet von weitem kommen sehen."*

[9] The German lexeme *Rechtswissenschaftler*, which is used generally to describe legal academicians and legal theorists, means literally a scientist of law, and the legal faculties at German universities are called *Rechtswissenschaften,* the sciences of law.

Significantly, Jhering's "feeling" for justice/law,[10] or, as I prefer, "affect" is not experienced through rational means: "[T]he power of law resides in feeling, just as it is in love; reason cannot replace the lack of feeling."[11]

This feeling or affective reaction denotes a pre-verbal, corporal relation to a phenomenon or effect.[12] It anticipates work on Law and Affect, suggesting that law is not simply the antidote to human passion and irrationality, but that it contains *arational* and affectively charged elements in itself—a subject that shall be taken up in this special issue by Christine Hentschel and Susanne Krasmann in their discussion of so-called left-to-die refugee boats in the Mediterranean Sea. Jhering's concept of a feeling for law/justice contains two interrelated parts—the general struggle for the legal order and the battle for subjective law/rights. The former notion of struggle counters Savigny's contention about organic development by pointing out that every change to an existing set of laws is accompanied by violent struggle and the contestation of those who stand to lose their privileges. Law is thus inherently political and involves dissent and potentially also violence; the latter notion involves the individual's obligation to fight for her subjective feeling for law/justice in order to secure the stability of law overall (adapted from Koller 2012).

From a contemporary point of view—and one that is interested in rendering Jhering's central concept applicable to the analysis of current circumstances—Jhering assumes that everyone has the same *Rechtsgefühl*. Potentially, this is also a claim for the universality of civil and human rights. The dilemma that arises here, however, is in the practice of achieving those felt rights. De facto, only those who are already recognized as being rights holders or legal persons within their legal environments—in other words, as citizens or as legal personae—are sufficiently empowered to fulfill the duty to fight for justice whether they feel it or not. This is the central predicament of human rights claims in contradistinction to their enactment and enforcement, and it represents perhaps the most critical issue within German and European legal debates today.[13] Without recognition of a viable legal status, including that of a rights holder, refugees have no voice with which to be heard and no tools with which to fight for what well may be their inherent feeling for law/justice.

After Jhering's 1872 statement—roughly forty years later—yet another contextual description of subjective relations to law and legal pluralism was introduced by the Austrian

[10] *Recht* has alternative denotations as *law* and *justice* in German.

[11] RUDOLF VON JHERING, DER KAMPF UM'S RECHT 45 (1872). The original reads: "*Die Kraft des Rechts ruht im Gefühl, ganz so wie in der Liebe; der Verstand kann das mangelnde Gefühl nicht ersetzen*."

[12] *See* Greta Olson*, The Turn to Passion, in* 28 SPECIAL ISSUE OF L. & LITERATURE ON LEGAL PERSONHOOD, 335 (Frans-Willem Korsten & Yasco Horstmann eds., 2016).

[13] The final event of the 2015 Deutscher Juristentag (German Jurists' Conference) was on the *Flüchtlingskrise in Europa – Krise des Rechts*? (The Refugee Crisis in Europe–A Crisis of Law?).

legal scholar Eugen Ehrlich (1862–1922), who is credited—along with Max Weber—with having co-founded legal sociology. By this time, Savigny's call for a legal code to be based on the supposedly organic and historically-derived principles of Roman Law, as systematized by German academic lawyers, was manifested in the codification of German Law in the Civil Code, or the *Bürgerliches Gesetzbuch* (BGB), which remains the basis of German private law today. In contrast to the emphasis on abstract principles of law as applied to particular cases in a highly rule-driven fashion, Ehrlich's notion of *lebendes Recht*, or "living law," denotes the mutable, pluralistic, and embedded qualities of forms of obligation, including non-state law. Ehrlich argued that jurisprudence cannot simply be based on doctrinal application of legal norms by jurists, but had to be founded on an analysis of the way people actually live, often in accordance with structures that exist outside of statutes and formal law, as in Ehrlich's own ethnically heterogeneous setting in Bukovina. In essence, Ehrlich comprehends living law to be constituted by a variety of normative projects, processes, and orders. Like later explicit arguments for legal pluralism, Ehrlich's model suggests the possibility of appealing to multiple normative sets of logic to resolve conflicts.

In Ehrlich's case, living law entailed the context of great cultural and ethnic diversity of Bukovina (then part of the Austro-Hungarian empire and now in Ukraine), which included "Armenians, Germans, Gypsies, Hungarians, Jews, Romanians, Russians, Slovaks, and Ukrainians" and "was not determined by the law of the Austrian-Hungarian state."[14] In some ways, the situation in Bukovina anticipated the increasingly heterogeneous compositions of legal commonalities, such as the German and European ones. In the first case, legal systems that have traditionally been thought of as entirely discrete—such as those based either in common or civil-law traditions or those founded on legal frameworks derived from "the common law, the French *Code civil* and the German *Bürgerliches Gesetzbuch*"—have been rendered increasingly problematic, since, for instance, within Europe "all legal systems are mixed ones."[15] Further, individual legal systems have been forced to become more pluralistic. This alteration has been due to the overlapping force of European legislation and decisions rendered by the European Court of Justice and the European Court of Human Rights. It has also been caused by the effects of legal transplants and by the increasing recognition of "customary law, religious law or unofficial law-making," as well as the influence of globalized business practices.[16] Thus, Europe's more or less hermetic legal sovereignties are becoming more porous as well as heterogeneous. Consequently, this special issue departs from the insight that processes such as the so-called Europeanization of law are cultural ones that require methods and concepts derived from cultural analysis

[14] Stefan Machura, *Eugen Ehrlich's Legacy in Contemporary German Sociology of Law*, *in* EUGEN EHRLICH'S SOCIOLOGY OF LAW 39, 43 (Knut Papendorf, Stefan Machura & Anne Hellum eds., 2014).

[15] Mark Van Hoecke, *Methodology of Comparative Legal Research*, *in* LAW AND METHOD 1, 26 (Dec. 2015), http://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001.

[16] *Id.* at n. pag.

and critical theory to be comprehended in terms of how they interact with other interrelated fields of human activity.

Anticipating such claims, Ehrlich insisted that law was not just state-made and state-enforced law—or codified law—which had to be interpreted by jurist-scholars; rather, other forms of normativity had to be included in notions of social obligation and prescription. Moreover, a certain degree of legal creativity had to be allowed for in the "free determination of law" (*freie Rechtsfindung*) for those cases where codified law and abstract rules of application did not suffice.[17] To arrive at this creativity, lawyers needed to look beyond written legal texts and study those social interactions out of which the law arises. As Marc Hertogh points out in a comparison of European versus US American work on legal consciousness, Ehrlich's living law—as expressed in the people's consciousness of law/justice (*Rechtsbewusstsein des Volkes*)—transpires entirely independently of state-mandated law and thus includes subjective claims about what this law/justice should in fact be.[18] Here, notions of legal pluralism as centered in non-universalizable forms of individual or group legal consciousness interact with political philosophical theories of pluralism that insist on the individual representation and authoritative claims of groups and entities within a given sovereignty.

Jhering's advocacy of a feeling for law/right as the basis for legal developments, Ehrlich's insistence on the viability of local, non-state enforced forms of social ordering, and Grimm's defense of the cheerfulness, anti-rationality, and the indivisibility from poetry of Germanic customary law, strike me as quite forceful articulations of what have come to be known as the philosophies of legal pluralism. As mentioned above, many histories of legal pluralism begin with an account of how anthropologists attempted to understand non-Western and non-state-centric law. Thus in the so-called Gluckman-Bohannan debate, two leading anthropologists differed on whether to acknowledge the rationality and rule-based processes underlining what had been called "customary" law in local African traditions or to regard English legal concepts as particularized and non-universalizable and as just as "folkish" as African ones.[19] The general emphasis in this debate on the non-translatability of legal concepts such as rationality and objectivity led to a bracketing of the general understanding of law as state-centered and state-made. Furthermore, it suggested that law has to be understood as one culturally and materially determined form of normativity amongst other competing ones. This debate has continued into the present in the form of human rights demands for the recognition of culturally specific rights, for instance, those of

[17] Machura *supra* note 14, at 44–45.

[18] Marc Hertogh, *A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich*, 31 J.L. & SOC'Y 4, 457, 474–75 (2004).

[19] Adapted from Martin Ramstedt, *Anthropological Perspectives on Law and Religion*, *in* ROUTLEDGE HANDBOOK OF LAW AND RELIGION (Silvio Ferrari ed., forthcoming).

indigenous peoples to types of collective ownership and usage that are not compatible with Western-centric, legally enforced concepts of personal property based on notions of discrete legal persons.

Moving into contemporary discussions of legal pluralism, Paul Schiff Berman, in one seminal formulation, refers to the phenomenon as a form of "alternative jurisprudence" that recognizes the existence of "hybrid legal spaces, where more than one legal, or quasi-legal, regime occupies the same social field." One obvious case of what Berman calls "jurisdictional hybridity"[20] can be found in the European Union, with its mixture of local national forms of legality, European ones, and increasing recognition of other sources of normative authority.

A similar advocacy of pluralism has occurred within the field of political science that also echoes the earlier German discourse on the inherent affectivity of law. This counters the Habermasian ideal of achieving a consensus that can be reached through communicative debate between rational subjects. Chantal Mouffe contends that antagonism and an awareness of the inherently conflictual nature of democracy has to be acknowledged:

> [L]iberalism is unable to adequately envisage the pluralistic nature of the social world, with the conflicts that pluralism entails. These are conflicts for which no rational solution could ever exist, hence the dimension of antagonism that characterizes human societies . . . .[I]t is impossible to understand democratic politics without acknowledging 'passions' as the driving force in the political field.[21]

The last sentence might be applied to the affective, conflictual, and culturally embedded nature of unfolding legal processes, or what Jhering once called the "struggle for law." Adjudication also involves dissent between various actors and interest groups in cases where more than one judge or justice is involved. The degree to which such dissent is, and should be, rendered visible to a general public, or those not involved in what Lawrence Friedman called "internal legal culture," is a topic central to discussions of democratic process.[22] In the following pages, Susanne Baer takes up the issue of dissent amongst Justices in the German Federal Constitutional Court. Frans-Willem Korsten describes how modes of visibility and invisibility intersect with forms of dissent in adjudication—and are thus inherent to what he sees as the necessity of theatrical enactments of legal processes—in order for them to gain public legitimacy.

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[20] PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM 11, 13, & 25 (2014).

[21] CHANTAL MOUFFE, AGONISTICS 3 & 6 (2013).

[22] LAWRENCE FRIEDMAN, THE LEGAL SYSTEM 223 (1975).

B. Images of the So-called Refugee Crisis

Allow me to make more clear how cultural legal processes unfold, as well as how this occurs in conjunction with affectively-loaded medial dissemination of these processes. Such clarifying can be done by way of an example that relates to the central judicial-political debate at the time of this writing—the so-called European refugee crisis. "Crisis" is an emotionally charged word that conjures up visions of impending wars, natural disasters, or, in the least dramatic instance of the noun's denotation, marital dissolution. Accordingly, the verbal and visual tropes that have been commonly employed to illustrate the so-called refugee crisis have included those of undifferentiated waves (suggesting natural disasters such as a Tsunami) or swarms of people (with connotations of infestations and insects) that might figuratively break over, drown or infest the European body politic. The end point of the imaginary mini-narrative implied by these topoi, is that the waves or swarms of refugees will ultimately destroy Europe. I want to argue that these discursive patterns were altered, or at least temporarily interrupted, by the wide-scale dissemination of two sets of photographs in 2015.

The first set of these were publicized during the spring of 2015 and featured images of capsized boats and drowning refugee seekers, particularly after the April 19, 2015 drowning of at least 800 refugees after a boat sank off the cost of Libya. Even the generally politically quietest *The Economist* headlined its April 25th issue with a large image of an unidentified capsizing boat: "Europe's boat people: a moral and political disgrace."[23] In this case, the sheer scale of the death toll led to outraged calls for changes in general European policy, as marked by the morally-charged lexeme "disgrace." As has been pointed out by scholars such as Thomas Keenan, the enactment of human rights' protections can only be achieved through the production of a collective sense of shame amongst those who bear responsibility for the non-recognition of such rights.[24] Visual elicitations appear to be a particularly powerful vehicle for creating such a collective sense.

Of still greater impact, to my mind, were a second series of images. These were of the dead three-year-old Syrian toddler Aylan Kurdi after the child's corpse had been washed up on a Turkish beach. These images, and I do not need to reprint them here in view of their iconicity, were highly disturbing due to the intense personalization of the refugee topic that they evoked. The photographs show Aylan's body in isolation, thus highlighting his singularity. Dressed in Western clothes, including a red tee shirt, blue shorts and—so typical of small children—Velcro shoes, the boy's face-down corpse appeared to resemble that of any sleeping Western child. Rather than a mass of undifferentiated bodies, here was a single

[23] Cover of *The Economist* of *Europe's Boat People: A Moral and Political Disgrace* (Apr. 25–May 1, 2015).

[24] Thomas Keenan, *Mobilizing Shame*, 1302.2/3 THE SOUTH ATLANTIC Q. 435, 435–36 (2004).

defenseless small boy, who looked disturbingly like any other sleeping European toddler.[25] The story of the boy, as well as that of his drowned older brother and mother that went public after the world-wide distribution of the photographs, was highly affectively resonant because it presented a singular narrative about the effects of refugee policies rather than a fear-inducing evocation of masses of people. Here the story was about the death of two small boys and their mother, and the resulting bereavement of the father and husband.

The photos of Aylan went viral and appeared in a whole range of media and forums that far exceeded official news sources. These images were subsequently described as symbols of humanity's suffering as well as the failure of European immigration policies; in immediate reaction to the publication of the images, leaders such as David Cameron made statements about their nations' readiness to accept more refugees. Significantly, a change was also registered in linguistic descriptions of the refugee issue. Rather than concerning putatively economically-motivated "migrants," the subject of these debates was now the issue of "refugees"—a lexeme that denotes the violent necessity of peoples' movements across national borders rather than their volitional wish to relocate.[26] The images of Aylan Kurdi, therefore, not only elicited calls for changed refugee policies within Europe,[27] but also led to the creation of a number of memorials for the child and artworks that commemorated and memorialized his death as synecdochic for the deaths of so many others. Among these is an enormous mural painting depicting the iconic image of Aylan that presently hangs beside the Main River in Frankfurt.[28]

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[25] Nazgol Ghandnoosh*, Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies,* THE SENTENCING PROJECT 22–23 (2014), http://sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf. It is arguably significant that the child in question is Caucasian in terms of the elicitation of audience empathy: Work on punitive attitudes in the United States suggests that a disproportionate amount of crime reporting concentrates on white females, who are arguably also infantilized as reporters' victims of choice, and that this media trend contributes to racial stereotypes concerning crime.

[26] Zeit Online, *Ban Ki Moon ruft zu Mitgefühl mit Flüchtlingen auf* (Sept. 30, 2015), http://www.zeit.de/politik/ausland/2015-09/ban-ki-moon-un-vollversammlung-solidaritaet-fluechtlinge; The University of Sheffield, *Aylan Kurdi: How a Single Image Transformed the Debate on Immigration* (Dec. 14, 2015), https://www.sheffield.ac.uk/news/nr/aylan-kurdi-social-media-report-1.533951.

[27]Süddeutsche Zeitung, *Briten wollen Tausende Flüchtlinge aus Syrien aufnehmen* (Sept. 4, 2015), http://www.sueddeutsche.de/politik/premierminister-cameron-briten-wollen-tausende-fluechtlinge-aus-syrien-aufnehmen-1.2634609; Bundesregierung, *Effektive Verfahren, frühe Integration* (Oct. 26, 2015), https://www.bundesregierung.de/Content/DE/Artikel/2015/10/2015-10-15-asyl-fluechtlingspolitik.html as well as Bundesregierung; *Hilfen für minderjährige Flüchtlinge* (Oct. 16, 2015), https://www.bundesregierung.de/Content/DE/Artikel/2015/07/2015-07-15-auslaendische-kinder-jugendliche.html.

[28] Belinda Paul, *Riesen-Graffiti zeigt toten Flüchtlingsjungen*, HESSENSCHAU (Mar. 10, 2016), http://hessenschau.de/kultur/riesen-graffiti-in-frankfurt-zeigt-toten-fluechtlingsjungen,aylan-graffiti-102.html.

I now want to dwell briefly on a very different kind of image involving asylum seekers than those described above. I would argue that the unseen, yet vividly imagined images of assaults on women during the New Year's night in Cologne have haunted the German legal imaginary since the beginning of 2016. Over six hundred sexually-related assaults were registered as occurring during the night in addition to robberies. The great majority of the alleged 153 perpetrators were from Morocco or Algeria, and most of these men and youths were also seeking asylum in Germany. Reports of these attacks led to their instrumentalization in a moral panic in which prejudicial clichés about *the* Arab/Muslim man were invoked. These clichés had strongly Orientalist elements and fed into longer-standing prejudices about the inherent criminality of foreigners, in particular foreign men.[29] These prejudices were appealed to in ever-louder calls for the harsher treatment and immediate deportation of so-called "criminal foreigners" and asylum-seekers.[30] Further, various political parties demanded new legislation that would treat actions such as grabbing or touching a person against her will as criminal acts.

Several issues have become apparent through the discussion of these images. In the case of the Aylan Kurdi photographs, one of these issues concerns the relation between visibility and the publicity of the so-called refugee crisis. Emotionally evocative images and narratives represent necessary vehicles for swaying public opinion, which in turn affects public and

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[29] On prejudices regarding Muslim men, *see* Chandra Mohanty, *Under Western Eyes*, *in* FEMINISM WITHOUT BORDERS 17 (2003); on Orientalism *see* EDWARD W. SAID, ORIENTALISM (1978); on the traditional collocation of criminality with foreign men in Germany, *see* Helga Sadowski, *Depiction of Female Migrants in German Mass Media*, 41.6 CRITICAL SOC. 951 (2011); Rainer Geißler, *Mediale Integration von ethnischen Minderheiten*, WISO DISKURS, FRIEDRICH-EBERT-STIFTUNG, https://www.uni-siegen.de/phil/sozialwissenschaften/soziologie/mitarbeiter/geissler/wiso-diskurs.pdf [Sept. 2, 2016]; Ilka Sommer, *'Ausländerkriminalität' – statistische Daten und soziale Wirklichkeit*, BUNDESZENTRALE FÜR POLITISCHE BILDUNG (June 14, 2012), http://www.bpb.de/politik/innenpolitik/innere-sicherheit/76639/auslaenderkriminalitaet?p=all; Eckhart D. Stratenschulte, *Freiheit oder Sicherheit – Dilemma oder falscher Gegensatz?*; BUNDESZENTRALE FÜR POLITISCHE BILDUNG (Nov. 22, 2010), http://www.bpb.de/internationales/europa/europa-kontrovers/38185/einleitung?p=0,; *Der 'kriminelle Ausländer' – Vorurteil oder Realität? Zum Stereotyp des 'kriminellen Ausländers'*, 1 IDA-NRW 3 (2008).

[30] Arthur Kreuzer, *Silvesterübergriffe in Köln und Hamburg – eine kriminologische Zwischenbilanz,* GIEßENER ALLGEMEINE ZEITUNG (Jan. 9, 2016), http://www.arthur-kreuzer.de/GAZ_1_2016_Silvesteruebergriffe_in_Koeln_und_Hamburg.pdf; Philipp Seibt*, Sexualstrafrecht: Was ist, was kommt, welche Lücken bleiben?* (Jan. 11, 2016), http://www.spiegel.de/panorama/justiz/sexualstrafrecht-die-rechtliche-situation-im-ueberblick-a-1071445.html; Deutsche Presse Agentur, *Reaktion auf Kölner Übergriffe: Opposition fordert schärferes Sexualstrafrecht*, SPIEGEL ONLINE (Jan. 8, 2016), http://www.spiegel.de/politik/deutschland/koelner-uebergriffe-schaerferes-sexualstrafrecht-von-gruenen-und-linken-gefordert-a-1071214.html; Tatjana Hörnle, *Betatschen ist nicht immer strafbar*, FAZ (Jan. 11, 2016), http://www.faz.net/aktuell/politik/inland/sexualstrafrecht-betatschen-ist-nicht-immer-strafbar-14007043.html; and Zeit Online, *Bundesregierung will kriminelle Ausländer schneller abschieben* (Jan. 12, 2016), http://www.zeit.de/politik/deutschland/2016-01/bundesregierung-kriminelle-auslaender-ausweisung. Legal source: Bundesministerium für Justiz und Verbraucherschutz, *Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz*, http://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_SchutzSexuelleSelbstbestimmung.pdf;jsessionid=F34CFB715C1BAFEEEFF0DB9372251F95.1_cid289?__blob=publicationFile&v=4 (May 31, 2016).

legal policies regarding the treatment of those seeking the recognition and enforcement of their rights. Yet the quandary remains regarding whether such images do not in fact represent a further form of exploitation that functions to reify the victim status of those represented in them. The other issue that a discussion of the iconic Aylan photos and the imagined Cologne assaults brings to the fore is that law and governmental policies that are enforced by law do not occur in a black box according only to rational means and the structured, methodological application of abstract legal norms. Rather than autonomous fields of activity, laws and legal policies are culturally produced and embedded processes; and responses to these processes are mediated through narrative, medial, and affective means. All of these concerns are taken up in the contributions to this special issue, and this brings me to the subject of cultural approaches to law.

C. Why Examine Law as a Cultural Phenomenon and Practice?

During the past several decades, socio-legal and legal-anthropological studies of legal pluralism in the wide sense described above have been joined by other culturalist investigations of law—including Law and Literature, Law and the Humanities, Law and Visual Culture, and Law and Popular Culture—in what has been called the "cultural turn" in legal studies.[31] These younger interdisciplinary ventures expand upon the work of critical legal studies, critical race theory, and queer and feminist critiques of the law in that they not only disavow law's autonomy as a rational science but also stress legal institutions' participation in social practices of domination and exclusion. Further, they underline the imbrications of the legal with narrativity, visuality, and performance. Such pluralistic and culturally-oriented approaches commonly argue that legal processes cannot be separated from their specific and individual historically contingent settings, and that law—meant here to include policing, adjudication, and attitudes concerning legal institutions and activities—can only be transported and made sense of through culturally specific topoi. Examples of this type of work can be found in this special issue with Frans-Willem Korsten describing law's theatrical enactments, with Jeanne Gaakeer's and Andreas von Arnauld's contributions focusing on the narrative structures of law, and with Martin Kayman's and Christine Hentschel and Susanne Krasmann's essays exploring visual and sculptural renderings of law and legal force. Further, the medial presentation of legal decisions in press reporting and the general framing of cultural issues this provides is taken up in Justice Susanne Baer's essay.

In the first instance, this issue on "Law's Pluralities" documents insights into law and legal processes that can be garnered only by adopting interdisciplinary, non-exclusively juridical

[31] Susan S. Silbey, *Legal Culture and Cultures of Legality*, *in* HANDBOOK OF CULTURAL SOCIOLOGY, 470–79 (John R. Hall, Laura Grindstaff, & Ming-Cheng Lo eds., 2010); Lesley J. Moran, *Legal Studies after the Cultural Turn: A Case Study of Judicial Research*, *in* SOCIAL RESEARCH AFTER THE CULTURAL TURN, 124–43 (Sasha Roseneil & Stephen Frosch eds., 2012).

perspectives. Such insights are the result of an intrinsically pluralistic take on respective legal systems and function to bracket the concept of an "*Einheit der Rechtsordnung*"—that is, the unity and uniformity of a legal order,[32] a topic that Franz Reimer investigates here in his essay on culturalist perspectives in legal methodology and theory. Law can serve to protect forms of civility as well as to reinforce practices of social exclusion. Law's pluralities become apparent when law is understood both to include a body of historically developed collective knowledge as well as to be an effective instrument of control by—and for—the powerful. In the second instance, the proposed issue advocates adopting critical, cultural perspectives on law in order to better comprehend socio-legal conflicts in the current period of overlapping and competing jurisdictions. "Law's Pluralities" then takes note of alterations in European and German legal practices and current dissonances in attitudes towards law as well as debates about whether a common European legal culture is under development and, if so, even desirable.

Anxieties about the supposed homogenization of legal practices and loss of specific, national cultural-legal identities have been vocally expressed in Britain—with regard to proposals for a common European Public Prosecutor—and France—in response to a common European code.[33] Such debates recall early nineteenth-century concerns about the need to assert a common German identity by freeing the territories from the allegedly imperialist influence of the Napoleonic Code. It appears that at times when the articulation of a group or national identity is perceived as inchoate or as imperiled, the delineation of a distinct normative regulatory system as expressed in law becomes an overwhelming concern. In these cases, a nation's or a peoples' legal system and constitution are viewed as particularly authentic manifestations of what is imagined to be a specific linguistic and cultural identity. Such legal instruments are perceived as contributing to what Benedict Anderson has referred to as a particularist "imagined community" which is inherently affectively charged.[34] As with criticisms of the scope of the German Federal Constitutional Court's rulings regarding, for instance, the Lisbon Case and the constitutionality of the European rescue funds, these debates demonstrate that legal issues and questions of sovereignty intersect with political issues that also touch on concerns about the preservation of local identities.

What this special issue then hypothesizes to be law's increasing plurality has been caused by a variety of factors of which none can be said to be primary. The occasionally conflict-ridden integration of individual European legal systems and national courts with EU

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[32] KARL ENGISCH, DIE EINHEIT DER RECHTSORDNUNG (1987) [1935].

[33] *Cf*. Ralf Michaels, *Code vs. Code, Nationalist and Internationalist Images of the Code Civil in the French Resistance to a European Codification*, 8 EUROPEAN REVIEW OF CONTRACT LAW 1–20 (2012) and Nigel Farage, *Innocent until Proven Guilty? Not under the EU's Justice System*, THE INDEPENDENT (Nov. 10, 2013), http://www.independent.co.uk/voices/comment/innocent-until-proven-guilty-not-under-the-eus-justice-system-8931215.html; *see also* Kayman chapter in this volume.

[34] BENEDICT ANDERSON, IMAGINED COMMUNITIES 43 (2006).

legislation and the European Court of Justice and European Court of Human Rights is one such factor. A second is the influence of international commercial law with its preference for common-law concepts of property and attendant forms of legal transfer, which has led to what has been described as a convergence of legal systems. A third contributing factor is the increasing heterogeneity of populaces within individual EU states. This has led to a greater divergence in attitudes towards the appropriate role and scope of the judiciary—particularly in its interactions with topics relating to cultural difference and the viability of customary and/or religious law. Recent disputes concerning the treatment of refugees, social security benefits for migrant individuals, and the possible recourse to Sharia councils in family law conflicts attest to a current uneasy plurality of attitudes. Conflicts regarding the rights and protections of members of quasi-marital lesbian and homosexual unions as well as of trans*sexuals provide another area of cultural-legal conflict. A fourth factor involves the so-called politicization and increased mediatization of legal processes themselves, which has raised heightened concerns about whether such coverage leads to distorted views of legal processes. This has occurred, on the one hand, through large-scale coverage of and ensuing debates about the meanings of criminal tribunals such as Jörg Kachelmann's trial for rape (2010–2012) and the NSU trial (2013–present), and, on the other hand, through popular media interventions into the legal such as *Verklag mich doch!* (2011–2014).[35]

Inevitably, calls for cultural approaches to law intersect with arguments for comparative legal research and adjudication as well as for defenses of legal pluralism. The editors and contributors to the proposed issue advocate cultural approaches to law and posit pluralistic "cultures of legality"[36] rather than adopting a "legal culture"—or a "Law and Culture"-methodology.[37] The use of "culture" in the singular problematically infers that a given legal environment consists of one organic, stable, and unified whole. Such a position tends then to reify divisions of cultural entities into the local and the normative versus the "foreign" and the non-normative. Moreover, to posit the existence of singular legal cultures belies the experience of individual forms of "legal consciousness" or "legal subjectivities."[38] Dependent on one's position within a socio-legal order and the experiences of one's cohort within this order, individuals will have more or less trust in the validity, fairness, and intrinsic legality of the legal processes and institutions that control them. Thus positing any singular German

[35] In this pseudo-reality television series, fictional legal cases were introduced and commented on by lawyers as though they had actually occurred.

[36] Silbey *supra* note 31, at 470–79.

[37] *Cf*. in particular the works of Lawrence Friedman: Lawrence Friedman, *Legal Culture and Social Development*, 4.1 L. & SOC'Y REV., 29–44 (1969); LAWRENCE FRIEDMAN, THE LEGAL SYSTEM (1975); Lawrence Friedman, *Is there a Modern Legal Culture?*, 7 RATIO JURIS, 117–31 (1994).

[38] Susan S. Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCIENCES,323–68 (2005); Jan M. Broekman, *Legal Subjectivity as a Precondition of the Intertwinement of Law and the Welfare State*, *in* DILEMMAS OF LAW IN THE WELFARE STATE, 76–109 (Gunther Teubner ed., 1986).

legal culture, for instance, would reductively and misleadingly deny divisions within this hypothetical entity and obscure the constant effect of internally and externally motivated change. Finally, a critical understanding of culture as stratified and in a constant state of dynamic, internal change has to be taken when, for instance, *talāq* is cited in arguments within German courtrooms about the scope of *ordre public* in marriage disputes. As the Islamic scholar Irene Schneider has argued, an undifferentiated view of Islam is often adopted in such German rulings—one that ignores quite heterogeneous, historically varied national and religious interpretations of *talāq* and homogenizes Muslim identity entirely.[39]

D. Contents of Law's Pluralities

To address the issues raised above, this special issue on "Law's Pluralities" evinces a double structure. In the first case, the essays that follow here all address the issue's proposal for an understanding of law as pluralistic and the argument for the necessity of adopting critical, cultural positions in order to understand contemporary conflicts between cultures of legality. In the second case, the individual sets of essays also speak to one another by addressing similar issues from differing disciplinary, methodological, and/or critical perspectives. However, as the following overview shall render explicit, certain themes concerning the cultural embeddedness and plurality of the legal are taken up in all of the discussions, thus showing transversal points of commonality as well.

Greta Olson's and Franz Reimer's contributions open the discussion of law's pluralities first from a culturally critical and then from a legal comparative set of perspectives. Importantly, Franz Reimer's essay questions whether the pluralistic and cultural approach to law—that has been advocated by Olson in the above and in other publications—can in fact be useful in terms of the methods of legal application. Accordingly, Reimer speaks to Olson from the perspective of German legal methodology and pedagogy, thereby supplementing her explicitly cultural-studies approach with a legal theoretical one. First pointing out that an understanding of law as culture was intrinsic to nineteenth- and early twentieth-century legal theory, Reimer then outlines how an oppositional relation between law—as an instrument of state power—and culture—as consisting of activities within the state—was subsequently posited. He then highlights criticisms of law-as-culture approaches particularly in Thomas Gutmann's work. Gutmann criticizes understandings of culture for their implicit normativity, hidden prescriptive understandings of how humans operate, and failure to assist in elucidating law's normative claims. Reimer then considers how conceptualizations of law's affectivity can be effectively implemented in legal methodology and interpretation. Most importantly, he highlights the plurality of law in a different sense than Olson does. He points out the need to understand individual legal systems comparatively and in terms of

[39] Irene Schneider, *Der Ṭalāq auf Reisen: Kodifikation, Geschlechtergleichheit und Islamischer Personalstatut in der globalen postkolonialen Moderne*, *in* RELIGIONSFREIHEIT UND GLEICHBERECHTIGUNG DER GESCHLECHTER, 133–59 (Juliane Kokott & Ute Mager eds., 2014).

their internal pluralism. As Reimer writes in this issue: "Almost any legal system can then be seen as a cultural archive, a repository of the history of social-political thought. While the plurality of legal systems has become very clear during the past few decades, the internal pluralism of all legal systems remains to be rediscovered and rethought."

Irrespective of the conceptual framework, Reimer argues that applying the law remains a highly challenging cultural practice in terms of fact-finding as well as in the interpretation of legal norms. As a result, he brings up a point of debate that is implicit in the juxtaposition of Susanne Baer's and Bettina Kaiser's articles. Whereas Kaiser discusses the methodological viability of comparativism in constitutional jurisprudence, Baer's description of actual debates within the German Federal Constitutional Court about controversial cases suggests that comparativism—also in a historical sense—happens regardless of how more or less valid it is perceived from a doctrinal point of view.

The set of contributions by Susanne Baer and Anna-Bettina Kaiser address interpretive issues in constitutional court settings. Baer takes a praxis-oriented perspective, and Kaiser a methodological-oriented one. Baer argues for an interdisciplinary approach to law and to understanding the speaking of the law (*Rechtsprechung*) as a practice via a discussion of the German Constitutional Court's so-called headscarf decision from March 2015. Thereby, Baer points out that this discussion is limited by her obligation, as a presiding justice, not to reveal any precise details of how the ruling was arrived at. Baer highlights not only the conflicting norms that had to be considered, including the framing of the case in precedent decisions and with recourse to the Basic Law as well as to rulings by the ECHR, but also the divergent influences of the variety of actors who were involved in the case. This includes the two women who brought their cases to the Constitutional Court as specifically gendered and socially-positioned legal subjects, the lawyers who—as in all large-scale cases—pursued the cases through the courts, the legal scholars who commented on the ruling, and the press which has framed the case to achieve a maximum of dramatic effect. Finally, the ruling was affected by the presiding justices' greater or lesser experiences of being—like the plaintiffs—in a minoritarian position within the social-legal commons.

Baer suggests that only by adopting an interdisciplinary, gender-, narrative-, and medially-sensitive approach to law will we be able to comprehend the ruling with sufficient complexity as "an intervention into legal pluralism," because the ruling consisted of many conflicting stories that were only subsequently framed within and by a single authoritative legal text. An intersectional approach to law is necessary, she argues, that is, one that recognizes overlapping forms of discrimination caused by a person's gender, sexuality, religion, ethnicity, and class. Yet such an approach must also avoid essentializing attitudes by, for instance, assuming that women justices will automatically adjudicate differently from their male counterparts.

Taking a pluralistic view of constitutional interpretation from an entirely different angle, Anna-Bettina Kaiser points out cases in which comparative constitutionalism has been made

recourse to as well as the problems involved in determining their legitimacy. Kaiser contrasts a debate between US Justices Breyer and the recently deceased Justice Scalia with the recent German dialogue between Justice Susanne Baer and Christian Hillgruber about the validity of constitutional comparison. The article then goes into detail how the German Federal Constitutional Court, while expressing reluctance to compare legal systems explicitly, nevertheless participates in dialogues with other constitutional courts that inevitably lead to a mostly implicit practice of comparing constitutional systems. Kaiser's contribution suggests that, on the whole, there are good reasons for constitutional courts' reluctance to embrace comparative constitutional law. This reluctance can be explained through problems of legitimacy, through the considerable shortcomings of comparative constitutional law as a method of constitutional interpretation, and through the functional limits of constitutional jurisprudence. Nonetheless, comparative constitutional law does have a place within the distinct, generalizable, and overarching aims of constitutional jurisprudence, and functions to address questions concerning horizontal effects, proportionality, and the scope of judicial review.

Andreas von Arnauld's and Jeanne Gaakeer's set of articles argue for the narrative and hermeneutic qualities of law and adjudication in several overlapping ways. Both authors invoke law's pluralities by inviting readers to consider how law is shaped culturally through often un-acknowledged generic and aesthetic codes that are governed primarily by narrative structures. Von Arnauld provides a performance of aesthetic coding in the playful and performative form of his article on *petit* and *grand récit* in legal texts and processes. His text opens the discussion of law's narrativity by describing how particularly the preambles of constitutions function to create a sense of collective narrative identity by reducing historical complexities to singular, simplified plot lines and by evoking a sense of loyalty in legal subjects. Thus his work on law's narrative qualities highlights the identity-formative aspect of the law that has been espoused by the present author above and which is transported particularly effectively using narrative means. Von Arnauld then demonstrates how legal texts such as the German statute prohibiting incest also make recourse to myths, literature, and historical traditions in order to validate their prescriptions narratively. Finally, he illustrates how narrative structures operate within German criminal legal statutes. In sum, his contribution argues for a cultural study of constitutional and statute law through narratological analysis.

Jeanne Gaakeer's contribution, on the one hand, recurs to the tenor of the special issue more generally in that it stresses the narrative qualities of all legal judgments. On the other hand, as an article written by an appellate justice in the highest criminal court in the Netherlands, it also reiterates themes from Justice Baer's text in that it emphasizes the processual and practical hermeneutic aspects of juridification in a civil-law system and espouses the necessity of bringing practical wisdom to the process of judgment. Gaakeer points out that the selection of facts in a judgment transpires analogously to the arrangements of narrative elements in a plot. This insight brings her to call the adjudicator the "judge narrator," who chooses facts and does or does not choose to translate previous

actions into transgressions of legal norms. She points out potential discrepancies between pre-trial and the trial narratives, differences between common and civil law system narrational structures, and how profound narratological and interpretive problems can arise. This happens, for instance, if a defendant has already confessed, or a defense lawyer fails to narrate a case well, or if the alleged perpetrator chooses to remain silent. Importantly, Gaakeer expands on Peter Brooks's much noted claim that "law needs a narratology" to argue that such a narratology has to be system specific and that most work on the narrative qualities of law and adjudication erroneously departs from an analysis of the structures and procedures of common law systems.[40] Gaakeer concludes that judges as well as scholars need to develop an increased hermeneutical and narrative competence. She also advocates for paying greater attention to the narrativity, emplotment, and hermeneutics of jurisprudential processes in civil law jurisdictions in contradistinction to common law ones.

Finally, the last three essays in this issue by Martin Kayman, Frans-Willem Korsten, and Christine Hentschel and Susanne Krasmann move away from Gaakeer's and von Arnauld's emphasis on the narrative qualities of law and legal judgment. Their implicitly more linguistically-based understanding of law is hence augmented by the last three contributors' accounts of the visuality, mediality, and inherent theatricality of legal proceedings and legal force. In the first of the triad of essays, Kayman shows how the foundations of law are imagined today though the figure of the "icon." In a historical account of relations between the visual and the legal in the common law context, Kayman points out how the current plurality of competing images offers a diverse set of narratives about law and identity. The essay then reflects on a number of highly conflicting digital, visual, and sculptural commemorations of the eight-hundredth anniversary of the Magna Carta, alongside a case regarding the rights of self-styled "diggers" to reside on land earmarked for commercial development adjacent to the commemorative site. In light of perceived threats to British identity brought on by multiculturalism, globalization, devolution, and the reception of European law, the majority of commemorations work to shore up national identity by configuring it around foundational images that provide sites for what Kayman calls post-secular "rituals of identification." The Magna Carta is thereby positioned as a particularly salient basis for claims to the distinctively British protection of liberty through the rule of law. This observation reinforces arguments made by von Arnauld and myself in this special issue about the identity-solidifying function of what might be called national and sometimes nationalistic legal imaginaries. As Kayman argues in this issue, however, the highly conflicting images of the Charter that are experienced in the commemorative artworks reveal it to be a "postmodern icon" whose empty core conceals the fact that, in contemporary Britain as elsewhere, "law is increasingly law [only] because it calls itself law." Kayman's essay reminds us that the Charter was initially negotiated not in order to defend human liberty, but the

[40] Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1 (2006).

rights of the aristocracy, and that the rule of law it commemorates protects the liberty of some by justifying the loss of liberty of others.

Korsten's contribution, in turn, makes an initial claim for the theatricality of law, in general, arguing that law can be seen as theatrical in four distinct ways. First, and on an abstract level,—as French legal historian Pierre Legendre has argued—law is intrinsically theatrical, because language is in itself theatrical. Human subjectivity is developed through language, and human beings comprehend themselves and others via linguistic means. Second, from a certain historical moment onwards, law has been enacted in the form of a theatrical dispositive. On law's stage, people have enacted predetermined, recognizable roles according to distinctly defined rituals; as in a classic theatrical drama, a court trial consists of several consecutive acts. Drama is then involved in peoples' interacting with one another without their knowing the outcome of what it is they are enacting. Furthermore, an audience consisting of the jury or justices serves as the *pars pro toto* of the general public. Third, law is inherently theatrical because the concept of a legal person is derived from the Latin lexeme *persona*—the mask used by an actor in classical theater. Fourth, law is theatrical in terms of the means whereby people come to understand how the system of law works, and this is the sense of the theatrical with which Korsten's article primarily concerns itself.

Korsten then proceeds to make an argument about the theatricality of European civil law in contrast to the dramatic qualities of Anglo-American common law. This bears on intrinsic notions of sovereignty as well as on the directions in which these two divergent systems are currently evolving. For Korsten, the European civil law system is moving not only towards a de-nationalization of individual legal systems but also towards an increased state of invisibility regarding legal proceedings. This increased invisibility has been caused by the growing importance of the European Court of Justice. By contrast, the common law United States system is becoming at once more privatized, as case outcomes are increasingly determined by plaintiffs' financial resources, and ever more starkly visible through increased media coverage of spectacular show trials. Korsten's work on the intersections of visibility and theatricality introduces in effect the discussion of *Rechtskraft* (the force of law) that follows in this special issue's final essay. For law to come into effect and to maintain its authority, processes of judgment have to be rendered appreciable to a large public in a ritualized manner.

Christine Hentschel and Susanne Krasmann's essay concludes this special issue on Law's Pluralities by making a subtle claim about affectivity and the enforcement of law. Their contribution focuses on so-called "left-to-die" refugee boats in the Mediterranean and how such boats have been treated under international law as well as in terms of dominant representational codes. Hentschel and Krasmann write against the tenor of the positive arguments for a pluralistic approach to law that have been voiced in this introduction. They suggest that "a plurality of legal regulations" regarding the obligation to assist vessels under distress and to allow for the disembarkation of their passengers has allowed actors to disclaim binding responsibility for the lives of those on the boats. Thus Hentschel and

Krasmann demonstrate that *Rechtskraft* (the force of law) has been used to create the conditions under which thousands of migrant drownings in the Mediterranean have been treated with legal impunity and have thus contributed to other European forms of "securitizing (undesired) populations."

Hentschel and Krasmann's discussion centers on a research project undertaken at Goldsmith's College at the University of London which presents the left-to-die boat case using multiple kinds of visualization techniques, including surveillance technologies. Specifically, the project represents the case of the left-to-die boat that involved the death of sixty-three Libyan migrants despite their having had multiple interactions with parties that could have saved them. This case presents a counter-case to the usual methods of eliciting sympathy for refugees through an emphasis on individual stories of suffering, such as in the Aylan Kurdi photographs, or through affectively arousing photographs of drowned bodies. Instead, the research project uses technologies that generally contribute to the control and objectification of migrant populations to map and document "the violence of the border regime" and effectively to turn the technologies of surveillance back on those performing the surveillance.

In total, these essays provide a variety of arguments for the pluralistic nature of contemporary legal processes and the efficacy of using methods from critical, cultural theory not only to dissect them but also to integrate understandings of legality into larger discussions of sociopolitical trends—such as Europeanization. The opening introductory essays by Greta Olson and Franz Reimer frame the discussion of understanding law as a hybrid and intrinsically affective cultural process, and reflect on this understanding for legal theory and methodology. Whereas Olson highlights an understanding of law's pluralism as extending to other forms of normativity and to the dissemination of legal phenomena through medial, narrative, visual, and affective means, Reimer makes a case for the need to investigate the internal plurality of individual legal orders, also in terms of their differing histories and underlying value systems.

The following pair of essays then presents adjudication to be a comparative, culturally embedded process (Baer, Kaiser); and the next pair demonstrates that legal processes and texts are narratively constructed and solely comprehensible using narratively-derived interpretive means (Gaakeer and von Arnauld). Finally, the closing triad of essays show law to be inherently theatrical, and also to be a source of a sense of national identity—whose mediation is dependent on various forms of visualization and potentially conflictual commemoration—and to be affectively reinforced and brought about (Kayman, Korsten, Hentschel and Krasmann).

The work presented here is intended to contribute to more subtle understandings of how changes in overlapping legal systems and cultures do not just involve law in a traditional narrow sense, but also engage in, and are expressed by, various fields of human activity and

contestation. The cultural approach to law's pluralities that we espouse may help to comprehend better the non-divisibility of cultural and legal processes and debates.

Introduction: Arguments for Cultural Approaches to Law as a Program of Research

1. Greta Olson (Käte Hamburger Center for Advanced Studies in the Humanities "Law as Culture," Bonn; American and English Literary and Cultural Studies, Justus Liebig University, Giessen): "Introduction: Mapping the Pluralist Character of Cultural Approaches to Law"
2. Franz Reimer (Public Law and Legal Theory, Justus Liebig University, Giessen): "Law as Culture? Culturalist Perspectives in Legal Theory and Theory of Methods"

Pluralistic Approaches to Constitutional Interpretation

3.Susanne Baer (German Federal Constitutional Court, and Law and Gender Studies, Humboldt University of Berlin): "Speaking Law: Towards a Nuanced Analysis of "Cases"
4. Anna-Bettina Kaiser (Public Law and Foundations of Law, Humboldt University of Berlin): "'It isn't true that England is the Moon': Comparative Constitutional Law as a Means of Constitutional Interpretation by the Courts"

Law's Narratives and Hermeneutics

5. Andreas von Arnauld (Public, International, and European Law, Walther Schücking Institute for International Law, Kiel): "Norms and Narratives"
6. Jeanne Gaakeer (Appellate Court of The Hague, Legal Theory and Jurisprudence Erasmus School of Law, Erasmus University Rotterdam, the Netherlands): "The Perplexity of Judges Becomes the Scholar's Opportunity"

Law's Visuality, Theatricality, and Affectivity

7. Martin Kayman (School of English, Communication and Philosophy, Cardiff University, UK): "Imagining the Foundations of Law: Magna Carta in 2015"
8. Frans-Willem Korsten (Erasmus School of History, Culture and Communication / Leiden University Centre for the Arts in Society): "*Öffentlichkeit* and the Law's Behind-the-Scenes: Theatrical and Dramatic Appearance in European and U.S. American Criminal Law"
9. Christine Hentschel (Criminology: Security and Resilience, University of Hamburg) and Susanne Krasmann (Sociology, Institute for Criminological Research, University of Hamburg): "In the Force Field of the Law: On Affect and Connectivity in the Casework of Forensic Architecture"