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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

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.

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.”

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. 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, 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.”

What de Sousa Santos highlights is that during moments of codification,
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.

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 vergnügheit; worunter ich die neigung verstehe, den leuten nicht gerade zu alles und jegliches fest vorzustecken und auszumessen, so dass 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

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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.” 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.” 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. 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 EHRICH’S SOCIOLOGY OF LAW 39, 43 (Knut Papendorf, Stefan Machura & Anne Hellum eds., 2014).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{17} Machura supra note 14, at 44–45.


\textsuperscript{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” 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.

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. 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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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.” 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. 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


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


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


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 Arnau’d’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. Maran, 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, 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. 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. 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

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


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

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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).

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.  

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

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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.\textsuperscript{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, mediarity, 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

\textsuperscript{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

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”
Law as Culture? Culturalist Perspectives in Legal Theory and Theory of Methods

By Franz Reimer*

Abstract

This Article questions in what sense law in the German tradition has been—and can still be—considered a form of culture. The Article offers an overview of traditional approaches to law and culture in German Legal Theory and the Theory of Methods, and argues that the law has shifted from being perceived as culture during the nineteenth and early twentieth centuries to being in contrast with culture, which is considered the “other” of the law. Mediated by “legal culture,” the discourse pendulum has swung back to the notion of “Law as Culture” during the last three decades. Thomas Gutmann, the German lawyer, has fiercely challenged equating law with culture, describing it as “murky” and irrelevant. Similarly, the concept of “Law as Culture” is questioned by the provocations of “Law and Affect.” This Article claims that, irrespective of conceptual framework trends, applying the law remains a highly challenging cultural practice in terms of both fact-finding and interpreting legal norms.

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A. Law as Culture Avant la Lettre

From a jurisprudence viewpoint, the insight that law and culture are closely intertwined is not a recent one. It can be traced back to Ancient Greece when it was used particularly by historians—the first comparative lawyers. Notably, Aristotle discovered this link in Book IV of his Politics, when he discussed the interdependency of politeia and society. Stunned by the multitude of constitutional orders, Aristotle stressed the relationship between “constitution” and socio-political contexts. Centuries later, Pascal and Montaigne once again highlighted the cultural and sociological embeddedness of law. In a way, these philosophers constitute a “Law as Culture” movement avant la lettre.

In Germany, culture took on its specific current denotation during the eighteenth century. Marburg Professor Wilhelm Arnold’s Cultur und Rechtsleben, written in 1865, appears to be the first explicit confrontation between culture and law from a jurisprudential point of view; although Arnold’s focus was on the relationship between civil law and the economy. Even at the beginning of the twentieth century, one did not perceive law and culture as opposing or contradictory concepts; rather, juridical norms (Rechtsnormen) and cultural norms (Kulturnormen) were seen as concurrent. Accordingly, Josef Kohler, an early comparative lawyer and the co-founder of German intellectual property law, saw law as a “cultural phenomenon,” that is a “creation of culture intended to promote culture.” Inspired by Max Ernst Mayer and Emil Lask, Gustav Radbruch described jurisprudence as a “verstehende Kulturwissenschaft,” which roughly translates as a “science of cultural hermeneutics.” In other words, there is a long, notable tradition of law as culture in German legal thought.

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3 Id. at 36.
4 See generally MAX ERNST MAYER, RECHTSNORMEN UND KULTURNORMEN (1903); see also HOFMANN supra note 2, at 40.
5 See generally JOSEF KOHLER, DAS RECHT ALS KULTURERSCHEINUNG (1885).
6 JOSEF KOHLER, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 3 (3d ed. 1901) (“Das Recht ist eine Schöpfung der Kultur, es hat die Aufgabe, die Kultur zu ermöglichen, zu fördern und zum Gedeihen der Menschheitszwecke zu führen.”). It may be noted that Kohler included his own poems in his legal essays. See JOSEF KOHLER, DICHTER UND ERFINDER, IN INDUSTRIERECHTLICHE ABHANDLUNGEN UND GUTACHTEN 1, 6 (1899).
7 See GUSTAV RADBRUCH, RECHTSPHILOSOPHIE 118 (1932); GUSTAV RADBRUCH, RECHTSPHILOSOPHIE 115 (Studienausgabe ed., 2003). For a critique of the notion of legal science as a cultural science see HANS KELSÉN, DIE RECHTSWISSENSCHAFT ALS NORM-ODER ALS KULTURWISSENSCHAFT, IN 40 SCHMOLLERS JAHRBUCH 95, 95 (1916).
B. Law and Culture

For decades, however, law and culture have been explicitly or implicitly placed in opposition to one another as two realms of life with entirely different rationalities. Often, law was conceived of as powerful and protective, whereas culture—whatever was meant by this label precisely—was viewed as a frail plant in need of protection. Culture also served as a dialogue partner for law. As a societal subsystem of its own, culture may be considered both a formative and a limiting factor in relation to the law.

The law and culture dichotomy also mirrors a fundamental distinction made between the state and society (Staat und Gesellschaft). This distinction pervaded German political and legal theory during the nineteenth and twentieth centuries. Accordingly, law could be seen as the state’s instrument of control, whereas culture was perceived as the epitome of free activities within a society. This dichotomy is reflected in the famous Böckenförde Dilemma:

The liberal, secularised state is nourished by presuppositions that it cannot itself guarantee. That is the great gamble it has made for liberty’s sake. On the one hand, it can only survive as a liberal state if the liberty it allows its citizens regulates itself from within on the basis of moral substance of the individual and the homogeneity of society. On the other hand, it cannot attempt to guarantee those inner regulatory forces by its own efforts—that is to say, with the instruments of legal coercion and authoritative command—without abandoning its liberalism and, at a secularized level, lapsing into that pretension to totality out of which it led the way into the denominational civil wars.

The author of this dilemma, constitutional judge Ernst-Wolfgang Böckenförde, sees culture as the key to the problem:

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8 See Leo Rosenberg, Die Gründe der Rechtsbildung. Akademische Rede zur Jahresfeier der Hessischen Ludwigs-Universität am 2. Juli 1928, 2 Schriften der Hessischen Hochschulen, Universität Gießen 19 (1928) (“Gibt es doch keine Kultur und keinen Kulturfortschritt als hinter der schützenden Mauer des Rechts.”) (“There cannot be any culture and cultural progress if it does not occur behind the protective wall of the Law.”).

9 See generally Horst Dreier et al., Kulturelle Identität als Grund und Grenze des Rechts, Akten der IVR-Tagung (Franz Steiner Verlag eds., 2008).

In culture cognitive powers, mental states and traditions come together and create attitudes, habits and a concomitant ethos. Such a culture is, however, not a given, let alone a fixed entity. Culture lives, particularly in the secular state, in freedom and out of free, spontaneous impulses . . . . Under the auspices of freedom of expression, of art and of Weltanschauung she tends to become a mobile, fluid element . . . . That is why the secular state must support, and as far as possible, protect existent and lived culture.  

According to this perspective, culture—in this particular sense—is a *conditio sine qua non* for the liberal, secular state; it substitutes for a civil religion that has turned out to be intolerant. It is no surprise then that the question concerning the sources of the liberal state raised by the Böckenförde Dilemma and related questions concerning multiculturalism and *Leitkultur* (the controversial concept of a so-called defining culture), gained momentum in Germany in the aftermath of a peak in migration in 2015. In such a situation, it has become more and more common to take recourse using the vague concept of values. To be sure, the use of this concept in constitutional law dates back to the 1950s. According to the Federal Constitutional Court, the concept of civil liberties is enshrined in the Basic Law (Germany’s constitution) as an “order of values” and a “system of values.” Values have, in public discourse, become a label for the majority’s expectations of how minorities should behave. It was in this sense that Federal Constitutional Court Justice Peter Michael Huber declared that “the stronger society’s fragmentation in ethnic, religious, social, and cultural aspects becomes, the more the state must generate a sense of community. As an immigration state, Germany is dependent on a state which enforces its values.”
These and similar claims concern the alleged relevance of culture for the legal system as a whole. On a less abstract level, awareness of the contingency of the law, its non-autonomy, and its embeddedness has also grown. Given post-World War II Germany’s dense system of regulations on the one hand, and the insistence on civil liberties on the other, the deficits of “law according to the books” soon became glaringly obvious. Further, the prerequisites of “law in action” also attracted attention due to the insights of the Law and Society movement and telling observations about the discrepancy between the codified law and actual practice. The water protection law provided a good example of this: Despite wonderfully sophisticated administrative laws, protections could not be enforced due to the lack of a government agency to do so.15 But even at the beginning of the Bonn Republic (1949–1990), there seemed to have been a sensitivity to the cultural, material, and aesthetic preconditions of a functioning legal system which was presumably driven by the desire to enhance acceptance for the newly created democracy and its institutions.

This may be illustrated with an anecdote concerning the Federal Constitutional Court, probably the most successful actor in the German political system. In a famous memorandum from 1952 concerning its constitutional status, the Court pointed out that “only if the attempt to imprint the representative position of the Federal Constitutional Court to the people is visually successful will the Court be able to fulfill its function to politically integrate the whole of the state and the people entirely.”16 As a result of this memorandum and a victorious struggle for power and authority, the Court gained administrative and fiscal independence. Yet, even before the Court enacted its own rules of procedure in 1975, which provides in Section 64 that the Justices “in the oral proceedings wear a robe with cap,” the Justices had decided to wear a specific type of robe in 1957 and delegated the preparations of cases to a committee of three of the Justices. After a four-year discussion led by Justice Erwin Stein, the Justices voted to adopt a red robe tailored by

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15 See generally GERD WINTER, DAS VOLLZUGSDEFIZIT IM WASSERRECHT (1st ed., 1975).

16 Denkschrift des Bundesverfassungsgerichts, in 6 JÖR 144, 146 (1957) (“Erst wenn es gelingt, dem Volk die repräsentative Stellung des Bundesverfassungsgerichts auch bildhaft einzuprägen, wird das Bundesverfassungsgericht seine zugleich politisch integrierende Funktion innerhalb des Staats- und Volksganzen voll erfüllen können.”). The Chief Justice Hörker-Aschoff apparently considered the site of the Court to be of paramount importance. See 6 JÖR 156 (1957) (“Der Wunsch, die repräsentative Stellung des Bundesverfassungsgerichts dem Volke auch bildhaft einzuprägen, ist berechtigt; ich fürchte indessen, daß er sich schwer erfüllen läßt, nachdem der Gesetzgeber das Bundesverfassungsgericht in die dörfliche Einsamkeit einer ehemaligen Residenzstadt verbannt hat.”).
the staff of the Badisches Staatstheater. This robe of “operetta-like opulence” has become familiar to all German television viewers. It can be seen as a part of the success story of the Federal Constitutional Court—the branch of government that citizens trust more than any other branch within the German political system.

C. Legal Culture(s)

In a period in which comparative law has become omnipresent, it seems uncontroversial that legal systems have their respective “legal cultures” in the sense of the pre-legal and paralegal conditions of a given legal system or the legal reasoning in a given jurisdiction. Probably going back to the concept of a “Kultur des Rechts”—a culture of law, as described by the legal theorists Savigny and Jhering—the term is frequently used in the plural form; in any event, it serves as a description of the cultural particularities of a given legal system.


18 CHRISTOPH SCHÖNBERGER, Anmerkungen zu Karlsruhe, in DAS ENTGRENZTE GERICH 9, 26 (Matthias Jestaedt et al. eds., 2011).


For an analysis of the enter-exit mechanisms of the court, see Korsten chapter in this volume.


21 GUTMANN, infra note 34, at 32 (attributing the term “Legal Culture” to LAWRENCE M. FRIEDMAN, LEGAL CULTURE AND SOCIAL DEVELOPMENT (1969), but the concept seems to date back to the early nineteenth century); See HEINRICH LUDEN, 10 NEMESIS: ZEITSCHRIFT FÜR POLITIK UND GESCHICHTE 246 (1817); see also WENZEL ALEXANDER MACIEIOWSKI, SLAVISCHE RECHTSGESICHTE § 421 (1839).
or of a family of law. Not surprisingly, therefore, practitioners of comparative law have rediscovered culture’s relevance in the application of the law during the last two decades, and they have pointed to the fact that no regulation can really be understood outside the background of its specific tradition and culture. In this sense, any given legal system has its respective culture.

It is tempting then to resort to dichotomies, such as case law versus statutory law, to qualify legal systems in terms of their alleged legal cultures. That said, it becomes quite clear on close inspection of many legal systems that they cannot be adequately described according to such labels. In other words, the concept of “legal culture” often serves as a stereotype and a barrier to perception instead of an aid to better understanding respective legal systems. Legal cultures may suggest the “unity of the legal order”—to use a famous

22 See, e.g., NIKLAS LUHMANN, DAS RECHT DER GESellschaft 163 (1993) (“Europa hatte auf Grund der Errungenschaften des römischen Zivilrechts eine entwickelte Rechtskultur.”).

23 Rainer Wahl, Die zweite Phase des Öffentlichen Rechts in Deutschland, 38 DER STAAT 495, 512 (1999) (explaining that the term “Grundrechtskultur” (i.e., civil liberties culture) by Peter Häberle equally aims at comparing different legal systems); see also Peter Häberle, Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat. Zugleich zur Rechtsvergleichung als “fünfter” Auslegungsmethode, in JURISTENZEITUNG 913–15 (1989).

24 Felix Frankfurter, Some Reflections, 47 COLUM. L. REV. 527, 527 (1947)

(“Even as late as 1875 more than 40% of the controversies before the Court were common-law litigation, fifty years later only 5 %, while today cases not resting on statutes are reduced almost to zero. It is therefore accurate to say that courts have ceased to be the primary makers of law in the sense in which they ‘legislated’ the common law. It is certainly true of the Supreme Court that almost every case has a statute at its heart or close to it”).

Similarly the Annual Report of the German Federal Court of Justice for 1966 states:


25 See Olson chapter in this volume. (“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.”).

phrase coined by Karl Engisch. But assuming that a legal system is homogenous and consistent reveals a failure to take into account the democratic disruptions in the law. Instead, we must “learn to live with a legal and constitutional order which is not a whole and homogenous one.”

D. Law as Culture Revisited

It seems that comparative law—in particular comparative constitutional law—with its objective of exploring the plurality of legal orders, has led to the rediscovery of law as culture. What was the dominant functional approach to comparative law has turned out to be unsatisfactory because it tends to conceive of law exclusively as a means to an end. Instead, it has become clear that to compare law means to compare cultures. For instance, what is regarded as a legal problem in Germany might be seen as a matter of republican traditions and values in France. In Germany, constitutional lawyers such as Peter Häberle and Rainer Wahl first expressed this insight. In other words, dealing with the diversity of legal systems necessitates a closer or deeper investigation than mere legal comparison between single or indeed numerous provisions in the sense of the letter of the law; rather, this investigation entails exploring the law in action—by looking, for example, at the law’s implicit premises, attitudes, routines, behavioral schemes, and divisions of labor, etc.

During the last three decades, analyses in which the law is seen as a deeply cultural phenomenon or “Law as Culture” have become popular. It goes without saying that the promise of this programmatic slogan cannot normally be fulfilled in terms of legal practice, neither by legal scholars because they lack access to the methods of cultural studies, nor by

27 See FRIEDRICH MÜLLER, EINHEIT DER VERFASSUNG 114 (1979) (“Wir müssen lernen, mit einer Rechts- und Verfassungsordnung zu leben, die kein in sich einheitliches Ganzes ist.”); See also HELMUT COING, System, Geschichte und Interesse in der Privatrechtswissenschaft, 32 481–88 (1951) (“Das Recht ist . . . für die Interessenjurisprudenz ebensowenig moralisch wie logisch eine einheitliche Ordnung. Es hat überhaupt keine Einheit.”).

28 Häberle, supra note 23, at 915.

29 See e.g., VERFASSUNG ALS KULTUR UND KULTURELLER PROZESS 28 (1998).

30 VERFASSUNGSVERGLEICHUNG ALS KULTURVERGLEICHUNG, in STAAT – SOUVERÄNITÄT – VERFASSUNG. FESTSCHRIFT FÜR HELMUT QUARITSCH ZUM, 70 GEBURTSTAG 163 (Dietrich Murswiek et al. eds., 2000).


32 See Poster, Käte Hamburger Center for Advanced Studies, Forum Recht Als Kultur [Law as Culture], http://www.recht-als-kultur.de/en; see also Ulrich Haltern, Notwendigkeit und Umrisse einer Kulturtheorie des Rechts, in KULTURELLE IDENTITÄT 193 (Horst Dreier & Eric Hilgendorf eds., 2006).
cultural studies specialists because they cannot possibly have sufficient insight into the various branches of the legal system(s)—a problem which frequently leads to their promoting simplistic pictures of the law. Neither can this task be fulfilled through interdisciplinary research because “being interdisciplinary is so very hard to do.” In other words, due to disciplinary barriers, “law as culture,” understood as an overarching research project, remains an unfulfilled promise.

E. Recent Challenges to Law as Culture

I. Dumplings in a Murky Soup?

A recent attack by the German legal philosopher Thomas Gutmann on the notion of “Law as Culture” sheds light on the dangers, chances, and challenges presented by culturalist approaches to the law. While conceding that culturalist inquiries into the law can be fruitful in cultural studies, Gutmann doubts that there is any benefit to lawyers from such inquiries. Asking “what the concept of culture can contribute to the internal perspective of legal science, i.e. to critical reflection with the law,” his answer is that it can contribute “nothing but confusion.”

Before distinguishing between “culture” as a methodological and a substantive concept, Gutmann refutes the notion that culture provides a source of normativity. Gutmann’s first main concern, however, regards the validity of culture as a concept of legal methodology. He draws on Kelsen, postulating the necessary separation between “is” and “ought,” and states that culture is a concept too highly aggregated and too holistic. According to Gutmann, this applies in particular to the notion of “legal culture” as a method for practicing comparative law: “A culture-oriented comparison that refers to a holistic concept of culture


35 See id. at 13 (“Es soll im Folgenden vielmehr allein um die normativen Implikationen der Verwendung des Kulturbegriffs im Recht gehen und damit um die Frage, was der Begriff der Kultur zur internen Perspektive der Rechtswissenschaft, also zur Eigenreflexion des Rechts, beitragen kann. Die Antwort dieses Beitrags wird lauten: Nichts, außer Verwirrung.”).

36 Id. at 15.

37 Id. at 21 (referring to the process of differentiation of modern law and “the culture,” he seems to forget—in spite of using quotation marks—his own caveat as to the multiplicity of concepts of culture and to assume a contrast between law and “the culture” which appears to be a classical petitio principii).

38 Id. at 31.
as a homogeneous system of values is bound to fail. The notion that legal systems are like dumplings floating in a murky cultural soup slowly soaking full cannot explain anything.”

As a specific form of cultural theory of the law, Gutmann analyses the concept of a Menschenbild (the image of human being) which he sees as an arbitrary mechanism for normative claims: “But this is exactly what such a concept of culture means: everything and nothing. What is lost, then, is again any discursive control over the normative contents of the law. This control, however, must be the objective of legal theory.”

Gutmann’s second main point of critique concerns a culturalist fallacy which he identifies as the integration-oriented aspect of communitarian thought. One of Gutmann’s concerns is that culture and identity have, inter alia, always functioned as hegemonic concepts. Yet, he also rejects multiculturalism, occidental culture, and deconstructivism as relevant normative positions. His conclusion is that, again, with regard to working with the law, one cannot expect any elucidations from the concept of culture.

That said, it may well be that this erudite attack on the use of culture as a legal concept suffers from a lack of interest in a productive definition of culture which is neither minimalist nor maximalist. It is easy to identify fallacies on the basis of exaggerations and overstatements, but how convincing can a model of legal application be that aims to ignore the non-legal context of the law? How can law in action be understood and convincingly applied and improved without a sensitivity to law’s intended effects or ascribed social meanings? In other words, the methodological purity of legal application that Gutmann proposed is bought dearly by the practical irrelevance of his model.

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(These all shows that a culture-focused legal comparison, which relies on a totalist-oriented cultural concept in the sense of allegedly unified and Lebenswelten and collectively shared Wertvorstellungen social Großgruppen is doomed to fail. The presentation, that legal systems like dumplings in a murky cultural soup slowly soak up, cannot explain anything.)

Id. at 36–37.

Id. at 43.

Id. at 45.

Id. at 50 (wondering if Gutmann would agree that abusus non tollit usum).

GUTMANN, supra note 34, at 62 (“Am Ende gilt auch hier, dass die Arbeit am Recht durch den Begriff der Kultur keine Aufklärung zu erwarten hat.”).
II. Law and Affect

Under the umbrella of “Law and Culture,” numerous playful and fruitful confrontations have taken place. These range from “Law and Popular Culture” to “Law and Religion” and “Law and Visuality.” Reflecting on the observation that many newer titles in the field of law and literature refer to madness, suffering, passion, resentment, and so on, Greta Olson has recently raised the question of whether “Law and Affect” have already supplanted law and literature. The “Affective Turn” may be the newest in a series of paradigm shifts within cultural studies. It draws on Spinoza’s affect theory in his 1677 work Ethics, as well on Massumi’s concept of Affect as a “prepersonal intensity corresponding to the passage from one experiential state of the body to another.” It should be noted that “body” in this sense includes mental and ideal bodies. Affect “functions through encounters and the ensuing altered levels of intensity these encounters initiate and not through causally related change.” In other words, affect is not to be equated with feeling or emotion. In Shouse’s words, “[f]eelings are personal and biographical, emotions are social, and affects are prepersonal.” The emerging concept questions the humanist-inspired notion of moral subjects; it explores the grammar of the body “that cannot be fully captured in language.” This implies an anti-linguistic and anti-narrative approach to law. What then might be the consequences of such an approach for legal theory?

At first sight the anti-linguistic approach neatly matches with the recent tendency to explore and stress the visual dimensions of the law. The role of pictures in law—both in sensu proprio et metaphorico—has not exclusively been analyzed within cultural studies. Rather, various branches of legal research have begun to discover visuality. The visual turn in law cannot be equated with an affective turn, but it may nonetheless show that the idea of text-based,
logocentric rationality is under pressure amongst jurists. Even though it is simplistic to assume that "the law has until today defined itself as the embodiment of rationality, reason, objectivity," affect is certainly not a key category in legal theory and jurisprudence. In order to draw a broader picture, it is important to note that some legal texts are quite explicit about the affective dimension of the law. For instance, the role of force and pain is omnipresent in the Basic Law. The text uses the term "force" (Gewalt) twenty times, reminding readers both of the forcefulness of the law and the state (Staatsgewalt, öffentliche Gewalt, and Gewaltherrschaft) and of the raison d'être of the law, the protection of individuals from the force of arms (Waffengewalt). As an archive of national history, and a collective memory, the constitution is full of affective power, as when it states that "[p]ersons in custody may not be subjected to mental or physical mistreatment." The obvious reason for this is an awareness of the vivid experiences that many of the founding fathers—and indeed mothers—collected during the Nazi period: Law can be used to pave the way to bodily harm and to the extinction of others, but it can equally serve as a barrier against such atrocities.

From time to time, an awareness of the affective dimension of the law has popped up in academia. One of the most forceful descriptions is the passage by Rudolf von Jhering in his famous "The Struggle for Law" when he highlights that affect is at the very origin of law:

The Law does not originate like language, painless, by way of mere conviction, but it is born with pain, and it is exactly upon the basis of this painful birth, which is like that of a child by its mother, that the power which then comes into the law is based.

It is the visceral—as opposed to both the cognitive and the emotional—dimension of the law that Jhering highlights here. And not surprisingly, it is Jhering who also stresses the interdependency, if not equality, of law and force, and regards law as "the policy of Force." But in spite of this prominent voice and other recent approaches, the field of "Law and Affect," unlike "Law and Emotion," has not yet been systematically explored. One reason

53 Olson, supra note 44, at 12 (citing and translating ANDREAS FISCHER-LESCANO, RECHTSKRAFT 117 (2013)).

54 Grundgesetz [GG] [Basic Law], art. 104(1), § 2.

55 RUDOLF VON JHERING, KAMPF UMSES RECHT (1872), http://www.koeblegerhard.de/Fontes/jheringDerKampfumsRecht.htm (translated by author) ("Das Recht entsteht nicht wie die Sprache, nicht schmerzlos, nicht im Wege bloßer Überzeugung, sondern es wird geboren mit Schmerzen, und gerade darauf, daß es mit Schmerzen geboren wird, wie das Kind bei der Mutter, gerade darauf beruht diese Kraft, die sich hinterher dem Rechte zuwendet.").

56 RUDOLF VON JHERING, DER ZWECK IM RECHT 249 (1884).

57 It might be of interest that the International Association on Legal and Social Philosophy dedicated its 2015 world conference to "Law, Reason and Emotion." See "Law, Reason and Emotion"; Conference of the International
for this might be that the premises of the “Turn to Affect” as represented by Massumi, Shouse, and others, e.g. anti-intentionalism, seem incompatible with the fundamental concepts of a legal system that is based on the idea of autonomous moral subjects. If “affect is independent of signification and meaning,” then it is relevant within legal orders which aim to create meaning by way of norms in order to regulate society, and in jurisdictions which not only address individuals but define themselves by respecting and protecting his or her dignity. For example, consider the words of the Basic Law: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." That said, it would be a fallacy to regard “Law and Affect” theories as irrelevant solely because their premises differ, if in fact they do differ, from those of lex lata. It is true that within the framework of the law as it stands, affect may not be a valid criterion for interpretation unless the law itself permits it to be taken into account. Banned from the process of justification, affect has been recognized as a major factor during the process of discovery. In other words, even if the internal perspective on the legal order, including the law on the books and the doctrinal system (Dogmatik) offer no room for the concept of affect, the external perspective on the law has to take notice of it. Jurisprudence, legal theory, sociology of law, and legislation studies (Gesetzgebung) have to reflect on the affective dimensions of the law. There is no way of avoiding the provocations of “Law and Affect.”

These considerations lead to the question about the merits of affect theories for understanding—and indeed the amending—of the law. If affective dispositions hold human action so that cognition always "comes 'too late' for reasons, beliefs, intentions, and meanings to play the role in action and behavior usually accorded to them," then this resembles the nineteenth-century legal theoretical affirmation of determinism, this

Association on Legal and Social Philosophy (IVR) in Washington (July 26–Aug. 1, 2015), http://ivr2015.org/program-overview/ ("While all legal systems claim to serve reason and justice, they must also recognize and respect the emotional basis of human society. This relationship between law, reason and emotion can be presented as a conflict, harmony, or otherwise, but will always be present in legal discourse.").

58 Leys, supra note 45, at 443.

59 Id. As Leys summarizes one of the key convictions of “the new affect theorists.”

60 Grundgesetz [GG] [Basic Law], art. 1, § 1.


62 See the anonymous Federal Constitutional Court Justice quoted by Uwe Kranenpohl. UWE KRANEPOHL, HINTER DEM SCHLEIER DES BERATUNGSGEHEIMNISSES 164 (2010) ("Every legal problem is soaked through with life experience, hopes, fears, emotions, ideas about a just world – all this is present" – "Jedes juristische Problem ist ‘durchtränkt’ von Lebenserfahrung, von Hoffnungen, Ängsten, Emotionen, Vorstellungen einer gerechten Welt – das ist alles mit anwesend.").

63 Leys, supra note 45, at 443.

64 See, e.g., FRANZ VON LISZT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS 136 (1900).
debate may then turn out to be as fruitless as the intellectually impressive discussion that was held more than a hundred years ago about freedom and determinism in the law. The reason may lie in what Ruth Leys has criticized as the “false opposition between the mind and the body,” i.e., “the sharpness of the dichotomy, which operates at once with a highly intellectualist or rationalist concept of meaning and an unexamined assumption that everything that is not ‘meaning’ in this limited sense belongs to the body.” In so far as “Law and Affect” draws our attention to the visceral dimensions of the subject’s existence, without negating his or her status as a morally or legally accountable being, it is also an indispensable complement of the traditional perspectives which acclaim or presuppose rationality and autonomy of the subjects.

F. Law in Action as a Cultural Practice

I. The Interpretation of the Law

The most famous German textbook on the Theory of Methods (“Methodenlehre”) describes its subject matter as a “hermeneutic self-reflection of jurisprudence.” It is evident that hermeneutics is a key topic in legal methodology. Applying the law is normally equated with interpreting the law, and interpreting the law is traditionally associated with four guiding elements: the text, the context, history, and the rationale. These elements, in turn, are associated with the grammatical, the systematic, the historical, and the teleological methods of interpretation. These elements of interpretation have been mistakenly attributed to Savigny. Yet, they are canonical and have, in spite of many doubts, remained indestructible as the basis of interpretive methods. Irrespective of their linguistic cogency, these elements express a reasonable agreement within the legal community concerning their efficacy. In any event, applying these elements demands considerable philological and historical skills. For instance, when reconstructing the genesis of constitutional articles—the everyday business of the German Federal Constitutional Court—the justices have to perform a second-order level of interpretation, i.e. they interpret non-legal documents in order to understand legal ones. This process sometimes results in competing stories of origin: Some are narrated within the judgment, and others are offered in the dissenting opinion.

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65 See generally KARL ENGISCH, DIE LEHRE VON DER WILLENSFREIHEIT IN DER STRAFRECHTSPHILOSOPHISCHEN DOKTRIN DER GEGENWART 7 (1965).

66 Leys, supra note 45, at 458 (“This too is a false dichotomy, one that . . . threads its way throughout much of the new literature on affect.”).


68 See FRANZ REIMER, JURISTISCHE METHODENLEHRE 141 (2016).
Supporters of a rhetorical analysis of the law would see this as evidence of the fundamentally rhetorical structure of legal reasoning.  

Any careful interpretation of “the law” will show that—contrary to suggestive formulae such as “Einheit der Rechtsordnung”—there is no monolithic body of law. Rather, every jurisdiction consists of a highly diverse set of layers of legal rules and institutions, some dating back to last week, and some dating back to 1,500 B.C. Therefore, almost any legal system can be viewed 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.

II. Interpretation of the Facts

Applying the law does not only consist of interpreting legal rules. The main challenge is fact-finding. In spite of the usual perspective which identifies an insuperable difference between the two, “fact and law do not belong to two different worlds, as if fact occupied the earthly space of crude factuality and law was accommodated in a celestial universe of pure normativity.” It should, however, be noted that the term “fact” is a simplification, since in an information-based society such as ours, everything depends on the interpretation of the information at hand. In other words, hermeneutic skills are of paramount importance in finding, reconstructing, or construing the facts, and this process shall always include appreciating multiple meanings of so-called objective facts. Cases are normally decided based on fact-finding as opposed to the interpretation of laws. But facts alone are not enough; to identify the meanings and effects of a headscarf worn by a Muslim teacher in a German school, lawyers must enter into a dialogue with cultural analysts. Lawyers cannot reasonably claim to be theologians, sociologists, political scientists, and so on, yet they must become multilingual in order to understand the languages of these disciplines. In other words, in a complex and pluralist society, understanding the facts necessitates a deliberate division of labor-approach. This is perhaps where cultural approaches to law appear most relevant.

69 See, e.g., Katharina Gräfin von Schlieffen, Wie Juristen begründen, in 66 JURISTENZEITUNG 109 (2011); Juristische Rhetorik, in HANDBUCH RHETORIK (Gert Ueding & Gregor Kalivoda eds., 2015).

70 Supra note Error! Bookmark not defined., passim.


72 See REIMER supra note 68, at 60.

73 See Baer chapter in this volume.
G. Summary

Law has for a long period of time been considered as culture. The objections raised against this conceptual starting point rightly criticize, *inter alia*, the indeterminacy of “culture” but fail to define, or even to attempt to define, what culture could mean. Contrary to the prominent critique by Thomas Gutmann, a culturalist analysis of the law by lawyers can have, apart from its intrinsic value, three important results: First, it will improve the process of actually applying the law—particularly with an increasingly diverse society. Second, it will improve the process of creating legislation. Third, a culturally-oriented approach to law shall offer criteria by which to judge the legitimacy of the law and therefore the plausibility of critiques of the law. Both cultural studies and legal science can benefit from a dialogue about the law, its disembeddedness and embeddedness, its autonomy and heteronomy, its pride and its prejudices.
Speaking Law: Towards a Nuanced Analysis of “Cases”

By Susanne Baer*

Abstract

“The headscarf case” is more than just a case. Talking law is often talking cases, but we need to understand law more specifically as a powerful practice of regulation. Law is also not only another discourse, or just text, or politics, with fundamental rights as “an issue,” or a promise, or just an idea. Instead, to protect fundamental rights, it is necessary to understand how in reacting to a conflict, we in fact speak rights today—Rechtsprechung—as a form of practice. The German Federal Constitutional Court’s decision in the conflict about female teachers wearing headscarves in German public schools may be used to illustrate the pluralities of law—understood here as legal pluralism. This pluralism includes actors and legal arguments as frames to the speaking of law. In addition, it becomes clear that any analytical focus on gender, based on the current state of the art, further illuminates these issues. As such, interdisciplinary legal studies become inherently critical to the protection of fundamental rights.

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Law is interesting to many. In fact, law is, today, a dominant focus of political discussions. Although politics is multifaceted and much more open to a larger variety of arguments than law, political questions are often discussed as controversies surrounding legal questions. This turns complex problems into a call to decide between right or wrong. And this is more than a game of changing codes. Turning things legal may very well obscure the different politics of each practice. Thus, we need the ability to understand law as a very specific type of practice. My plea in this Article is for the importance of understanding of law as a specific practice of regulation. This calls on us to not merely talk about “the case,” “the law,” or “legal discourse,” but to very precisely identify which practice of law we want to talk about. It is also a call to avoid treating fundamental rights as just another issue, a mere promise, a grand idea, or another version of politics. Rather, this Article proposes that to indeed protect fundamental rights, it is necessary to understand how, specifically, courts speak of law today as a form of practice.

In German, Recht sprechen captures the meaning of jurisprudence literally as a practice of speaking both the law and justice—as Recht has both meanings in German. Certainly, one must also consider other forms of “speaking” law, like legislative debate or academic reflection. To the contrary, the focus here is on the way we discuss “cases,” which are usually court rulings. It is motivated both by a commitment to interdisciplinary legal studies and by my practice as a sitting Justice with the mandate to ensure fundamental rights at the German Federal Constitutional Court. As to the latter, there is a need for nuanced critique, because this is what judges need to live up to their task.

More generally, I believe that in engaging with the pluralities of law, we need to be very precise concerning what we are talking about. This is not only because law is different from politics. It is also because the practices of law vary, and the force of law depends on the specific practice at hand. What precisely do we mean when we talk about “law”? And when we address “a case,” do we mean a ruling in the form of the authoritative text that judges sign, or are we talking about the social event of bringing a claim with an argument in court and with deliberation, decision, and reactions to it? And does the ruling constitute the written decision, or are we also referring to the reasons for it—which are sub-headed as Gründe in our court decisions and are listed in those decisions? Does this narration of facts matter? Or, changing positions, should “a case” be described from the perspective of the individual as a right to something or from the seemingly objective perspective of a court or an outside observer? Is law, then, the litigant’s notion of it—as in legal consciousness—or a lawyer’s idea? Or has “our” notion of law, as influenced by the continental European tradition, been generated through intense interaction between academia and courts, where it has developed in the courts and therefore, has been much more driven by lawyers in common law contexts? These questions arise from close readings of court decisions alone.

In addition, theory matters. To name two sides of a much more complicated discussion: If we talk about fundamental rights, are we then discussing doctrine as the agreed-upon meaning of the legal text? Or should we instead understand law as a political claim that is couched in legal terms? As will be explained in this Article, an understanding of law as a practice of regulation and of court decisions as one particular form of practice allows us to catch these variations. Eventually, this informs more nuanced critique.

A. What is a Case, Really?

As a judge with the mandate to speak the law—Rechtsprechung—, I am used to starting discussions of fundamental rights in the form of individual cases. So, let us begin with such a case.

Looked at from the bench, “my” case is a constitutional complaint lodged by two women from North Rhine-Westphalia against a statute that was admitted by the Court and accepted as valid, and the state law banning teachers from wearing headscarves was ruled to be unconstitutional. But “the case” can be told very differently: On March 13, 2015, the news spread that from now on German teachers would be allowed to wear a headscarf in public schools—something which had been previously prohibited.

Or, the German Federal Constitutional Court decided, and in fact, the Justices of the Court signed a ruling on January 27, 2015, that a general prohibition on public school teachers from wearing a headscarf or veil is a violation of the Basic Law’s fundamental rights.

Or, put differently once again, the constitutional court in Karlsruhe made a plea for greater religious tolerance. Some critics would say the court paved the way for an “Islamization” of Germany, while others may tell you that the court protected individual liberty, and still others caution that the court delegated the problem of social integration in an increasingly heterogeneous society to schools. Some describe “the case” as a sellout on the fundamental right to gender equality, while others see it as an effort to manage and counter Islamophobia after the Charlie Hebdo attacks in Paris and to take a stand against Pegida, short for Patriotic Europeans Against the Islamization of the West, a noisy, racist, and particularly Islamophobic, sexist, and patriarchal political movement in Germany. Rather differently, some constitutional law specialists describe “the case” as an instance, in which the First Senate of the Court took issue with a decision that had been made by the Second Senate in 2008. The Second Senate prescribed specific legislation to prohibit religious clothes being worn in public schools and thereby, emphasized the interest of undisturbed schooling, the “peace in school or Schulfrieden, while the First Senate was now emphasizing religious freedom as an individual right. Or law took the stage in Karlsruhe for a moment in the ongoing struggles for sexual and gender equality, religious tolerance, and in the fundamental right to a liberal, humanist education.
What then happened? There are many ways to narrate the story of a case, but what is a case, really?

Often, and especially in interdisciplinary settings, a “case” is the name of an argument used in order to not frighten the non-lawyers in the room, instead of the First Senate of the German Federal Constitutional Court’s Decision 1 BvR 471/10. But watch out for how references to “the case” actually function. If “case” is used to name the so-called headscarf ruling—or Kopftuchurteil—after two women sued the government for the right to teach while wearing headscarves, this particular frame emphasizes conflict. As a reference to constitutional law, it pitches individuals against the state and often frames one right as in conflict with another. It reduces a highly complex issue to a fight with winners and losers. As a plot form, this conflict is interesting and promises to be quite easy to understand and follow. “The case” is in the news, and such a case is regularly used to start a discussion and illustrate a point.

In addition, the manner in which a complicated issue is framed as “a case” tends to stabilize the law as the prime or even sole carrier of justice. To discuss “a case” as a court decision functions to attribute wisdom to the bench. Even when a given decision is criticized, the court ruling is nonetheless portrayed as the potential solution to the problem. Thus, a court is presented as the site of authority, if in a more personalized fashion in common law contexts where the bench is referred to as the seat of judges, and less so in continental legal ones where the court is referred to as an institution. Without a more nuanced understanding of the conflict at hand, talking about “the case” and, in fact, discussing any version of a court decision, may suggest in not so secular cultures that salvation is out there and a good ending will inevitably occur. In political terms, this framing portrays law as an authority rather than as a constant struggle, a discursive practice and an iterative development. Is this the idea, then, behind portraying related phenomena as “a case,” to hide the actual practices of law?

To better grasp the power of law in its different practices, we should understand “the case” as the dominant and problematic frame for a complicated plurality of stories. Then, a different set of questions comes to mind. What is it that happens out there, really? How does a conflict enter the various arenas of law? What is litigated and by whom and in what manner? And who decides in what kind of institutional context the case shall be adjudged? Asking these questions means pursuing an understanding of law as a practice, and this opens up the space for more refined critique.

B. Methodological Challenges

Law is a genre of its own kind, and its practices are specific to itself. Yet, understanding law as regulation is not to refute the theme of the conversation to which this Article was asked to contribute: To understand “law as cultures, narratives, images, and genders.” Indeed, my argument is an attempt to support an interdisciplinary approach to law that includes using analytical tools to understand law’s cultural and narrative dimensions. But my point is to
take law seriously as a practice. Lawyers may tend to take law for granted and even perpetuate some myths about it, and critical interdisciplinary scholarship may allow us to move beyond this facile position, but it should not disregard the specific workings of law itself.

Understanding law as practices of regulation is, then, the starting point for empirical legal studies, including discourse analysis. Here, law is viewed as a practical phenomenon in this world, and not simply as either an idea or a system of rules, or as either a technique of governance, another expression of empire, of hegemony, or of the state; it is not simply only narrative or culture. Law as a practice of regulation may involve all of these aspects, but it is also something more complicated and specific. But understanding law in this manner creates a methodological problem for empirical legal studies.

If we take the headscarf “case” as an example, we would want to know what “really” happened in this practical instance of a court speaking law. In particular, an interdisciplinary analysis might be interested in discovering how the ruling was arrived at. There is the wish to understand how the decision was made, which matters were considered significant, and which not. Yet the text of the decision offers limited information about these matters, and this represents a methodological challenge. The type and amount of information given in a decision is also not only limited, it also differs in relation to the legal culture in which it is written. In fact, there is a localized tradition of judging, notwithstanding the transnational conversation that occurs between courts. Narrative structure, type and scope of argument as well as style vary greatly both between legal systems as well as within legal systems, depending on the institutional traditions at hand. To stay with my example, a German Constitutional Court Senate ruling differs from that of many other courts. Unlike a short Chamber decision, the German Constitutional Court Senate ruling gives a full account of the case’s history and summarizes the expert and third-party statements that were collected before the decision was rendered, whereas other courts present “the case” differently. Additionally, German courts speak in one voice and not as individual justices, with the sole and rare exception of dissents to rulings of the Federal Constitutional Court. Even in this case, the delivery is far less personal than that of common law colleagues.

Public proceedings cannot compensate for the limitations of the text. The German Federal Constitutional Court takes most decisions without public hearings. Thus, a “sitting judge in session” in my case, is primarily a Justice who sits in the deliberation room with her colleagues. This is quite different from courts that stage oral hearings regularly. To the contrary, if a decision does not tell you all there is to know about a case, it would seem to

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2 “Regulation” is often used to describe a specific set of norms that are directed at infrastructure. In contrast, I use the term to mark the nature of law as a process of intervention. See generally Susanne Baer, Rechtssozioologie (2d ed. 2013); see also Nicola Lacey, Criminalisation as Regulation, in Regulating Law 144 (C. Parker et al. eds., 2004).

3 See Susanne Baer, Praxen des Verfassungsrechts, in Demokratie-Perspektiven 3 (Michael Bäuerle et al. eds., 2013).
be an obvious choice to ask the Justices of the Court about these matters. But then another
methodological challenge arises. Generally, a judge is not free from the effects of the actor-
observer bias. She is more likely to portray actions in the most positive light possible, to be
defensive, and to perpetuate an image that works to sustain her own and the court’s
standing. More importantly, a German judge is simply bound by law. As in other legal
systems, no judge is allowed to tell the public about the actual practice of judging. As a sitting
Justice at that Federal Constitutional Court that decided the headscarf case, I am thus not
permitted to tell you what really happened in deliberations. Formally, I am under a legal
obligation to not reveal the details of rulings that have been deliberated on. Clerks are not
present at final deliberations and stand under the same obligation to not reveal details. And
no member of the institution has, to date, torn down the veil from what happens in the
Federal Constitutional Court’s deliberation rooms.

Indeed, this veil of secrecy over deliberations protects judges and the institution itself. It is
highly functional. It also, however, presents a barrier against research. But this barrier can
be turned into an advantage. Because there is no authoritative voice on how a collegial court
arrives at a judgment, there is an opportunity for scholarly analysis, which is also always an
opportunity for a new understanding of the law. Because you do not really know and
because there is no one biased authority, there may be many voices to inform our
understanding of a given case. Yet there is no way to really see the practices of deliberation.

With the caveat of my obligation of secrecy in mind, I want to shed some light on what you
are indeed allowed to know about the deliberation process in the Federal Constitutional
Court. Also, I would like to point out some aspects at risk to remain hidden in much debate
about the headscarf “case.” Understanding the set of issues underlying the ruling will allow
us to better understand the filters that were at work. Namely, this specific instance of
speaking the law involves questions of legal pluralism, regarding the actors who were
involved, the way legal arguments work as frames of an issue, and the nature of
compromise.

C. Multiple Norms: Legal Pluralism, Embedded Constitutionalism

Practices of regulation do not deal with any one set of rules. Speaking law constitutes more
than applying one legal formula or one single principle to the matter at hand. As the German
term, Rechtsprechung, suggests, speaking laws, like interpreting statutes, is always a
broader claim to justice. Yet even on the level of application, there are, from an
interdisciplinary point of view, always multiple norms at work. If we seek to understand law
as practice, legal pluralism matters.

Conflicts surrounding “the case” illustrate this point. There is a state law set of formal rules
that address the employment of teachers in public schools. There are also rules that govern
the organization of school itself. Those norms have been created by democratically elected
parliaments and are often driven by the executive and by a specific conglomeration of
interests. In addition to national or state laws, constitutional law and international law guarantee human rights. Then, there are the formal rules of religious authorities—in this case, Islam—as classic phrases interpreted again and again by different groups of scholars are bundled into schools, including critical scholars who provide re-readings of Islamic texts. As such, the issue of veiling or wearing a headscarf provides a case in point for understanding legal pluralism as the multiplicity of norms that inform and influence any social conflict, ranging from personal habits and informal cultural norms to religious rules and, in some cases, also to state-made or state-endorsed statutes. We need to locate the law within such settings.\(^4\) There is a specific normativity, colliding with secular state norms, that is imposed by religious leaders on a larger or local scale or by members of a given family. Furthermore, there are informal rules, yet rules nonetheless, such as habits and norms of conduct, which are highly contextual, but are driven by majority practices that define what is considered normal. What, then, is “the law” to inform “the case”?

All of these rules and types of prescription differ in their reach, scope, and content; they also overlap and are contingent. To decide, or in fact: to agree on a decision, is to intervene in a complex set of relations. As one example, in Germany at this precise moment, the dominant informal norm concerning headwear is to not cover one’s head in a building or when the weather outside permits, except as a distinct form of fashionable practice. This is quite different from the past and thus, also differs from those norms still followed by older women in Germany and in rural communities, where covering one’s head is still a common practice. But the hegemonic norm that suits the majority of non-head-covering individuals follows a non-praxeological set of religious beliefs—namely, versions of Christianity, in which you cannot judge a non-head-covering person on the basis of this practice. Does this matter considered in light of a constitutional or human rights guarantee of religious freedom, and in light of a prohibition of the state’s privileging one religious belief over another?

Specifically, decisions on fundamental rights need to address legal pluralism. Different from regular courts, constitutional courts and international courts are called upon to find ways to deal with the issue of competing forms of regulation and normativity because they have the power to invalidate law, to reject international obligations or national exceptionalism, and to pave ways through the new obscurity\(^5\) in which we live. Therefore, the German Federal Constitutional Court discusses the European Convention of Human Rights, as interpreted by the Strasbourg Court. This is what I call “embedded constitutionalism”: A national application of constitutional law taking the surrounding varieties of law and international obligations into account. The headscarf case is located in Germany, and thus, constitutionally speaking, situated within a specific set of relations between the German state and “the church,” which encompasses all religious organizations recognized by the

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\(^4\) See LOCATING LAW (Elizabeth Comack, 2d ed. 2006) (discussing Canadian cases in the context of race, class, and gender to understand the role played by law in maintaining or undoing inequalities).

government—primarily the Catholic, Protestant, and Jewish faiths. This differs significantly from the French system of laïcité or the British and Danish system of state-churches. To make sense in Europe, this must at least be recognized. In addition, France and Germany and many more nations are bound together in the European Council, governing the European Convention of Human Rights, and in the European Union, as a space of shared values, which is now articulated in the European Charter of Fundamental Rights. When the German Constitutional Court decides a case, it is embedded in these transnational configurations. Thus, a German decision has to take those other perspectives into account. Here, legal pluralism matters.

In addition to the plurality of norms in a stricter legal sense, to do justice—in a broader sense—to the conflict at hand, courts also need to address other norms. Regarding wearing a headscarf or a veil, the praxeological nature of religious rules in Islam matters. The Q’ran is mentioned in the Federal Constitutional Court judgment, which refrained from privileging one interpretation over the other, but accepts a plausible interpretation of the religious belief to which one adheres. Because it is not for the state to define the rules of a religion and because a state governed by a commitment to protect fundamental rights has to recognize and respect the rules that believers deem to be mandatory, those women who feel obliged to wear a headscarf for religious reasons have the right to hold this belief and to shape their behavior accordingly. Notably, it is not the prerogative of the state to adjudge whether wearing a headscarf or a dress code for head coverings for Jewish or Sikh men, for that matter, constitute proper religious beliefs, or are a good idea given other considerations such as a commitment to gender equality. What the Court states is that different religious norms may call for different sets of behaviors, and human rights should protect these behaviors. This paves a way through the multitude of norms that govern the case, in that normative pluralism matters but some norms nonetheless take precedence.

Returning to the non-legal norms, one may discuss the rules that govern gendered behavior, both in religious contexts as well as in organizations like schools and settings such as the education system, which are themselves highly gendered. Similarly, to understand “the case,” one would need to understand the rules that govern integration, and othering, to take the role of migration and racism into account. The headscarf case thus illustrates that legal pluralism matters, in its discussion of transnational law as well as in its recognition of non-state made forms of obligation.

D. Multiple Actors: Courts and Judges

In addition to legal pluralism understood as the multiplicity of norms, to consider law as a set of regulatory practices, it is also necessary to highlight the multiplicity of actors affecting the practice of regulation. Because we are considering “a case,” I shall start with the courts, particularly the role of judges.
In any given legal case, the judges are important actors in the performance of regulation. The naive understanding of judges as agents who simply apply the law has long since disappeared, yet their authority remains. The term Rechtsprechung in fact reminds us that the judge has traditionally been considered the “mouth of the law”—la bouche de la loi; this again points to the meaning of law as the stating of norms and justice. Yet we also recognize that courts in general—particularly constitutional courts, human rights courts, and supreme courts—do not simply apply the law. Today, most people will not see legal interpretation as a simple mathematical computation of formulas. But what is it, then, that judges do?

To consider the very authority and power of judging, again, jurisprudence should be thought of as a form of regulation, as an ongoing practice “doing” law. To understand how this practice of regulation functions, one must drop mere references to such and such a court and such and such a judge or Justice, and develop an understanding of courts as institutions with a set of actors that perform different tasks in a variety of contexts.

To understand how courts function, one may look at courts as the organizational context in which a specific type of regulatory practice takes place, one with a specific set of actors. In doing so, organizational design and organizational culture come to matter. To understand adjudication as a regulatory practice, one would need to know how it is performed not only with its own history, but also with its own set of rituals, rhetoric, and forms. Here, sociological and ethnographic studies may help us to understand how organizations work; micro-sociology and psychology can be harnessed to analyze social interactions within law; and finally, insights from political science can be used to understand how structures of governance and power relations intersect with law, for example. With the use of these analytical tools, “the case” might be seen not only as the effect of a regulatory practice, but also as the effect of a specific institutional design produced in a specific organization’s culture, with its own norms and rituals.

Subsequently, we may ask in what ways the courts are, for example, gendered. Based on the history of legal institutions and in light of the nature of political power, it is highly likely that courts of law must be considered heteronormatively male. If this is correct, one might ask what happens when women enter the court, when people—litigants, lawyers, staff, justices—start to queer or change formally male courts, or displace other normalities. Yet before we address these additional issues, a closer look at the judges seems worthwhile. Who are the individuals who decide “the case,” in the organizational context of courts? Who are, in the case of the German Federal Constitutional Court, we Justices? What exactly do

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7 For a summary of these perspectives with further references, see generally Baer, supra note 3.
we do? How did we get there, what has “made” us who we are, and who or what do we become, as Justices?\

Legal systems differ tremendously in these respects. When it comes to appointing judges, their length of terms, their status, pay and position, qualifications and biographies, the degree of visibility they have to the public, and the amount of room allowed for their personal visions and professional and personal identities, there are many interesting variations in this world. To stick with my own example, the German Federal Constitutional Court is neither a regular court, nor is it a supreme court. Rather, this court is an institution with the sole and special mandate to adjudicate constitutional law. It is composed of two Senates with eight Justices each, who are elected by either the Bundestag as the federal parliament or the Bundesrat as the assembly of the states. Because political make-up varies, this already allows for changing preferences in ideological assumptions concerning Justices. Additionally, the Justices are proposed by various political parties based on their success in elections, thereby allowing for visible preferences across the spectrum. Yet the election of a Justice also requires a two-thirds majority agreement, which is based on the idea of finding a candidate the opposition can also agree to. Thus, institutional design fosters a certain scope of, yet no unlimited plurality regarding a Justice’s politics.

Yet we know from sociology that there may be much more that distinguishes judges from one another than their political party allegiances. In socio-legal studies of courts, the individual factors of judges’ biographies, including their training and professional identities as well as their specific experiences in specific institutional contexts and cultures, have all been identified as important. All of these factors seem to contribute to how judges decide. Again, the challenge is that we do not really know how deliberation works, because of their secrecy. Neither do we very well know how decision-making works in general, and how one’s biography affects it. To inform nuanced critique, one must know more.

Within German legal sociology, there is a long tradition of Justizforschung—research on judges—which began as a critique of what was perceived as the elitism of the bench. For a long time, and in no small part under the influence of Marxism and Neo-Marxism, such elitism was seen as solely class-based. Today, however, more nuanced studies indicate that there is a problematic shortcut from family background to decision making. In addition, based on the subsequent insights offered by gender and critical race studies, we now know that other hierarchies besides class operate in all social settings, including institutions such

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8 See Sebastian Jäckle, Pathways to Karlsruhe, 25 GERMAN POLITICS 25 (2016) (providing commentary on some of these existential questions that Justices face).

9 See Hubert Rottleuthner, Perspektiven der Justizforschung, in 21 DEUTSCHER SOZIOLOGENTAG 212 (Friedrich Heckmann ed., 1983) (providing a classic summary of the tradition of judicial research and noting that socio-legal studies and legal realism in the U.S. drew significantly on this German tradition); see also Hermann Kantorowicz, Some Rationalism About Realism, 43 YALE L. J. 1240 (1934); see also James E. Herget & Stephen Wallace, The German Free Law Movement as the Source of American Legal Realism, 73 VA. L. REV. 399 (1987).
as the courts, and that class is often sexualized and racialized as well. May this inform our understanding of “the case” as well?

As always, and similarly to the class-elitism-shortcut, one needs to beware of the essentialism fallacy. Early twentieth-century critics of the courts already noted that the point is not just who Judges “are.” Certainly, it matters who makes a decision in a given case. Yet the question may be more properly posed as to how deliberation is framed and shaped by class, or gender, as socially meaningful markers of inequality. It is not that men and women judge differently per se. The question is when and how being a woman on the bench—or a man—matters, in what ways does this matter, and how do these differences play out. Alternatively, essentialism has not gone out of fashion. In fact, it remains depressingly common. In the headscarf ruling, some have indeed assumed that there must have been a sex-based difference in how the Justices regarded the conflict, and that the women would assume a particular position on the issue. Notably, it is less often supposed that particular positions are expected of men, as men. Others may have attributed a particular argument to being German or being brought up a Christian. Here, the way judging is attributed to biological sex or the way nationality is cited as a coded way to talk about race or religion still proves highly attractive because it relies on easy stereotypes and bias.

Gender studies have shown again and again that sex is relevant, yet not determinant, of behavior. Gender matters as a much more elaborate concept of the construction and meaning of sex. Indeed, gender studies have taught us that one makes essential sexual differences as a heterosexist dichotomy by looking for the sex or gender difference in judges’ deliberations. Instead, to understand ways of judging, we need to think more carefully about all of the ways in which perspectives on the headscarf issue are gendered and marked by other factors as well.

If gender inequality is understood to be the effect of the allocation of privilege as a normalization process, this form of inequality can be theorized as a bias that people retain, particularly when their sense of normality goes undisturbed. The point—to be clear—is that social divisions are multidimensional, complicated, and affected by intersectional identities. They are not only complex, but complex in highly specific ways, because complexity is itself political.

To use the example of the headscarf ruling, one might then ask whether it matters that three of the eight court Justices were women and five were men. Was the deliberation really affected by whether or not the Justices are parents, whether or not they enjoyed school? What is the impact of having been raised a Christian, or of being an active believer or an atheist? Does sexual identity matter? If so, how? My personal experience certainly matters to me and to how I see the world. To know exclusion matters, as does pride, and to enjoy success matters, as does the experience of being different, or experiencing oneself as part of a community. Moreover, to be viewed with a mixture of voyeurism, curiosity, and skepticism, and sometimes even hostility or disgust, also has an effect on you, both in private
and in your judicial role. It affects the manner in which you “speak” law/justice concerning fundamental rights. Yet this only says so much. It is still mostly unclear as to what exactly these differences may entail.

Essentialist assumptions are widespread regarding the practice of wearing headscarves as Muslim, yet pluralism reigns. In fact, a range of positions can be found on this issue amongst women, men, liberals, conservatives, the general public, Muslim scholars, scholars of Islam and religious diversity, representatives of a secular state, Christian denominations, or Jewish communities. Why does anyone think and argue the way they do? There are not only many voices, but also a plurality of positions within the pluralistic paradigm. This fact, as well as our own lives and actions, must caution us not to fall for the essentialist fallacy.

Although some specific aspects of judges’ biographies matter when it comes to deliberating over a given case, because they inform patterns that make sense of legal arguments, there are also positions and situations that inform individual activity. Therefore, to understand judges as actors behind a case, additional factors matter. To name but one, it may matter greatly whether a judge has always adhered to the mainstream in her or his decisions, or is used to being an outsider. Similarly, judges’ current ways of existing in the world matter because they inform her or his behavioral and epistemological presuppositions.

Thus, gender and equivalent factors matter but in ways far more complex than the stereotypical replication of the man/woman division, the upper/lower class scheme, or the German/migration background allows for. Judges are always gendered, marked by class, and racialized, but their actions are not in any sense fully determined on the basis of their biological sex, their class, or race. Indeed, studies of judicial deliberation that place an analytical focus on gender, always discussed in conjunction with class and race, support the call for more diversity on the bench.10 But this call is not based on the essentialism fallacy; it relates to a much broader argument about the need for change in the judiciary that includes an awareness of processes of legitimation, representation, and inclusion, while taking account of the practices of deliberation as such.

E. The Form of the Case: Access and the Politics of Knowledge

The headscarf case can be seen as an intervention into legal pluralism that was made by a legal organization, a court, and was co-written by the eight different individuals who were appointed as Justices there. Yet the ruling was produced by far more people. As such, the actual ruling is just one instance in a process that involves many different actors. How then can this process be better understood?

10 See generally WOMEN IN THE WORLD’S LEGAL PROFESSIONS (Ulrike Schultz & Gisela Shaw eds., 2003); GENDER AND JUDGING (Schultz & Shaw eds., 2013); ERICA RACKLEY, WOMEN, JUDGING AND THE JUDICIARY (2013).
The headscarf ruling had a beginning. If we discuss the overall conflict of which the court decision is a part, the beginning is constituted by the plurality of norms mentioned above. Yet if we focus on the regulatory practices that are involved in the court decision at hand, the beginning of the case is the litigants’ action. In “the case,” two women went to court. This is important because it often goes unmentioned. Yet if there is no such activity, no mobilization of law, then there is no case. Legal tribunals do not freely choose to deliberate over cases or the issues at hand. Courts are responsive actors, who speak when they are called upon, with some choice on whether, and more choice on how, to respond to a given issue.

Regarding litigation, neither the subjective nor the objective conditions by which individuals gain access to the court’s regulatory processes should be taken for granted. Not everyone thinks of themselves as having the subjective right to seek redress in court; as has been shown in work on legal consciousness informed by feminist and critical race theory, those who are not privileged are particularly reluctant to access what they perceive to be a legal privilege. Even those who do think they have the right to gain access to the legal system do not all exercise this right. Many lack the necessary—financial and educational—resources to seek legal redress. So, what is it that allows for the headscarf decision, in which a court responded to a challenge brought by those who, in the past, had not always taken this route?

In the conflict surrounding the wearing of headscarves on which the German court had to decide, a Turkish-born, now German, public school teacher of elective Turkish language classes refused to obey the school administration that had ordered her not to wear her headscarf while teaching. She wished to adhere to the rules of her religion. Within the same case, the Federal Constitutional Court addressed the complaint of another Turkish-born, now German, public school employee, who had been trained as a social worker to resolve religious and cultural conflicts in schools. She also refused to remove her headscarf in school. In an effort to reach a compromise with the school, she offered to cover her head and neck with a pink woolen beret rather than a headscarf, yet the administration insisted. She fought back and then went to court. Both went to the court not just once, but three times, from the Labor Court to the Federal Labor Court. After these lawsuits were unsuccessful, they then lodged a fundamental rights complaint to the Federal Constitutional Court—as Germans refer to the court synecdochically, Karlsruhe. Had they been unsuccessful, they might have continued their efforts to have their rights redressed in Strasbourg, a U.N. committee, or even Luxembourg—one of the many legal forums for addressing rights in Europe today. But any analysis of the case must take this itinerary into account. One should consider how “the case” was brought to and handled in the various courts, not just in final court. How did the narrative of the case change? Does narrative depend on the type and level of court in which it was tried?

There is a specific way in which courts tell the story of the case, in terms of the so-called facts. Yet it is well known that there is a great deal more that was and is involved. In the headscarf case, the complainants were women as well as members of a religious minority
within Germany. On two counts, their complaint is thus an exception to the general rule of avoidance and silence that pertains to outsiders in law. Insisting on having fundamental rights and speaking for oneself first entails a person considering herself to be a legal person who holds such rights. It also means claiming a normality that was not originally designed for you and which has traditionally been assigned to those in positions of privilege. This is particularly evident in conflicts concerning “another” religion—for example, Islam—as it is clear in relation to the rule of patriarchy. Hence, the presence of a Muslim woman in court, outside of legal conflicts surrounding marital and family issues, is anything but paradigmatic. Furthermore, Germany has a predominantly public school system, in which teachers traditionally work as civil servants. For a long time, civil servants were considered state actors, and could not be seen as individual bearers of rights like other citizens. Therefore, what we see when two Muslim women teachers gain access to the court is a disruption of our horizon of expectation.

This disruption, despite portrayals in the media, is most often not an individual heroic act. In fact, and in most cases that receive attention beyond the actual parties involved, it is not only the complainants who gain access to fundamental rights. Lawyers are also involved in strategic litigation and in the struggle for fundamental rights. It is often a segment of civil society that provides backup for litigation and in publicizing the case. Thus, in point of fact, the regulatory process began when the two teachers decided they had a recognized legal right and went to see a lawyer. Within interdisciplinary legal studies, research has shown that stories change when people speak to lawyers and judges or members of law enforcement. The issue here is the translation of life events into legal proceedings, and we must understand this translation as a significant activity in its own right.

In Karlsruhe, it is not necessary to have a lawyer to lodge a case; a case can be brought by an individual citizen. The Federal Constitutional Court was founded as a citizens’ institution after the collapse of the Nazi regime in response to the regime’s corruption of the justice system. It was intended to counter the danger of majoritarian rule and never to rely on legal elites. Yet, in fact, and this is an important part of the narrative, the citizens’ court is more a myth than a reality, because most if not all of the larger and more important cases are driven forward by lawyers. One has to exhaust all other legal remedies before one may lodge a complaint with the court. In addition, the Federal Constitutional Court expects litigants to produce a highly refined set of arguments before the case will be admitted for decision.

For the most part, then, lawyers are involved. What do we know about them? How do they filter the story of a case and how? What about the performative quality of a written application? You do not need experience as a judge to know that this written text is highly relevant, and beyond the legal quality, this includes how the application appears, whether it contains typos, the typeset it uses, its formatting, and the text’s narrative quality. On the basis of what we know from gender studies, there will also be naturalized assumptions about sex. Overall, understanding that lawyers have a voice of their own adds to the recognition of law’s pluralities.
In addition to complainants and their lawyers, another group of people also has access to the regulatory process of claiming fundamental rights. In the first German Federal Constitutional Court headscarf decision from 2008, the Senate staged an oral hearing. There is no obligation to do so in this type of proceeding, which is why the First Senate did not decide to do this in a later case, where it relied instead on written expertise and documented evidence. But in 2003, the court invited scholars, mostly from the field of sociology, and school administrators to discuss issues deemed relevant to the decision. Here, non-legal knowledge entered the scene in person, while in all other instances it does so only in writing. How is such knowledge translated into law and what gets lost in translation?

In a decision of the Federal Constitutional Court, a list of authority figures who were asked for their opinions is offered, as well as citations from scholarly works and references to other relevant cases and statutes. Who gains a voice in the decision, and who else gains access to the court and its regulatory speaking of rights by way of being cited? The question of whom or what is cited as relevant is subject to the Justices’ deliberations in court, and practices differ. But the issue is to no small degree political because the choice of citations attributes authority to some sources and silences others.

To focus further on the topic of scholarly work in court rulings, it may be important to recall that there are many supreme or constitutional courts in the world that never cite an article or a book. The Federal Constitutional Court does so occasionally. What remains hidden in this process is that Justices read all that can be found, based on systematic research by the clerks who prepare a first treatise that is of relevance to the deliberations—namely, every legal article and book published on the issue at hand. In a legal culture such as Germany’s, scholars constitute an important epistemic community that contributes to the speaking of fundamental rights in a rather loud voice. Scholars, moreover, have their own agenda. Let us consider, for instance, the scholarly community that teaches Staatsrechtslehre—the law of the state, both constitutional and administrative, now increasingly called constitutional law. This community is still predominantly and hegemonically male, heterosexual, and mostly autochthonous, to mention just some of the characteristics at work. As an epistemic community, which may be more important, it is deeply invested in specific assumptions about law, the state, or justice, which results in a specific path dependency, all of which may inform a particular stance in a given case.

What then happens when non-legal scholarship is introduced? In the Federal Constitutional Court’s preparations for deliberation, lots of sociological studies and data are dealt with, and all of the Justices are given this information to read. To the scholars out there, this means: Keep on publishing. Even if your voice does not figure explicitly in legal arguments and written decisions, a plurality of voices is taken into account, and this certainly contributes to the laws applied to fundamental rights, at least in the background.
In the second headscarf ruling of the German Federal Constitutional Court, as always, the politics of knowledge were also at work. One must take note of who is seen as an expert and on what issue and what kind of knowledge is adjudged insufficiently expert. For instance, it is important to understand the religious norms of Islam when you discuss the wearing of headscarves. Yet expertise on this matter is complicated by the variety of interpretations that exist, and by the claims to authentic authority involved in all quests around religion. Also, to discuss the conflict surrounding the wearing of the headscarf, one definitely needs knowledge about gender. Thus, it is important to pay attention to data that is delineated on the basis of sex. Yet in addition, one needs an understanding of gender, to take intersections with other inequalities into account where possible.

Besides complainants, lawyers and scholars, both legal and non-legal, other voices that contribute to the speaking of law are provided by the media, at least in prominent cases held in the highest or constitutional courts. In fact, what most individuals know—or do not know—about the law, and about the headscarf ruling, indeed about any legal conflict and its implications, is brought to them via the news. News is created by reporters and journalists. Just like the judges, the lawyers, or the academicians, journalists have their own identity characteristics, their path dependencies, and their work is also shaped by specific conditions. Today, the media is under severe pressure to produce copy as rapidly as possible. Media sources thus often rely solely on the press release issued by the court to report on the case. These press releases are textual creations in their own right. In Karlsruhe, they are produced in cooperation with Justices, but nonetheless involve a short interpretation of the ruling itself. In media reporting, the conflicts dealt with by courts are inevitably much more abbreviated, and they are often sensationalized, as well as individualized, despite the collegial nature of decision-making. The way they are constructed needs to be studied to enable us to understand their potential shortcomings. Many politicians who then proceed to make statements about court decisions also rely on the news or press releases. Who, then, speaks of fundamental rights here? It is definitely worth investigating those who report on the law and legal proceedings as a very particular type of speaker.

Thus, to understand the practice of speaking of fundamental rights today, there is a need to analyze who gains access to the process of speaking. In a discussion of access, the demographics of the litigants who are involved matter, as do the lawyers, academics, or experts who are allowed to speak, and, by contrast, to those who are silenced or excluded from the process. The speaking of fundamental rights involves knowledge production, and an understanding of the deliberative process in context helps us to grasp this process. The story of the wearing of the headscarf in a public school is but one of many.

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11 See Johannes Fried, Wissen als Soziales System, in WISSENSKULTUREN 12, 31 (Fried & Michael Stolleis eds., 2009) (arguing that "legalese" invaded Western culture from the thirteenth century onward).
F. Legal Arguments as Framing

As has been shown, there are subjective and objective factors that inform whether or not people have access to the law, and there are many actors and voices at work in this process. Over time, one may understand “a case” as a conflict that is transformed into a process of deliberation, which results in a ruling that retells the story and presents legal arguments to support a decision.

It is these legal arguments that are first and foremost labeled as “a case.” They are a legal shorthand for life’s complexity. Others have pointed out that there is an injustice in this process because the law can never tell the entire story. Yet is there an entire story of a case to be found anywhere, ever? The discursive force at work in the proceedings renders court decisions and certain voices authoritative so that some events are told and thereby, deemed relevant, and others dismissed. One way to look at this is to understand the speaking of law as a process of inclusion and exclusion. Taking this into account, the larger issue of law’s pluralities that is being pursued in this Article may be best understood if we look at legal arguments as a type of framing.

Framing means that things might be told differently and that a frame dictates the way they are told. When life meets law, life is framed in the legal manner. This does not mean that nothing exists outside the frame of the law; there is always a subtext to the legal text. Yet to understand legal procedure, an act of framing allows us to understand the ways in which something is accepted and legitimated through being retold, while other issues as well as persons are excluded from the purview of the law. They do not figure there, are rendered irrelevant, and disappear. Law frames life in that it states and dictates what matters. As parts of this frame, legal arguments may not just be seen as aspects of procedure, considerations, perspectives, points, or positions. Instead, legal arguments and court decisions constitute authority because institutional design matters. Yet they constitute authority because they are anchored in a deliberation process specifically designed to be legal, not political. This anchor is defined by what we call “method” in adjudication or legal reasoning. Yet as is well known, method also has a political dimension.


13 See THE EUROPEANIZATION OF GENDER EQUALITY POLICIES (Emanuela Lombardo & Maxime Forest eds., 2012) (reviewing the critical framing analysis); see also DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW (2015).

Contrary to a well-known stance within critical legal studies, however, adjudication is not simply indeterminate. Nor is it fully determined. Court decisions are different from other types of arguments because they need to be anchored in the law in order to be legitimate. Frankly, and particularly as a Justice of a constitutional court, it would be suicidal to leave the legal terrain because the manner in which we intervene in politics and the acceptance thereof entirely depends upon the legal mode we use. Again, this does not mean that court rulings are immune to politics. But for constitutional courts in particular, it is crucial that these courts differ institutionally and otherwise from politics to allow intervention in the political field.

In the headscarf ruling, as in most fundamental rights cases, there is little, but there is, authoritative text in the constitution on which to base one’s deliberation. The Grundgesetz, or Basic Law, as the German constitution, explicitly and more elaborately than, say, the U.S. constitution, protects the rights of liberty and the equality of religious and other beliefs, gender equality, parental rights, and freedom of occupation. Article 4 Sections 1 and 2 of the Basic Law state: “Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.” Yet the 2015 ruling had a great deal of precedent material in the 2008 decision by the other Senate of the Federal Constitutional Court. In times of legal pluralism, the German court does also anchor its ruling in the European Court of Human Rights’ interpretation of the European Convention of Human Rights (ECHR): it practices what I call “embedded constitutionalism.” Other important participants in the conversation include lawyers and government entities who are invited to offer their opinion, as well as scholars and experts of specific fields who offer arguments. In Germany, lobby groups and civil society organizations rarely intervene, because there is no tradition of amicus curiae briefs, but some are invited by the Court, and via public forums many voices participate in the speaking of fundamental rights. To effectively inform a ruling, however, all of these voices have to be framed as legal.

Legal frames differ significantly. In the 2015 ruling, the Federal Constitutional Court made an initial decision about how to frame the case by referencing Articles 3, 4, 6, 7, and 12 of the Basic Law. It uses precedent to secure the case’s anchor and legitimacy and employs principles that are firmly established as doctrine, which consists of generally agreed upon lines of argument. Yet, it does so with a specific starting point: A frame. In fact, in 2008, the Second Senate of the German Federal Constitutional Court focused on a discussion of whether you can accept a teacher’s decision to wear a headscarf in school by looking at the

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16 The German Federal Constitutional Court has two sets of Justices (the First and Second Senate), consisting of eight Justices each, each serving for a twelve-year term.
character of the school, the nature of teaching, and the pupils and parents involved. In 2015, the Justices started the discussion by asking whether the teacher felt obliged to wear a headscarf according to her religion and then, eventually turned to the limits of that freedom. In this frame, the court also needs to take into account a long line of precedent specifying the meaning of religious freedom as being based on self-determination and holds that it is not for the state or the courts to decide whether religion mandates a norm or not. It also needs to discuss the line of precedent elaboration on the meaning of religious freedom in social encounters, which states that there is no right that protects one from being confronted by another citizen’s expression of her religious beliefs and that the constitution endorses a society in which religious expression exists freely. Eventually, all points that inform the 2008 decision are taken up as well, but the frame has now shifted.

Certainly, this is the legal perspective and form of argumentation. The analytical tools provided by literary studies and linguistics may indeed help us to further understand how courts speak towards fundamental rights. Law profits from understanding that structure and style possess a material efficacy in legal texts and rulings. In addition, there are fascinating ethnographic, sociological, and historical analyses that help to understand the meaning of veils and veiling in various societies, religious settings, and to understand the informal rules that govern the regulation of this practice, which should also inform our understanding of “the case.” We need close readings to inform nuanced critique. Again, this demonstrates that there is nothing indeterminate in the law, and that legal processes are not just ideology, but informed by a variety of factors. Courts, as a specific actor doing law, are not immune or isolated from non-legal impact. Yet there is a specificity of legal arguments, different from others, to be understood from an interdisciplinary perspective.

One needs to inquire into the effects of the rhetorical quality of legal texts, into the metaphors they employ, and the images figured forth by their words. Close readings of legal texts and rulings brings to the fore a plurality of visions. One example is the politics of naming. If you read the German Federal Constitutional Court headscarf decision, you may note that it is written in gender-specific language and does not use the generic masculine form that is still mostly authorized in German to represent everyone. Does this matter, and if it does, how so, and to whom? Whom does a court explicitly address with its words? Are fundamental rights spoken differently when they are, literally, spoken for men or for women only? Is this merely a cosmetic issue, or is it worth fighting for words? You may also notice that the Court attempts to characterize Muslim women carefully and to be specific about the type of headscarf worn by them. Similarly, if you read the many Senate rulings of the German Federal Constitutional Court on cases that have been brought successfully by transsexuals, you shall notice the politics of the way in which sex is referred to. Once again, then, is it worth fighting for words?

In addition, to understand “a case,” one must see the nature of court rulings as a compromise. To some, compromise is anathema to fundamental rights. They hold that the foundational legal principle is not to compromise on the very basics—the very meaning of
being human, and as such, a legal subject of fundamental rights. Yet at the same time, if fundamental rights are understood as rights that protect people in terms of their living with others, then they are always already in some sense compromised. Nonetheless, compromise is often seen as typical of politics but not of law. In fact, compromise does not signal the clarity of a decision, the sword of Lady Justice, and may even endanger the authority of a court. In particular, a constitutional court must function differently from the realm of politics, which thrives on compromise. It needs to be clear and right. Compromise appears shallow, while a unanimous decision by the court signals strength. Yet in our regulatory practice, as a collegial court, compromise is as central as it is in every collective.

In Karlsruhe, we do not only discuss a draft treatise of the decision, the key points that are to be made, the road to be taken, and the arguments we consider to be convincing. Following that, a draft of the decision is circulated, which has been written by the reporting Justice, and all of the Justices submit suggestions for revision. In the last session, we then discuss suggestions for every word, sentence, comma, citation, precedent, and comparative note. To reach consent on a final version, a compromise must be made. In the headscarf decision, as in any other decision, there will have been many convincing arguments for framing things differently. There is also dissent. Certainly, there was discussion as to whether to declare any prohibition of wearing the headscarf in schools unconstitutional as a violation of individual rights. After all, it is established doctrine that the individual does not have to be accepted by the majority in order to remain in the collective; rather, the state carries the obligation to allow the individual to stay, or here, the teacher to wear the veil. Instead, we reached a compromise in holding that in general the headscarf may not be prohibited, in order to protect religious liberty and to ensure gender equality for women who wish to retain their positions as public school teachers. Yet in order to deal with extreme conflicts that surround the wearing of headscarves, states may nonetheless prohibit teachers from wearing them in a school district for a limited period of time to ensure that schools can indeed function. This does not necessarily result in terminating employment but calls for a proportionate reaction, such as relocating the teacher to another school.

G. Understanding Practices of Regulation

Up to this point I have tried to list a number of helpful approaches to understanding “a case” such as that of the headscarf ruling. The key appeal is in its not discussing court decisions as yet another type of text or as a single emanation of a legal culture; rather, the effort is to understand the specificities of certain practices of regulation. But it is impossible to encapsulate all facets of this practice. I can only tell you so much. As I have mentioned, I have an obligation to keep deliberations secret; the Justices are called upon not to lift the veil. I am under a legal obligation, and bound by a sense of professional ethics, as well as institutional loyalty, not to tell you how we really reached the headscarf ruling. Perhaps more importantly, I am protecting myself by not telling you. Generally, the more united we Justices stand, the harder it is to attack us and the stronger we are. But also, on a personal level, the less you know about where I stood in relation to this case, the more freedom I shall
have in the next deliberation. In collective decision making, it is extremely important to stand your ground as firmly as possible, but also to be open to reasonable change. A foreseeably stubborn colleague cannot be part of the process of finding common ground, which is what we need because every decision we reach as a Senate, and thus as a collegial institution, is a compromise.

Insofar as jurisprudence is prudence concerning speaking the law—*Rechtsprechung*—court decisions may be seen as a form of speech. This helps to shed light on the speaker, the audience, the tone, and the rhetoric involved in what is said as well as the site of the saying and its technological and medial setting. A focus on a given ruling, “the case,” often sheds light only on one dimension of it, yet there is much more to law. The case focus is a focus on the court’s version of one moment in time, translated into law and specifically framed, within a legal perspective. But a case is also an experience that was brought to a court’s attention, and as such already a framed version of a conflict. Eventually, this becomes a legal argument, rendered as a written text to document the deliberative compromise that was reached by a collegium—a ruling comprises a set of answers to a specifically filtered set of questions. If we wish to comprehend the multiple dimensions of law, we need to scrutinize these instances as specific practices of regulation. In the headscarf controversy, as in others, many different types of norms are at work. If we understand law as a practice, we also allow ourselves to hear all of the voices that enter into a given case, to ponder who has been rendered silent, and understand the politics of knowledge at work in the law. To seek the beginning of a case brings attention to the conditions of gaining access to the law; this attention would profit from critical analyses of gender and other social inequalities. Like all social practices, legal decision-making is marked by multidimensional inequalities in various ways. As a starting point, it is gendered, and we know a lot about this process, but still need to learn more and keep studying them.

The issues raised in this Article are suggestions for further research in interdisciplinary legal studies, and for empirical studies of law as a social, economic, cultural, and first and foremost a political phenomenon. Here, fundamental rights are neither only an idea nor ideal. Because I keep trying to deliver the promise of fundamental rights, as a Justice, I would certainly appreciate knowing more about what we do when we practice law. More generally, constitutionalism, with its promise of guarding fundamental rights, shall certainly profit from an understanding of its practice as grounded in that plurality that is the law.
“It Isn’t True that England Is the Moon”: Comparative Constitutional Law as a Means of Constitutional Interpretation by the Courts?

By Anna-Bettina Kaiser*

Abstract

This Article evaluates the merits and problems of comparative constitutional law as an interpretive means by the courts. It plea’s for a nuanced perspective towards both agents and methods of comparative constitutional law. The Article is in favor of the use of comparative constitutional law by the courts. However, challenges as to the legitimation of comparison in court, functional limits of comparative constitutional law in the judiciary, and methodological questions remain to be solved. As far as constitutional and supreme courts are concerned, this Article argues that arguments derived from comparison should be regarded as a means of persuasive reasoning.

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“Law’s pluralities” represent two distinct, yet intertwined concepts. The pluralistic approach highlights a plurality of methods when it comes to dealing with the law as well as the plurality of legal systems when they encounter one another. This Article seeks to combine both points of view by asking whether arguments derived from comparative constitutional law can be effectively applied in constitutional interpretation.

A. Legal Comparison—Learning about One’s Own and Foreign Legal Cultures

The method of legal comparison makes at least two promises: First, it allows scholars to become acquainted with foreign legal cultures or, more modestly, to make a serious attempt to do so. This permits learning from one another— for example, by incorporating suggestions and embracing solutions that only foreign legal systems can provide us with. This aim is even appreciated by strong opponents of comparative constitutional law as a means of constitutional interpretation. Second, the method of legal comparison also helps us to understand our own legal culture more thoroughly. As Justice Susanne Baer points out for the special case of the use of comparative constitutional law by the courts, comparative constitutional law provides a new point of view by creating a transparency of sources. Avoiding to cite inspiring judgments from other systems could lead, for example, to incorrectly declaring a decision to be a national Sonderweg, meaning a case that follows a special jurisprudential path.

But can these learning experiences be methodologically integrated into constitutional interpretation? And if they can be, what is the best means to do so? From a technical point of view, one way of learning from foreign law is to accept legal comparison as a constructive method in the context of constitutional interpretation. While scholars disagree on how the legal construction of constitutions works, four canonical methods of interpretation—based on the wording, the system, the spirit and purpose of the law, and historical interpretation—

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1 As strongly recommended by Ruth Bader Ginsburg, Looking Beyond Our Borders, 22 YALE L. & POL’Y REV. 329, 329 (2004), who claims that “[w]e are the losers if we do not both share our experience with, and learn from others.”

2 As Posner puts it, “[t]he problem is not learning from abroad; it is treating foreign judicial decisions as authorities in U.S. cases, as if the world were a single legal community.” Richard Posner, No Thanks, We Already Have Our Own Laws, in LEGAL AFFAIRS (2004), http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp.

3 See Christoph Schönberger, Verfassungsvergleichung heute, 43 VRÜ 6, 7 (2010).

4 Susanne Baer argues in favor of comparative constitutional law by the courts, which is not based on curiosity about the foreign, unknown, or exotic, but is employed because of the new insights the comparative approach provides. See Susanne Baer, Zum Potenzial der Rechtsvergleichung für den Konstitutionalismus, 63 JOR 389, 398 (Susanne Baer et al. eds., 2015).

5 On the German and US-American discussions, see FRANZ REIMER, JURISTISCHE METHODENLEHRE, 123–31 (2016). On the debate about the role of the interpreter, see also id. at 29; id. at 30; Dorsen infra note 48; Kommers & Miller infra note 49, at 91–92.
still serve as a starting point for constitutional interpretation in Germany and remain pertinent in nearly all constitutional democracies. Carl Friedrich von Savigny initially suggested similar methods as early as the nineteenth century in his Roman Law studies and other scholars modified and transferred them later to constitutional law. Peter Häberle built upon these methods as the first German scholar to suggest considering comparative law as a new, “fifth” method of interpretation. Yet, Häberle was also the first scholar in Germany to point out how complex the undertaking of comparative law actually is—emphasizing that it is impossible without a corresponding comparison of cultures. Along a similar vein, but drawing on the pertinence of cultural biases, Günter Frankenberg considered the problem of perspective to be a central element of discourse on comparative law. Accordingly, scholars conducting comparative work must first become aware of their particular perspective. Second, scholars may not rely on the objectivity of the analysis of cultural patterns; they are guided by a tertium comparationis—and the choice of the criterion of comparability is itself starkly determined by specific cultural backgrounds. Yet, lastly, this does not imply that one’s view is totally determined by history, social experience, perspective. Other scholars, such as Rainer Wahl and Susanne Baer, have aligned themselves with the view that culture is pertinent for any comparison: They believe that comparative law that is conducted without a comparison of cultures is simply naïve. Wahl claims, “[T]o truly understand German law, for instance, one has to go far back in German and European intellectual history.”

This leads to the central question: What agent is actually capable of conducting this kind of demanding legal comparison? As far as comparative constitutional law is concerned, the focus is on constitutional and supreme courts. Discussion concerning the importance of comparative constitutional law in constitutional jurisprudence has further been accelerated

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6 Carl Friedrich von Savigny has, however, pointed out that his four “elements of interpretation” are not to be regarded as alternative methods, instead, they are to be regarded as four steps in a single process of interpretation. He also terms his “elements” slightly differently: grammatical, logical, historical, and systematic. **CARL FRIEDRICH VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS, 213–15 (1st ed. 1840).**


9 See id. at 415.


12 Wahl, supra note 10, at 174.
by the recent public disagreement between two U.S. Supreme Court justices on this very issue. Whereas the conservative, and recently deceased, Justice Antonin Scalia opposed the idea of legal comparison as a method of constitutional interpretation, the more liberal Justice Stephen Breyer’s position was in favor of it. Recently, a German equivalent of this debate has evolved between Susanne Baer, Justice of the German Federal Constitutional Court (FCC), and legal academic Christian Hillgruber.

This Article invites the reader to reflect on the following issue: Should constitutional courts apply comparative constitutional law? And if so, how? In doing so, this Article adopts a comparative perspective. First, the Article addresses the extent to which the German FCC has dealt with arguments derived from comparative constitutional law, while attempting occasional sideways glances at the Supreme Court of the United States (SCOTUS). Second, this Article further explores the SCOTUS comparative constitutional debate between Justices Scalia and Breyer. In this context, attention will also be drawn to the parallel debate in the German academic sphere between Justice Baer and Hillgruber. Finally, the Article returns to the question of whether courts—or more specifically, constitutional courts—are appropriate agents for comparative constitutional legal practice. Although this Article generally supports the enhancement of comparative constitutional law, it pays special attention to the problems and shortcomings courts face when conducting comparisons of different legal systems. This Article agrees with Basil Markesinis’s view that opponents to the use of foreign law by constitutional and supreme courts may have rendered a service to comparative law: In their “persistent negativism,” they alert jurists to address methodology issues more cogently.

B. Constitutional Courts as Agents of Comparison?

I. A Short Analysis of the German FCC and SCOTUS Jurisprudence

The German FCC seemingly seldom employs the method of comparative constitutional law. As a new study shows, however, it has adopted a more welcoming approach towards

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14 See Baer, supra note 4; Christian Hillgruber, Die Bedeutung der Rechtsvergleichung für das deutsche Verfassungsrecht und die verfassungsgerichtliche Rechtsprechung in Deutschland, 63 JöR 367 (Susanne Baer et al. eds., 2015).


comparative law in recent years.\textsuperscript{17} Take, for example, the \textit{Fraport} decision from 2011 that adopted U.S. and Canadian jurisprudence on the public forum in a case regarding the scope of freedom of assembly.\textsuperscript{18} Nevertheless, there is still a certain hesitation towards comparative constitutional law, as the small number of FCC decisions that explicitly refer to foreign constitutional cases shows. Germany is not unique in this sense—this same reluctance can be observed in constitutional and supreme courts worldwide. However, two important caveats should be made.

First, not only do German judges regularly engage in institutionalized discussions with foreign colleagues,\textsuperscript{19} but they also practice a considerable degree of comparative constitutional law. The results, however, do not always explicitly enter a judgment.\textsuperscript{20} A famous example of such an implicit use of comparative constitutional law is the FCC’s \textit{Wunsiedel}\textsuperscript{21} decision from 2009. In the decision, the Court takes a stand on the constitutionality of a then-newly adopted criminal law punishing incitement to hatred.\textsuperscript{22} Applying its usual tests, the FCC would have had to declare this law unconstitutional. Free speech, the ‘open marketplace of ideas upon which democracy depends,’ is one of the most basic rights protected \textit{inter alia} by both the U.S. and the German Constitution. The FCC then

\textsuperscript{17} \textsc{Aura María Cardenas Paulsen, Über die Rechtsvergleichung in der Rechtsprechung des Bundesverfassungsgerichts} 181–82 (2009). See also Tania Groppi & Marie-Claire Ponthoreau, \textit{Conclusion: The Use of Foreign Precedent by Constitutional Judges}, in \textit{The Use of Foreign Precedent by Constitutional Judges} 411, 416 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).


\textsuperscript{20} See \textit{generally} Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Nov. 4, 2009, 124 Entscheidungen des Bundesverfassungsgerichts 300.

\textsuperscript{21} See \textsc{Strafgesetzbuch [StGB] [Penal Code]}, § 130, para. 4. This law was adopted in the context of an increasing number of demonstrations glorifying the National Socialist regime in the city of Wunsiedel. The demonstrations took place near the grave of Rudolph Heß; Heß was Hitler’s deputy from 1933 onwards. § 130 para. 4 of the German Criminal Code states the following: “Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.” Translation by Michael Bohlander, \textsc{Bundesministerium für Justiz und Verbraucherschutz} (2015), available at: http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1241.
held, however, that there was an unwritten but narrowly formulated exception for laws that restrict populist approval of the arbitrary and tyrannical rule of the National Socialists. It explains this exception with reference to Germany’s particular history, stating that favoring this rule in Germany constitutes an attack on the internal identity of the community with peace-threatening potential. The emphasis on Germany’s exceptionalism especially shows that, in the view of the FCC, advocating Nazi rule may very well be protected by freedom of speech provisions in other countries.

Presumably, the FCC has used the exceptionalism argument not only to extract an unwritten exception from Article 5, paragraph 2 of the German Basic Law, but also to explain a possible divergence from other countries’ jurisprudence. The Wunsiedel decision illustrates that two stages in the process of decision-making can be distinguished: First, the process of discovery, the procedure by which the court reaches a conclusion (and that is not transparent to the public), and second, the process of justification of its judgment, the procedure by which the court justifies a specific conclusion which, by contrast, finds its expression in the text of the final judgment. Thus, the interpreter of the court’s judgment should be aware of this important differentiation. It should not be assumed from a lack of references that the court did not compare its reasoning to those of other supreme or constitutional courts beforehand.

The second caveat concerns public international law. In this context, the FCC’s work necessarily has a comparative aspect. The influence of the European Court of Human Rights (ECtHR) on the FCC vividly illustrates this point: by no means has the FCC proven to be


26 For this classic differentiation, see Richard A. Wasserstrom, The Judicial Decision 27 (1961). For an account along a similar vein, German discourse differentiates between the decision-making process (Herstellung) on the one hand and the presentation of the decision (Darstellung) on the other, see, e.g., Baer, supra note 4, at 398.

27 It may also be of importance to interpreters of FCC judgments that there is a period of protection for the FCC’s files. For more about the period of protection—60 years for important documents such as draft judgments,—see Florian Meinel & Benjamin Kram, Das Bundesverfassungsgericht als Gegenstand historischer Forschung: Leitfragen, Quellenzugang und Perspektiven nach der Reform des § 35b BVerfGG, 69 JZ 913, 916–17. Justices also underlie the secrecy of deliberations. For the merits and demerits of this approach, see Baer’s contribution in this volume.
insular, but rather open-minded. In various decisions, but especially in the Görgülü and Preventive Detention cases, the FCC has—at least to a certain degree—incorporated in its jurisprudence both the European Convention on Human Rights (ECHR) and its interpretation by the ECtHR. The FCC’s approach was found to be an expression of the Basic Law’s openness towards public international law.

But this must not divert attention from the fundamental difference between comparative law in a wider sense on the one hand and comparative law in a more narrow, actual sense on the other. While comparative law in its actual sense necessarily transcends the own legal order, this is different with comparative law in a wider sense. The latter concerns comparison within one’s own legal order only and encompasses in particular applicable public international law. Comparative law’s role as a means of constitutional interpretation is hardly ever contested for such cases, whereas the role of comparative law in a narrow sense is controversial as regards the interpretation of national law. For example, the ECHR has the character of applicable law in Germany. Thus, it is part of the German legal order. When the FCC draws on ECtHR jurisprudence, it deals with applicable law of the German legal system. The same is true for European Union law—it has the character of applicable law in Germany. Conversely, it is a case of comparative law in its narrow sense when the FCC makes a comparison to law found in foreign legal systems, which is, of course, not applicable in Germany. The situation is different if the SCOTUS refers to regional human rights treaties such as the ECHR, because the U.S. itself is not a party to this Convention. When the SCOTUS refers to ECtHR cases, this is thus a case of comparative law in its actual, narrow sense.

28 BAER, supra note 27, holds the view that the FCC “indeed must . . . anchor its rulings in the European Court of Human Rights interpretation of the European Charter on Human Rights.”


30 Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], May 4, 2011, 128 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 326, 326, http://www.bverfg.de/e/rs20110504_2bvr236509en.html.


32 For a differentiation based on different criteria, see UWE KISCHEL, RECHTSVERGLEICHUNG 74–76 (2015).

33 See id. at 74–75.

34 BREYER, supra note 13, at 236–46 in his new book; Justice Breyer does not differentiate between these two accounts of comparative law—his argument applies to both necessary and merely optional comparison. See Markesinis, supra note 15, at 306. Markesinis, by contrast, neatly distinguishes two questions: First, whether national judges may seek inspiration from the practice of sister courts, and second, whether foreign law is used as public international law, or as supranational law, and foreign law application due to a rule of conflicts of laws.

sense because the ECHR is not applicable in the U.S. legal system. Thus, the SCOTUS’ comparisons in the case of the ECHR necessarily transcend the U.S. legal order.

In the U.S., the situation is comparable to Germany’s insofar as the SCOTUS jurisprudence has shown that it also deals with foreign jurisprudence, albeit only sporadically.36 However, the issue is debated fiercely, and not only in academia. Congress has even voted on a bill aimed at the prohibition of the use of foreign laws, policies, or other actions of a foreign state or international organization when interpreting and applying the U.S. Constitution.37 Although this bill was argued to be unconstitutional,38 and was ultimately unsuccessful, it shows how polarized the discussion remains. Justice Breyer, however, has adopted a welcoming approach towards comparative law.39

II. The Scalia/Breyer Debate in the United States, and the Hillgruber/Baer Debate in Germany

The methodological counterparts on the bench of the Supreme Court, Justices Scalia and Breyer, were invited to a public debate to discuss this very issue: Are Supreme Court Justices allowed to find guidance in, or to refer to, foreign legal systems?40 Whereas Justice Breyer responds in the affirmative, Justice Scalia voices strong criticism. In his new book, Justice Breyer asserts that the debate is a political one.41 But this Article’s view is that the debate also clearly comprises a legally relevant problem about the use of comparative constitutional law by the courts. Indeed, there are valid legal arguments to be made both in favor of and against constitutional and supreme courts using comparative constitutional law.

Justice Scalia’s opposition goes back to his preferred method of interpretation: originalism, which is the branch of interpretive theory focused on original meaning. This method of interpretation is interested in the original meaning as determined by a contemporaneous

36 See Groppi & Ponthoreau, supra note 17, at 412.
39 For example, this welcoming approach is seen in the above-mentioned cases. See generally Printz v. United States, 521 U.S. 898 (1997), Lawrence v. Texas, 539 U.S. 558 (2003), and Roper v. Simmons, 543 U.S. 551 (2005).
40 See Dorsen, supra note 13, at 519.
41 See Breyer, supra note 13, at 236. There certainly is a political debate in the U.S., as the unsuccessful bill in Congress aiming at the prohibition of citing foreign legal sources shows. See Constitution Restoration Act, supra note 37.
understanding of the U.S. American society at the time of the law’s introduction. But in Scalia’s view, even proponents of the antithetical “living constitution” approach to constitutional interpretation have to reject looking at foreign legal systems for guidance as “[the United States simply does not] have the same legal and moral framework as the rest of the world.” Indeed, one example of the different framework can be seen in the fact that the U.S. has only ratified a small number of human rights treaties. Further, it has made significant reservations to those it has ratified. At least for opponents to the consultation of foreign law by the Supreme Court, this suggests that the American “We the People” might believe that their constitutional rights and distribution of powers should not be interpreted in light of foreign judicial decisions. Moreover, Scalia claims, it is just not feasible for the court to contextualize single decisions. For him, the purpose of constitutional interpretation is not to arrive at the best decision, but rather to arrive at the one and only decision for which the constitution provides.

Justice Breyer’s first response is modest: He counters with the argument that looking at foreign jurisprudence may strengthen foreign courts and give them a leg up. His second argument is more important: He argues that comparative constitutional law leads to a

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43 Dorsen supra note 13, at 521. Justice Scalia makes one exception to the purported irrelevance of foreign law for constitutional interpretation. Phrases like “due process” have to be understood in the light of the law they were taken from: old English law. See Dorsen, supra note 13, at 525.


45 Delahunty & Yoo, supra note 35, at 311.

46 Konrad Zweigert, Der Einfluss des Europäischen Gemeinschaftsrechts, 28 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 601, 610–11 (1964); Zweigert, by contrast, recognizes that there are several possible solutions when interpreting a judicial provision. He argues, for the special case of ECJ case law, that to interpret general principles of EU law, the aim of comparison is to arrive at the best solution.

47 Opponents of this opinion claim that constitutional texts do not have one true meaning. See, e.g., Aharon Barak, Constitutional Interpretation, in L’INTERPRÉTATION CONSTITUTIONNELLE 91, 92 (Ferdinand Mélin-Soucramanien ed., 2005): there simply is no pre-exegetic understanding of a text. We can only access and understand a text—and this implies written constitutional texts—through an interpretive process.

48 See Dorsen, supra note 13, at 523. More convincing than this “argument of pity” is Justice Ginsburg’s approach. See Ruth Bader Ginsburg, Gebührrender Respekt vor den Meinungen der Menschheit: Der Wert einer vergleichenden Perspektive in der Verfassungsrechtsprechung, EuGRZ 341, 346 (2005) (comparative constitutional law is a question of comity and should be practiced with modesty because other legal orders constantly change).
mutual learning process. Indeed, this Article also makes the point that courts in different jurisdictions often face the same or similar problems. Why should other courts’ reasoning in similar cases then be irrelevant? This does not imply that there is an obligation to compare. Yet, arguments derived from comparison can be helpful in the decision-making process.

Justice Breyer’s third argument is that foreign legal systems are not so different after all. He states:

“Well, it’s relevant in the sense that you have a person who’s a judge, who has similar training, who’s trying to, let’s say, apply a similar document. And really, it isn’t true that England is the moon, nor is India. I mean, there are human beings there just as there are here and there are differences and similarities. And so one is . . . trying to deal with their application.”

Yet, it remains unclear whether this argument is supposed to apply to the Constitution as a whole, or only as far as fundamental rights are concerned. In his recently published book, Justice Breyer takes up this third argument and elucidates it by relying on Jeremy Waldron’s approach; according to Waldron, comparative constitutional law aims at a Law of Nations, or Ius Gentium. More specifically, Waldron argues that this Ius Gentium has a claim on us by virtue of an overlap between the positive law of certain states. Yet, the question remains as to whether such a theory really takes seriously the importance and value of different constitutional cultures.

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50 For the hope that a comparative perspective opens up the possibility of constitutional change within this mutual process of learning from new and innovative solutions found in other legal systems, see Ginsburg, supra note 1, at 337.


52 See BREYER, supra note 13, at 239.

53 See JEREMY WALDRON, PARTLY LAWS COMMON TO ALL MANKIND: FOREIGN LAW IN AMERICAN COURTS 3 (2012).

54 WALDRON, supra note 53, at 28.

55 Critical of such a universalist stance is Sandra Fredman, Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law, 64 INT’L & COMPARATIVE L. Q. 631 (2015). Stefan Kadelbach, Konstitutionalisierung und Rechtspluralismus, ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE (in press); Kadelbach argues that there is a context-
In Germany, there is a parallel debate going on based on similar as well as new arguments. The 2015 issue of the German journal *Jahrbuch des öffentlichen Rechts der Gegenwart* (JöR) lucidly demonstrates the argument between Justice Susanne Baer and Christian Hillgruber. While the latter pleads for a restrained approach, Justice Baer, with all due caution, argues along a similar vein as Justice Breyer in favor of comparative constitutional law applied by constitutional courts. The context of the debate is not so different either. Clearly, there is no recognized method called originalism in German jurisprudence. Yet, Hillgruber’s approach shares important features with that of originalism, albeit in the version of originalism that focuses on the original intent. These approaches share a historical dimension. In particular, Hillgruber stresses that the Basic Law lacks an express norm providing for the consideration of foreign jurisprudence, such as Section 39, paragraph 1 of the South African constitution. Similarly, as far as the European Court of Justice (ECJ) is concerned, there are provisions in the treaties, such as Article 6 (3) TEU and Article 340 (2), (3) TFEU, that expressly require legal comparison of constitutional traditions or laws of the Member States as a means to determine general principles. Cárdenas Paulsen calls this special case “communitarian interpretation.”

Conversely, Justice Baer, like Justice Breyer, exhibits a strong commitment to a universalism of human rights. She also argues that comparative constitutional law is valuable heuristically; it introduces very specific scientific knowledge into the debate. This, in turn, leads to a valuable contribution on the part of constitutional and supreme courts to the attempt to find criteria for constitutionalism. As other authors point out, there may also—in the absence of an express constitutional provision—be textual demands to recur to dependent adaptation of universal norm contents. In the abstract, their content may be universal, but applications will differ from case to case.

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56 JöR (Susanne Baer et al. eds., 2015). For the articles, see Baer, supra note 4; Hillgruber, supra note 14.
58 Christian Hillgruber, § 15 *Verfassungsinterpretation*, in *VERFASSUNGSTHEORIE* 505, 512–13 (Otto Depenheuer, Christoph Grabenwarter eds., 2010) limits his view to the German Basic Law.
59 Section 39, para. 1: “When interpreting the Bill of Rights, a court, tribunal or forum . . . may consider foreign law.”
60 Cárdenas Paulsen, supra note 17, at 141–45.
61 See Baer, supra note 4, at 399.
62 See id.
63 See id.
comparative constitutional law. The Canadian constitution, for example, refers to “a free and democratic society” in a limitation clause.

Justices Baer’s and Breyer’s position is more appealing than that of Justice Scalia. However, proponents of comparative constitutional law by the courts should not leave methodological criticism to their opponents. As Waldron points out in regard to the debate between Justice Scalia and Justice Breyer, critics like Justice Scalia often give a more clearheaded account of the proponents’ views than the proponents themselves. This is one more reason to practice methodological critique.

C. Comment: A Plea for an Agent-Specific Differentiation of Comparative Constitutional Law

On closer examination, comparative constitutional law, as practiced by constitutional courts, proves to be rather intricate, which is why this Article makes a plea for an agent-specific form of differentiation.

I. The Problem of Legitimacy

The usefulness of legal comparison depends mainly on the respective agent, the one who makes use of it. Scholars enjoy the liberty of comparing constitutional law on a theoretical level and may propose changes to the constitution, which may even subsequently cause a constitutional amendment to implement their proposals—at least in countries with constitutions that can be amended relatively easily, such as the German constitution. Yet, constitutional and supreme courts have to take the constitution as it stands. As a matter of legitimacy, a constitutional court must not exceed the legal powers the pouvoir constituant (constituent power) has bestowed upon it. In contrast, foreign constitutions, constitutional traditions, and interpretations provide legitimacy only to a very limited extent.

Yet, the claim that the determination of a court decision by foreign precedents would undermine the separation of powers by implicitly transferring judicial powers outside the respective legal system seems exaggerated; it implicitly assumes that there can be foreign precedents. Foreign judgments can never constitute precedents, however, because they can

64 See Vicki Jackson, Comparative Constitutional Law: Methodologies, in COMPARATIVE CONSTITUTIONAL LAW 54, 68 (Michel Rosenfeld & András Sajó eds., 2012).

65 See id.

66 See WALDRON, supra note 53, at 24.

67 Provided one does not call the bestowal a fairy tale, as Isensee does. See JOSEF ISENSEE, DAS VOLK ALS GRUND DER VERFASSUNG 73 (1995).

68 See Delahunty & Yoo, supra note 35, at 299–304.
never have binding authority on constitutional and supreme courts. They can, of course, be based on persuasive reasoning, and the court in question can embrace this reasoning. The problem of legitimacy nevertheless shows that the usual arguments put forward in favor of comparative constitutional law are not as compelling when it comes to its application by constitutional courts. This is also why an agent-specific view is so urgently needed.

II. Comparative Constitutional Law as a Method of Constitutional Interpretation?

As supreme and constitutional courts are bound by the constitution, comparative constitutional law can only be conducted by means of constitutional interpretation. This is not problematic if constitutions expressly provide for the possibility of considering foreign law for interpretative means. As mentioned above, Section 39, paragraph 1 of the South African Constitution expressly provides for this. The Basic Law lacks such an explicit provision—which was precisely Hillgruber’s point. Certainly, it may be worthwhile to consider comparative constitutional law as a method of interpretation. If comparative constitutional law had already been acknowledged as a fifth possible method of interpretation, the FCC could be expected to make recourse to comparative arguments more frequently. But, has comparative constitutional law become an accepted method of interpretation?

Even though this seems to constitute an attractive and cosmopolitan concept, it has not attracted many proponents. First and foremost, it is rather unclear which legal systems should be used as a standard of comparison. Peter Häberle proposes using neighboring states as a starting point. But, which states should exactly be included? One might think of

69 For the triad of comparators—legislative, academic, and judicial comparison,—see Nick Oberheiden, Typologie und Grenzen des Richterlichen Verfassungsvergleichs 11 (2011).

70 See Matthias Jestaedt, Grundrechtssysteme im Gesetz 104 (1999). Jestaedt raises a parallel to diachronic legal comparison. According to him, comparison over time is relevant only to the extent that an express approval or dismissal of the constituent assembly can be shown by way of interpretation.

71 See supra note 59 and accompanying text.

72 In particular, Article 1(2) of the German Basic Law is no such provision. See Horst Dreier, in 2 Grundgesetz. Kommentar Art. 1(2) recital 17 (Horst Dreier ed., 3d ed. 2013).

73 One has to admit that this may not entirely resolve the problem of legitimacy. Allegations of illegitimacy would prevail. See Schönberger, supra note 3, at 20 (“As opposed to legislators who can, for instance, make and change laws, constitutional courts must confine themselves to a more restrictive development of the constitution by way of constitutional interpretation.” (emphasis added)).

74 See Häberle, supra note 7, at 913 (acting as its main proponent).

choosing states with a Western constitutional tradition. But this only entails further problems, as even states with “similar constitutional structures”76 are, in part, distinctly different. An example is the death penalty, which is permitted in the United States, but expressly prohibited according to the Basic Law.77 Further, the majority view in Germany perceives the death penalty to be a clear violation of human dignity, thereby violating the very core of the Basic Law. As a result, the abolition of the death penalty could not be undone, even by constitutional amendment.78 From a methodological point of view, selecting which legal systems to compare will always be a problem, as is the case with all cherry-picking exercises. So far, no convincing proposal has been put forward to mitigate this concern.79 Thus, further profound methodological reflection is needed in order to avoid an arbitrary selection of the foreign material used for comparison.80

Another problem is the role of legal comparison among other, more established, methods of constitutional interpretation. This also raises fundamental questions of legal consistency and tradition. It is highly debatable whether arguments derived from legal comparison ought to have the power to force constitutional courts to defy long-standing constitutional interpretations. How should one deal with the fact that, for instance, the German Basic Law has at times a very specific constitutional text? An example of this would be the term allgemeine Gesetze (general laws) in Article 5 (2) of the Basic Law, concerning freedom of expression: Over time, a doctrine has developed which, as in this example, can be traced back to the Weimar Republic and its constitution.81 Hence, there is a certain path dependency in constitutional interpretation, which cannot simply be refuted by means of comparative arguments. These concerns explain why comparative constitutional law has not been established as a method of constitutional interpretation to this day.82 It is thus no

76 Schönberger, supra note 3, at 21.
77 Article 102 of the German Basic Law expressly provides for the abolition of the death penalty.
78 For representative views, see Bodo Pieroth, Hans D. Jarass in GRUNDEGESETZ FÜR DIE BUNDESPREUFBETRICH DEUTSCHLAND. KOMMENTAR, Art. 102 recital 1 (Hans D. Jarass & Bodo Pieroth eds., 14th ed. 2016) (providing a violation of Article 1 (1), human dignity). But see Matthias Herdegen, in GRUNDEGESETZ. KOMMENTAR Art. 1 recital 99 (Theodor Maunz & Günter Dürg eds., 2009) (arguing against a violation of Article 1 (1)).
79 But see infra note 89, at 634.
80 See Tushnet, supra note 42, at 1280–84, who—in the U.S. context—is optimistic that more complete references to non-U.S. law can be expected and appropriate techniques for distinguishing adverse material, rather than not citing it at all, will develop when the practice of referring to non-U.S. law matures.
81 Article 118 of the Weimar Constitution.
82 This does not, however, apply to concerns about comparative law in general. See Sebastian Müller-Franken, § 26 Verfassungsvergleichung, in VERFASSUNGSTHEORIE 885, 908 (Otto Depenheuer & Christoph Grabenwarter eds., 2010). Müller-Franken argues that although comparative constitutional law may not itself be a method of interpretation, comparative arguments might be taken into account by applying the canonical four methods of interpretation, especially those of teleological and historical interpretation.
wonder that Peter Häberle has recently mitigated his earlier thesis by placing greater emphasis on the role of legal comparison for the legislature and in constitution-making.\textsuperscript{83} However, concerns about the problematic use of foreign decisions as precedent can be diminished, given that no judge who relies on a foreign decision believes that she or he is actually bound by its findings.\textsuperscript{84} Accordingly, comparison could play a role in constitutional interpretation by constitutional and supreme courts, if we see its function as contributing to the process of finding good reasons for either divergence or convergence, rather than to stubbornly aspiring to converge despite fundamental textual, institutional, or cultural differences.\textsuperscript{85}

### III. Functional Limits of Comparative Constitutional Law by Constitutional Courts

Even if one is of the opinion that constitutional comparison should be used as a method of interpretation, as this Article does, fresh problems arise with regard to the function of constitutional courts. Constitutional courts, like other courts, decide cases. They do not always have the time and the resources to engage in comprehensive comparative law studies, even if they were merely to consult selected foreign legal systems. This becomes even more apparent by considering the close relationship between constitutional theory and comparative constitutional law.\textsuperscript{86} On a more practical level, a constitutional court would have to become acquainted with at least some different legal cultures to avoid allegations of being arbitrary.\textsuperscript{87} It is to be doubted that a judicial decision could digest this amount of input, although the FCC, for example, could surely handle more input than lower courts in Germany.\textsuperscript{88}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{83} See Häberle, supra note 20, at para. 26. Schönberger, supra note 3, at 20 (stressing the difference between constitutional interpreters and constituent power when it comes to the use of comparative constitutional law).
  \item \textsuperscript{84} See Tushnet, supra note 42, at 1284.
  \item \textsuperscript{85} For this deliberative understanding of comparativism, see Sandra Fredman, supra note 55, at 634 (stating that “[o]nce it is recognized that the function of comparative law is deliberative rather than binding, the force of many of the criticisms fall away”).
  \item \textsuperscript{86} See Schönberger, supra note 3, at 26.
  \item \textsuperscript{87} This might not be the case if the court’s aim is just to make plausible empirical connections. An example would be the impact on society caused by criminal law’s prohibition of incest.
  \item \textsuperscript{88} The FCC also has the possibility to request expert opinions from the Max Planck Institute for Comparative Public Law and International Law, as in BVerfGE 95, 335, 363–364—Überhangmandate, http://www.servat.unibe.ch/dfr/bv095335.html.
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D. Conclusion

To conclude, there are good reasons for constitutional courts’ reluctance when it comes to using comparative constitutional law in their reasoning. Such reluctance may be traced back to legitimation problems, to the considerable shortcomings of comparative constitutional law as a method of interpretation, and to the functional limits of constitutional jurisprudence. Does this mean that comparative constitutional law by constitutional courts should be abandoned altogether? No. Comparative constitutional law might solidify its place in court decisions as a method of persuasive reasoning, under the condition that differences in the respective textual, institutional, and cultural contexts are taken into account. To develop appropriate methods of comparison, efforts need to be made both in academic jurisprudence and in legal practice. Further, resources in the courts will be required. Rising to this challenge seems to be an especially promising venture in those areas of constitutional legal doctrine that do not seem to be bound to a particular constitution. This challenge might for example take place within the paradigms of the horizontal effect of human rights, proportionality, and the scope of judicial review.

89 If one accepts that arguments derived from foreign court opinions can only be deliberative and not authoritative, the cherry-picking concern loses much of its force. For more on this line of argument, see Fredman, supra note 55, at 634.

Abstract

As a normative social practice, law mediates between the “is” and the “ought,” between prescription and description. Obviously, narratives and narration play a role in law when it comes to describing facts and events: The testimony of a witness in court, the presentation of the case in a judgment, or (semi-)fictional cases used for legal education spring to mind.

In this Article, however, the focus is on the prescriptive side of law. If, in line with the definition given by Matías Martínez and Michael Scheffel, a narrative is to be understood as a “sequence of events and actions producing at the level of [literary] action an autonomous structure of meaning,”¹ it becomes possible to identify narratives and narrative elements within legal norms and provisions. The first part of this paper will deal with grand historical—or historicizing—narratives and cast some light on how they are used to give sense and direction to the interpretation and application of, especially, constitutional principles. The second part will suggest a narratological perspective on statutory law and attempt to reconstruct the process of norm application. This Article argues that this process relies mainly on comparative methods, and that narratives mediate between the seemingly opposed spheres of law and fact. Both kinds of narratives, the grands récits of constitutional law and the petits récits of statutory law, though quite different at first sight, possess common traits. They both fit the definition of narrative just cited; they both result from a process of selection and are thus prone to exclusionary effects. Moreover, the grand narratives of constitutional law also affect statutory law, its interpretation, and its application.

¹ Matías Martínez & Michael Scheffel, Einführung in die Erzähltheorie 138 (7th ed. 2007) ("Das Gemeinsame und Übertragbare von Geschichten ist nicht die Art und Weise der Darstellung in ihren sprachlichen und erzählerischen Modalitäten, sondern die Abfolge von Ereignissen und Aktionen, die auf der Handlungsebene eine autonome Sinnstruktur ergeben.").
A. The Cover Story: Grand Narratives

I. Preambles Narrate (Hi)Stories

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. — Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.²

The preamble of the 1776 U.S. Declaration of Independence surely can be regarded as the model for future preambles.³ With its blend of historical storytelling and appeal to common values, it has set the solemn tone we have come to expect from this type of text. It recounts

² The Declaration of Independence para. 2 (U.S. 1776).

the story of a despotic monarch, and of his subjects ready to throw off the yoke of oppression to be free in their “pursuit of Happiness.” This story is linked to an argument: The breach of the *contrat social* by “the present King of Great Britain” entitles the colonies to declare their independence. Preambles primarily provide a moral background for the ensuing legal framework. Often, this moral is embedded in a story of past wrongs and aspirations for a brighter future—as also seen in the Preamble to the 1946 Bavarian Constitution:

> In the face of the scene of devastation into which the survivors of the second World War were led by a godless state and social order which lacked any conscience and respect for human dignity, with the firm intention of permanently securing for the future generations the blessings of peace, humanity and justice and mindful of its history of more than a thousand years, the Bavarian people herewith bestows upon itself the following Democratic Constitution . . . .

With the rhetorical trope of a departure from an earlier “godless” period and with its double reference to the past—the dark times overcome and the traditions to build upon—this preamble employs the same phoenix *topos* as in the 1776 Declaration, one which also appears in the Preamble to the Charter of the United Nations (1945):

> We the Peoples of the United Nations, determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which

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*Id.*
justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . . have resolved to combine our efforts to accomplish these aims . . . ."\footnote{5 U.N. Charter pmbl.}

Once believed dead, the community of peoples is described here as rising out of the ashes of war, destruction, and abasement towards a new life and a unified future. Even if the emerging East-West conflict was soon to hinder the realization of this vision for decades to come, from a legal point of view, the grand narrative suggested by the Preamble is not a mere ornament. The spirit of commonality conjured up by that narrative shapes the Purposes of the United Nations laid down in Article 1, and, via this provision, also influences and inspires the interpretation of the Charter’s binding operative clauses.\footnote{6 See RÜDIGER WOLFRUM, pmbl, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 15 (Bruno Simma ed., 3rd ed. 2012). Yet, the text also mentions that the instances in which the Preamble has been explicitly referenced in interpretations of the Charter have been rare.} The system of safeguarding world peace and security as enshrined in the Charter—peaceful settlement of disputes in Chapter VI, collective security in Chapter VII, and regional arrangements in Chapter VIII—only becomes coherent against the background of the experiences that the Preamble’s narration relays.

II. Constitutions as Reservoirs of Collective Identity

Preambles do more than narrate (hi)stories. The grand narrative about who we are and what unites us is also rendered by and through other legal provisions, namely those of constitutional law. As Robert Cover writes in his seminal essay “Nomos and Narrative”:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. 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.\footnote{7 Robert Cover, Nomos and Narrative, 97 HARV. L. REV. 4, 4–5 (1983–84).}

Constitutional principles act as imaginary repositories for the aspirations of the society they constitute; they assure citizens of their collective, constitutionally-based identity. Described by Jan Assmann as that part of collective memory which preserves the fundamental connecting structures of a society that extend beyond the confines of autobiographical
recollection, cultural memory finds a prime medium of storage in constitutions. Who we are and what unites us is mediated by and through constitutional law. This is the meaning of those “epics” behind the constitution of which Cover writes. The grand narratives of departure from the past and of renewal, of tradition and origin, of our identity and that of the “others” make us collectively share the common project called the Constitution.

These foundational narratives serve three functions: (1) They reduce complexity by singling out those events that lend orientation as historical landmarks and turning points while history “keeps piling wreckage upon wreckage and hurls it in front of our feet;” (2) they reduce contingency by presenting history as a coherent sequence of events that has led to the here and now and that points teleologically towards the future; (3) they help to produce a sense of loyalty in constitutional subjects by appealing to common values through the construction of a “We.” At the same time, the construction of “We/Us” obscures the fact that the narrative is in truth entrusted to the High Priests and Priestesses of Law. It is a specialists’ tale primarily told by the representatives of power, in other words, of state authority.

The manner in which such foundational narratives bring legal norms and principles of constitutional law to bear can be seen with exemplary clarity in the U.S. Supreme Court’s decision in *Boumediene v. Bush* (2008). In the passage cited below, Justice Kennedy delivered the majority opinion of the Court, arguing that the plaintiff’s detention in Guantanamo Bay camp had to be rendered subject to judicial scrutiny. In order to give sense and direction to the interpretation of the relevant Constitutional clause, Article I, § 9 clause 2, which reads, “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,” Justice Kennedy enters into a grand historical narrative:

> The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchial power. That

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history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system. Magna Carta decreed that no man would be imprisoned contrary to the law of the land. Important as the principle was, the Barons at Runnymede prescribed no specific legal process to enforce it. Holdsworth tells us, however, that gradually the writ of *habeas corpus* became the means by which the promise of Magna Carta was fulfilled. The development was painstaking, even by the centuries-long measures of English constitutional history. Over time it became clear that by issuing the writ of *habeas corpus* common-law courts sought to enforce the King’s prerogative to inquire into the authority of a jailer to hold a prisoner. Even so, from an early date it was understood that the King, too, was subject to the law. As the writers said of Magna Carta, “it means this, that the king is and shall be below the law.” Still, the writ proved to be an imperfect check. Even when the importance of the writ was well understood in England, *habeas* relief often was denied by the courts or suspended by Parliament. Denial or suspension occurred in times of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them. A notable example from this period was Darnel’s Case.

After this discussion of the history of the writ of *habeas corpus*, Kennedy proceeds to recount this “notable” case. It serves as illustration of a growing political pressure on the King’s prerogatives, spurring a development that culminated in the Habeas Corpus Act of 1679.

The Act, which later would be described by Blackstone as the “stable bulwark of our liberties,” established procedures for issuing the writ; and it was the model upon which the *habeas* statutes of the 13 American Colonies were based. This history was known to the Framers. It no doubt confirmed their view that pendular swings to and away from individual liberty were endemic to undivided, uncontrolled power. The

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12 Id. at 739–41.
Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty . . . Because the Constitution’s separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles . . . .

In one grand historical arc, the court begins with reference to the “Barons at Runnymede” and passes by the “Framers” of the 1787 U.S. Constitution to finally arrive at the principle of the separation of powers. This principle, in turn, is introduced to argue for the judicial control over executive acts—and thus also for the scrutiny of what has been critically dubbed the “Guantanamo system.” Cover’s connection between the narrative and the norm, between “nomos and narrative,” is actually addressed openly. Justice Kennedy concludes his argument with the following words: “The broad historical narrative of the writ and its function is central to our analysis.”

As a continental lawyer, one might assign this kind of narrative reasoning to Anglo-American legal culture. A common law jurisprudence that reconstructs rules of law on the basis of historical precedents will obviously tend to use a more narrative style when it comes to interpreting the Constitution as lex scripta. Yet, the German Federal Constitutional Court also reasons in the style of legends when it takes recourse to foundational principles of the German Constitution, the “Basic Law.” This can be exemplified by a passage from the court’s Wunsiedel decision from 2009. The background of the case was an annual pilgrimage by neo-Nazi groups to the grave of Hitler’s Deputy Rudolf Heß in the Franconian town of Wunsiedel. The central legal question concerned whether Section 130, paragraph 4 of the Criminal Code could be considered compatible with the right to the freedom of expression. According to Section 130, paragraph 4, “[w]hosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three

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13 Id.


15 Boumediene, 553 U.S. at 746.
Because the right to freedom of expression as guaranteed in Article 5 of the Basic Law is primarily subject only to the provisions of “general” laws, thus banning laws which prohibit the expression of a specific political conviction, the Federal Constitutional Court had to resolve if and why a law directed specifically against Nazi propaganda could be compatible with the Basic Law. Eventually, the court declared the contested provision of Section 130 constitutional. In order to make its position plausible, the court made reference to what might be called the Coverean epic that—arguably—stands behind the Basic Law:

Concerning the requirement of the general nature of laws which impose restrictions on opinions according to Article 5.2 of the Basic Law, an exception is to be recognised for provisions which aim to prevent a propagandistic affirmation of the National Socialist rule of arbitrary force between the years 1933 and 1945. The inhuman regime of this period, which brought immeasurable suffering, death and suppression to Europe and the world, has an antithetical significance characterising the identity of the constitutional system of the Federal Republic of Germany which is unique and cannot be captured solely on the basis of general statutory provisions. The deliberate discarding of the tyrannical regime of National Socialism was historically a central concern of all the powers participating in the establishment and passing of the Basic Law... in particular also of the Parliamentary Council... and forms an internal structure of the order of the Basic Law (see only Article 1, Article 20 and Article 79.3 of the Basic Law). The Basic Law can be largely particularly interpreted as an antithesis to the totalitarianism of the National Socialist regime, and from its structure through to its many details seeks to learn from historical experience and to rule out a repeat of such injustice once and for all... .

Against this background, the propagandistic condonation of the historical National Socialist rule of

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16 STRAFGESETZBUCH [STGB] [PENAL CODE], § 130, para. 4, translation at http://www.gesetze-im-internet.de/englisch_stgb/ [hereinafter German Criminal Code].

17 See GRUNDEGESETZ [GG] [BASIC LAW], art. 5.2, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html.
arbitrary force, with all the terrible factual events for
which it is responsible, exerts an impact far beyond the
general tensions of the debate within public opinion and
cannot be covered solely on the basis of the general
rules regarding the boundaries imposed on freedom of
opinion. In Germany, favouring this rule constitutes an
attack on the internal identity of the community and has
a potential to pose a threat to peace. In this regard, it is
not comparable with other expressions of opinion, and
ultimately it can also trigger profound disquiet abroad.
Doing justice to this historically rooted special situation
by special provisions is not intended to be ruled out by
Article 5.2 of the Basic Law.\textsuperscript{18}

Thus, the Court recounts a story similar to that of the Preamble to the Bavarian Constitution
quoted above: Of dark and inhuman times now overcome—“the National Socialist rule of
arbitrary force between the years 1933 and 1945”—and of a new beginning, the “passing
of the Basic Law.” So radical is the break with the past that the Nazi period implicitly carries
“antithetical significance characterizing the identity of the constitutional system of the
Federal Republic of Germany.” It is interesting to note that the grand narrative in this
instance is not just employed to give meaning to a specific clause of the Basic Law, but
instead to disregard Article 5.2 in favor of an implicit, historically inferred singular exception.

\textbf{III. Hegemony and Difference}

In general, such narratives remain true to the historical facts only to a limited extent, yet
factual accuracy may be the wrong kind of yardstick with which to measure, anyway. As
Herfried Münkler notes, “Political myths do not recount events, but ruptures in time and
punctuations in history.”\textsuperscript{19} When introduced as part of a legal argument, such myths are
invested with the force of law. That these narratives, however, are cloaked as a sequence of
historical events, and not as storytelling, is far from unproblematic, given law’s general claim
to rationality. In this vein, constitutional jurisprudence even has clear examples of

\textsuperscript{18} Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], Nov. 4, 2009, 124 Entscheidungen des
Bundesverfassungsgerichts 300, 42–43, translation at

\textsuperscript{19} Münkler, supra note 9, at 18 (“Politische Mythen berichten . . . nicht von Ereignissen, sondern von Zäsuren der
Zeit und Interpunktionen der Geschichte.”).
“unreliable narration.” Thus the Federal Constitutional Court’s Second Senate narrated a seamless linear history of the incest taboo in its 2008 decision on incest between siblings; thereby, the court inserted the prohibition, as regulated in Section 173, paragraph 2, clause 2 of the German Criminal Code, in a long—a very long—tradition:

The prohibition of incest has its roots in Antiquity. Emanations of that prohibition can be found in the Codex of Hammurabi, in Mosaic and Islamic law, in the laws of Ancient Greece, in Roman, in extended form in Canonic and in Germanic law as well as in the early German penal codes. The incest motif has been taken up by myths and legends, informative of the constitution of early legal cultures; and ever since it has had great importance in literature . . . Model for the provision in Section 173 of the Criminal Code for the German Reich of 1873 was Section 171 of the Criminal Code for the North German Confederation which relied itself on the Prussian Criminal Code of 1851. The reason stated for introducing Section 173 into the Criminal Code of 1873 under the title ‘Blutschande’ (‘disgrace of blood’) were primarily the moral perceptions of the people . . .

The objects of punishment . . . are backed by the legislator’s conviction that a sense of wrong deeply anchored in society should be taken up and further on supported by means of criminal law . . . The disputed provision finds its justification in joining plausible objects of punishment against the background of a societal conviction that incest deserves punishment, a conviction anchored in cultural history and still powerful today, also in international comparison.

Quite in contradiction to this seemingly faultless historical narrative, the juge rapporteur, the Senate’s then-outgoing President Winfried Hassemer, related quite a different version of the story than the one above. Reading his dissenting opinion, it becomes palpable that

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20 For explications of this concept, see Ansgar Nünning, Unreliable, Compared to What? Towards a Cognitive Theory of Unreliable Narration, in GRENZÜBERSCHREITUNGEN 53 (Walter Grünzweig & Andreas Solbach eds., 1999); Vera Nünning, Unreliable Narration and the Historical Variability of Values and Norms, 38 STYLE 236 (2004).

21 Bundesverfassungsgericht [BVERGE] [Federal Constitutional Court], Feb. 26, 2008, 120 ENTSCHEIDUNGEN DES BUNDEVERFASSUNGSGERICHTS 224, 3–4, 50. For the unreliability of the majority’s narratives, see Andreas von Arnauld & Stefan Martini, Unreliable Narration in Law Courts, in UNRELIABLE NARRATION AND TRUSTWORTHINESS 347, 362–65 (Vera Nünning ed., 2015).
“grand narratives” are anything but faithful representations of who we are and what it is that unites us—in other words, what is “deeply anchored in society.” Such narratives represent social constructions. As a discursive practice they are situated in an area of exclusionary tension between hegemony and difference, between those who define the rules of the legal language game and those who do not.\(^{22}\) The degree to which such narratives prove to be products of their time and the results of dominant viewpoints becomes clear when one compares the statements that were made by the Federal Constitutional Court about male homosexuality in the notorious 1957 judgment of Section 175 of the Criminal Code,\(^{23}\) to the wording of the decision that was made on February 19, 2013 on adoption by homosexual couples.\(^{24}\) In both cases the Court heavily relied on preconceptions about the (ab)normality of homosexual relationships that in both cases served as linchpin of the respective argument. While, in 1957, the court portrayed the male homosexual as driven by an irresistible sexual urge and stressed the danger of seduction of male youth, in 2013, it did not even mention any such danger as a possible reason for treating married couples and same-sex couples differently. But then, as the court recognized earlier in that decision, “it is not only the law in respect of same-sex couples that has changed considerably but also society’s attitude to homosexuality and the life of same-sex couples.”\(^{25}\)

The fascination that the narrative construction of social coherence exerts on legal academics bored by quotidian bread-and-butter pragmatism must not divert attention from underlying power structures. The three functions of foundational narratives mentioned above—to reduce complexity, to reduce a sense of contingency, and to produce a sense of loyalty—all have an exclusionary component. Foundational narratives function to interpret events and developments teleologically and to render our present realities as part of a self-legitimizing narrative. Whoever remains outside of this narrative can only expect to be made part of the collective memory as “the Other.” As Cover writes, “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.”\(^{26}\) The worldview with which such narratives are imbued needs to be constantly critiqued in order to keep the “world in which we live” receptive to various

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22 See generally Michel Foucault, L’Ordre du Discours (1971); Judith Butler, Gender Trouble (1990).

23 See generally Bundesverfassungsgericht [BVERGE] [Federal Constitutional Court], May 10, 1957, 6 Entscheidungen des Bundesverfassungsgerichts 389.

24 Bundesverfassungsgericht [BVERGE] [Federal Constitutional Court], Feb. 19, 2013, 133 Entscheidungen des Bundesverfassungsgerichts 59, translation at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/02/ls20130219_1bvl000111en.html.

25 Id. at 55.

26 Cover, supra note 7, at 4–5.
forms of difference. Herein lies the pivotal importance of counter-storytelling in constitutional law.

B. Reports from Everyday Life: Implicit Case Stories

I. What the Law Tells Me

And now for something completely different: From the grands récits and the lofty spaces of constitutional law to the down-to-earth sphere of statutory law. If one applies the definition by Martínez and Scheffel cited at the beginning of this Article, narrative structures can also be detected outside of constitutions in certain “complete” legal norms. This, in turn, justifies the reconstruction of the process of norm application through narratological means. This argument can be made vividly clear by evaluating a penal provision—Section 221, paragraph 1 of the German Criminal Code—concerning the crime of abandonment:

Whosoever
1. places a person in a helpless situation; or
2. abandons a person in a helpless situation although he gives him shelter or is otherwise obliged to care for him, and thereby exposes him to a danger of death or serious injury shall be liable to imprisonment from three months to five years.

If one engages for a moment in the experiment of reading this provision as a narrative, the perpetrator—the person who abandons someone else—and the victim—the person who is abandoned—lend themselves as characters. In the second alternative for which the law provides, both are connected by a special relationship—shelter or some other obligation to care. A potentially tension-fraught constellation begins to become apparent. Two

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28 Statutory provisions are of a different shape and character. According to the classification in German legal doctrine, “complete” legal norms possess an “if-then” structure. The following observations only apply to them. There would be less use for a narratological approach to, e.g., sets of statutory definitions. Moreover, one has to take into account differences in legal cultures: In the German regulatory tradition, the substantive provision (the “command,” so to speak) is usually kept separate from provisions that define its elements. In the Anglo-American tradition, however, both functions—command and definition—are typically blended into one detailed and complex provision. For a skeptical account of the narrative quality of this kind of statutory law, see Monika Fludernik, A Narratology of Law?, 1 Critical Analysis of Law 87, 101–07 (2014).


30 German Criminal Code, supra note 16, at § 221, para. 1.
temporally ordered events— the abandonment and the danger of death or serious injury—are causally connected ("thereby"), which renders the events as a story with a plot in outline. At the moment of the victim’s abandonment—in the narrated moment, that is—the story becomes “enplotted”; it becomes worth telling and legally relevant.

A further story looms on the horizon: Not only are the two events connected in terms of the conditional elements of the offence (Tatbestand in German), but there is also a connection between these elements and their legal consequences (Rechtsfolge). In that it stipulates the consequences of a given offence, the legal provision anticipates the punishment of the perpetrator. In this case, the law’s specific focus on the “ought” rather than the “is” appears to diverge from other types of narratives. The connection between events is different from narrative literature in that it is neither empirical-causal nor numinous-final or “fateful.” Rather, the event of “punishment” is connected in a normative-causal way with the events narrated beforehand. This, however, does not altogether differ from the form of other everyday narratives. For James Boyd White, the point of stories, generally, is to trigger a reaction that seemingly lies outside of the story itself:

The meaning of the story, uncertain as it is, extends into the futures, in the law and elsewhere, for stories about the real world are told as grounds of action. The injury requires revenge; innocent suffering requires compassion; and so on. The idea of Hume and others that domains of fact and value are by definition distinct—“one can’t get an ‘ought’ from an ‘is’”—is certainly not supported by our experience of narrative and moral action. It is from the “is” from the story told a certain way, that we get our most important “oughts”: our sense that a particular story is incomplete without a certain ending, which we can supply.

That the perpetrator “ought” to be punished, that they “shall be liable” as the statute commands, is the very ending “We, the People”—as the democratic sovereign—supply in

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31 See WILLIAM LABOV, The Transformation of Experience in Narrative Syntax, in LANGUAGE IN THE INNER CITY 354, 361 (1972) (“A minimal narrative is defined as containing a single temporal juncture.”).

32 For the structure of “plots,” see JURI LOTMAN, THE STRUCTURE OF THE ARTISTIC TEXT 231–39 (Gail Lenhoff & Ronald Vroon trans., 1977). It defines an event as the “movement of the plot” that “always involves the violation of some prohibition and is always a fact which takes places, though it need not have taken place” i.e. “the shifting of a persona across the borders of a semantic field.” Id. at 233, 236, 238.

33 For these conventional narrative models, see Martínez & Scheffel, supra note 1, at 111–19.

34 BOYD WHITE, HERACLES’ BOW 175 (1985).
the case of our penal provision. Finally, one might add that law, like religion or magic, employs declarative speech-acts that can effect a change in reality. In declaring that the perpetrator shall be punished, law connects its own narratives to acts of transformation. In this manner, law functions reminiscent of what Vladimir Propp describes in his analysis of Russian folktales. In the words of Katharina Sobota, “Like creatures, rights can effectuate, found, constrain, dispense, transfer—they can exist, confound, be extinguished, and resurge again.”

II. Laws as a Reservoir of Case Stories

For some, these speculations about law as a narrative may appear too farfetched. They might seem to be the mental exercises of a legal scholar led astray by fancy. In their functional appearance, modern laws seem miles apart from what we expect to find in a narrative, particularly a good one. The inherent justification of a narratological perspective on legal norms might, however, be made plausible by starting with historical legal texts which are dressed up in a more narrative style than are modern statutes. Thus in Justinian’s Corpus Juris, we find stories from Roman history that are partially mythical and partially real. The customary laws of early thirteenth-century Saxony are repeatedly presented in Eike von Repgow’s Sachsenspiegel in a highly narrative fashion. In fact, the lavish illustrations of legal acts in this manuscript appear to be precursors of modern-day comic strips. Historical legal rules appear to be more colorful than current ones due to their more casuistic nature. These rules do not possess the level of generalized abstraction, characteristic of modern statutes in civil law systems like in Germany. They take their inspiration from concrete events, real or imagined, which are then retold as guidance for


36 This is even more palpable in German, where the law generally states that the perpetrator “is” punished (wird bestraft). See, e.g., German Criminal Code, supra note 16, at § 221, para. 1.

37 For a closer analysis, see Andreas von Arnauld, supra note 21, at 29–31.


40 See generally MARIE-THERES FÖGEN, RÖMISCHE RECHTSGESCHICHTE (2002).

41 See generally HENRIKE MANUWALD, NARRATIVE BILDER IN RECHTSHANDSCHRIFTEN, IN AUSBILDUNG DES RECHTS 168 (Kristin Böse & Susanne Wittekind eds., 2009).

42 See id.
future cases. Yet the structure of describing the normative conditions of the case (protasis) and stating the legal consequences of a given deed or act (apodosis), typical of today's legal norms, is already in place. Thus, we find in Moses 2 (Exodus), 22:5: “If a man do hurt field, or vineyard, and put in his beast to feed in another man’s field, he shall recompense of the best of his own field, and of the best of his own vineyard.”

Much in the same vein, Section 833, clause 1 of the German Civil Code orders that: “If . . . a thing is damaged by an animal, then the person who keeps the animal is liable to compensate the injured person for the damage arising from this.”

Whereas the Old Testament refers to actual events that may have occasioned that rule’s creation, the Civil Code in its abstraction is less vividly colorful. Yet both laws share a common structure. Stories are also enshrined in the modern statute. The normative legal text finds its origin and purpose in an experience processed through narrative means. According to Bernard Jackson, this stylistic alteration in modern law took place due to processes of bureaucratization and specialization. For legislation in civil law systems, one can additionally point to the Enlightenment idea of the generality of the law as well as the notion of a comprehensive legal order that encompasses every conceivable case. If an animal damages the neighbor’s garden, Section 833 Civil Code can be directly applied. On the basis of Moses 2, 22:5 one needs to draw an analogy to fields and the vineyards. Even more than “Continental” law, common law jurisprudence is still based on the kind of

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44 Translation taken from the Geneva Bible of 1599.


46 However, this already occurs with some level of abstraction. James Boyd White finds the cause for such abstractions in the limited capacities of human memory, be it individual or collective: “We normally deal with this problem by making skeletal outlines or formulas, which we can remember and which we use to organize the rest of what has happened and what will happen.” WHITE, supra note 34, at 171.

47 See BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE 97–101 (1988). Jackson refers to a 1985 draft of criminal code in England in which the abstract rules were complemented in an appendix by illustrative examples of the kind: “D, a doctor, finding P trapped and unable to speak after a road accident, injects a pain-killing drug.” Id.

48 See Cover, supra note 7, at 5.

49 See Jackson, supra note 47, at 3, 106.

50 On atypical (“difficult”) cases, see id. at 106–10 (“These are characterised by their significant deviation from the story that stands behind the norm. While a casuistic system can more easily accommodate such cases, in dealing with statutory law it can become necessary to avoid untenable results of generalisation by extending or reducing the ambit of the norm.”). For the limits of legal hermeneutics in unusual cases in which our everyday language fails, see Gerhard Struck, Die Menschenwürde gilt als unantastbar: Zur Rhetorik der juristischen Fiktion, 12 ZEITSCHRIFT FÜR SEMIOTIK 179, 185 (1990).
reasoning typical of ancient, especially praetorian law. Here, specific cases serve as reference for an “application” of the law drawing on analogies between the precedent and the cases at hand. Unsurprisingly, there used to be a close connection between law and historical narratives in England. The most distinguished legal scholars were legal historians in quite a specific sense; they were initiates of a common “law of the land,” embedded in historical tradition and the retelling of the causes célèbres.

III. Narrative Patterns: Mediating Between Text and Practice?

The comparison between the German civil code and Moses 2 shows that modern statutory law no longer records case stories with the same vividness and directness as in ancient times. Through its generalization, the law brought various possible constellations of cases together. To achieve this, the legislator takes recourse to an iterative model that is the abstraction of real incidents from the past, which at the same time may serve as blueprint for adjudicating future events. Rather than being narratives in the strict, narrow sense, statutory norms like Section 833 of the Civil Code or Section 221 of the Criminal Code record narrative patterns.

What do these insights entail for the narratological reconstruction of norm application? Traditional continental legal methodology is still based on a syllogism according to which the facts of a case taken from real life are to be subsumed under a textually-constituted legal norm. First, the conditional elements of a statutory provision are interpreted. This stage of adjudication is governed by hermeneutics. Then follows the subsumption stage, the assignment of the facts of the case to the stipulations of the legal provision, a step generally presented as a logical process. Though this model has been frequently criticized and modified, the prevailing view still clings to the idea that there is a certain point of transition between the text, or the law, and the practice, or the facts, while still abiding by the classic dichotomy between “is” and “ought.” Karl Engisch attempted to blur the lines between the norm and the facts with his famous metaphor of “glancing back and forth” (Hin- und

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54 Christoph Engel, Herrschaftsausübung bei offener Wirklichkeitsdefinition: Das Proprium des Rechts aus der Perspektive des öffentlichen Rechts, in Das Proprium der Rechtswissenschaft 205, 232–33 (Christoph Engel & Wolfgang Schön eds., 2007). See also Gaakeer chapter in this volume (discussing the hermeneutics of the adjudicative process in this issue.).
55 See generally Bernhard Schink, Bemerkungen zum Stand der Methodendiskussion in der Verfassungsrechtswissenschaft, 19 Staat 73 (1980); Robert Alexy, Theorie der juristischen Argumentation 17 (1987).
While the norm is interpreted with a particular case in mind, the legal norm and the facts are synchronized in a step-by-step process. Still, according to traditional legal methodology, the transition between the text and practice remains a categorical one. Herein lies the lawyer’s alchemical art.

If one accepts, however, that legal norms record narrative patterns, the operation of moving from norm to fact appears far less mysterious. Let us assume, for example, that a judge must assess whether, per Section 221, paragraph 1 of the Criminal Code, a train conductor has committed “abandonment” by forcing an un-ticketed minor to get off a train. To interpret the term “helpless situation,” the judge will determine whether being under age can be considered the cause of helplessness. Other possible causes of helplessness, such as fainting or the influence of drugs, will be considered irrelevant to the judge’s task. Statutory construction with a specific case in mind thus reflects a process of selection. From all the potential case stories inscribed in the norm, one will be culled, step by step. At the same time, the outline of a concrete narrative emerges: The story of the abandoned child. One may describe this case-oriented concretization of the norm as a process of ‘fading-in’ (to use a cinematographic metaphor). In a reciprocal manner, a wealth of facts is turned into a ‘case’ according to a reverse process of selection. Here, the case is cleared of factual elements without any relevance to the application of the law. These include the child’s shoe size, for instance, which is as irrelevant to our case as is the child’s hair color. Relevant facts, by contrast, include the minor’s exact age, the time at which the event took place, et cetera. During this process, irrelevant facts are “faded out.” In the end, two narratives reduced through a selective process are examined in terms of their congruence. When reconstructed in such a fashion, the subsumptive operation entails a comparative process, matching two narratives according to their similarities. The narrative mediates between text and practice and can thus overcome the—at least superficially existing—categorical difference between the facts and the law. On another level, the act of matching these two narratives can be conceived of as producing yet another meta-narrative. Law and the application of laws are thus always “entangled in stories,” to quote the title of a book by the German philosopher and legal scholar Wilhelm Schapp.

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57 For a similar reconstruction, see Walter Grasnick, In Fallgeschichten verstrickt, ZEITSCHRIFT FÜR RECHTSPHILOSOPHIE 192, 197 (2003).

58 A different solution is proposed by Ino Augsberg. See INO AUGSBERG, DIE LEBENSKRAFT DES RECHTS (2009). Augsberg (following Deleuze’s lead) proposes an isomorphic structure of law and facts in reconstructing both as texts.

59 See WILHELM SCHAPP, IN GESCHICHTEN VERSTRICKT (1953).
C. Grands Récits, Petits Récits

At first glance, the two parts of this Article may appear to be utterly disconnected, apart from the fact that both mention stories and narratives. The discerning reader will note that quite different notions and concepts of narrative were referred to: The first part dealt with grand narratives that conjure up and create a sense of community and connectedness, while at the same time entailing the danger of constructing difference from the norm as deviance.60 Such a ‘culturalist’ notion of narrative relates more to narrative contents or to semantic meaning, including foundational myths, traditions, turning points, and to the summoning power of appeals to the exceptional.

The second part of the essay, by contrast, led the reader into far less lofty everyday legal interpretive practice. The notion of narrative cited here was informed by a structuralist approach based on the definition by Matías Martínez and Michael Scheffel explained as a “sequence of events and actions producing at the level of [literary] action an autonomous structure of meaning.”61 This definition encouraged the search for the hidden narrative structures in statutory law. While norms of constitutional law with their textual openness and their reference to moral aspirations are especially close to the solemn narratives used to construct collective identities, the more earthbound statutory provisions are better suited for illustrating precisely how legally inscribed narrative patterns direct the legal norms. Has this Article presented two isolated reflections after all—a culturalist investigation of constitutional law and a structuralist narratological dissection of statutory law?

At second glance, however, these pursuits are more closely related. First, the grand narratives discussed at the beginning of the article can also be described as “sequences of events and actions” that produce “an autonomous structure of meaning.” This applies to the conceptions of history in the quoted preambles as well as those constitutional narratives that serve to link the norms of constitutional law with historical recollection. Second, both types of narrative possess exclusionary effects. The reduction of complexity and contingency by the grand narratives is the result of a process of selection, and selection processes also figured largely in the second part of this article. The exclusionary drift of legal narratives may have been less apparent in the examples given in the latter part, but it is present nevertheless. This becomes apparent when the judge in our example has to decide if the sex or the skin color of the abandoned child is relevant (or irrelevant) for “making the case.” Every narrative fixes a course of events or the meaning of a law and thus obviates everything that failed to become part of the story. This is why Robert Cover writes about the judges’ task to adjudicate authoritatively: “Judges are people of violence... Because of the

60 For a warning of this danger, see, e.g., Lutz Niethammer, Kollektive Identität (2000); Andreas von Arnauld, Die Wissenschaft vom Öffentlichen Recht nach einer Öffnung für sozialwissenschaftliche Theorie, in Öffentliches Recht und Wissenschaftstheorie 65, 92–93 (Andreas Funke & Jörn Lüdemann eds., 2009).

61 Martínez & Scheffel, supra note 1, at 138.
violence they command, judges characteristically do not create law, but kill it . . . . Theirs is the jurispathic office.”

In this process, the grand narratives of constitutional law also influence the everyday practice of norm application, as constitutional and statutory law are not unrelated. Constitutional law affects statutory law, its interpretation, and its application. Considering once more the example of illegal abandonment, imagine that an individual is taking a train to an academic conference in Germany. Because of a train drivers’ strike, the ride ends suddenly and in an irregular fashion, and all passengers are forced to disembark the train at a station in the middle of nowhere. The conference attendee is unfamiliar with the place and feels somewhat ‘lost in transportation’. Was he abandoned in a situation of helplessness? In a heated discussion, one of the passengers states that the real culprit is the chairman of the train drivers’ union, “that Mr. Weselsky.” He was ultimately responsible for their situation and should be punished accordingly. Imagine further, that a judge would consider in earnest to hold Mr. Weselsky criminally liable. In this case, she could not apply the Criminal Code without recourse to the German constitution. The right to strike is constitutionally guaranteed by Article 9, paragraph 3 of the Basic Law, acknowledging the right “to form associations to safeguard and improve working and economic conditions.”

The right to form associations encompasses the right to actively pursue the aims and purposes of that association and also encompasses the right to strike, which cannot be derived from the wording of Article 9, paragraph 3 of the Basic Law. It is, however, implied, as the Federal Constitutional Court has explained in its judgment on worker participation from March 1, 1979 that:

Basic Law does not belong to the “classic” human rights. The freedom of association was established only under modern industrial working conditions having developed in the course of the 19th century. When interpreting this right, the recourse to a traditionally fixed content is therefore possible only to a limited extent. Indications for specifying the norm can be derived from the historical development which dates back to the almost

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62 Cover, supra note 7, at 53.

63 The paper upon which this essay is based was first presented at a conference that took place during a large-scale strike by the train drivers’ union of Germany GdL (Gewerkschaft der Lokführer). I apologize for the occasional resulting pun.

64 Of course, I am hiding here behind a nameless passenger so as not to arouse the righteous scorn of criminal lawyers by expressing this deviant legal opinion myself.

65 GRUNDEGESETZ [GG] [Basic Law], art. 9, para. 3, translation at http://www.gesetze-im-internet.de/englisch_gg/. It was translated by Christian Tomuschat and David P. Currie, as revised by Christian Tomuschat and Donald P. Kommers in cooperation with the Language Service of the German Bundestag (March 21, 2016).
identical Article 159 of the Weimar Constitution. In this sense, the Federal Constitutional Court ... has always stressed that in determining the scope of this right its historical development has to be taken into account. As the wording of Article 9 para. 3 Basic Law and the historical development show, the freedom of association is primarily a civil liberty ... Elements of the guarantee are the freedom to found and join an association, the freedom to leave and to stay away from it as well as the protection of the association as such and its right to pursue the aims mentioned in Article 9 para. 3 Basic Law by certain specific activities. These encompass the conclusion of collective agreements through which the relevant associations regulate in particular wages and other material working conditions ... in their own responsibility and in general without interference by the State; insofar the freedom of association is serving a reasonable order of working life ... In principle, Article 9 para. 3 Basic Law leaves to the associations the choice of means which they deem suitable to attain their goals.66

Perhaps less “grand” than in the Wunsiedel decision presented earlier in this article, the Federal Constitutional Court once more grounds its legal argument in historical story telling. The judges find the basis for the right to freedom of association in the history of industrialization and thereby connect it to the narrative of the nineteenth century’s ‘Social Question’ and the trade union movement. Based on “the wording of Article 9 para. 3 Basic Law and the historical development,” the right is constructed as a civil liberty directed against interference by the State, leaving “to the associations the choice of means which they deem suitable to attain their goals,” in other words, the right to strike. Now, where does this story lead us? Can we supply that “certain ending”67 to the story which makes it complete? The narrative cited above suggests the following conclusion: the right to strike is constitutionally guaranteed, and it fulfills a reasonable social purpose that has a historical foundation. The State should not interfere with the pay dispute and should also refrain from taking any coercive measures against “that Mr. Weselsky.”

Omitted above is what follows in the Federal Constitutional Court’s judgment. In the ensuing passages, the judges stress the importance of implementing the freedom of association

66 Bundesverfassungsgericht [BVERGE] [Federal Constitutional Court], Mar. 1, 1979, 50 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 290, 366–68.
67 White, supra note 34, at 175.
through legislative means, the necessity to respect the particularities of the respective economic sector, and the necessity of protecting competing legal interests. Thus, another possible narrative may be derived from this judgment. It certainly should not involve prosecuting the union’s chairman, but it could move in the direction of regulating labour conflicts in important areas of infrastructure, like the railroad, by means of legislation. By only quoting portions of the judgment, this narrative conclusion has, however, been purposefully obviated by the present unreliable narrator.
Abstract

Benjamin Cardozo, a great promoter of the concept of the unity of form and content in law and literature, once wrote that “[t]he perplexity of judges becomes the scholar’s opportunity.” Cardozo’s observation prompts my contribution on narratives in the law to this special issue on pluralities in the law because of the interrelation between law in academic theory and law in practice. My experience as a judge and an academic working in both the fields of law and literature, and law and humanities, allows me to provide a unique point of view. This Article argues the following: First, “to narrate is already to explain” as Paul Ricoeur wrote; the way in which the facts of a case are narrated largely determines the outcome of that case, therefore jurists need to develop and cherish narrative knowledge. Second, jurists should be imaginative about both the law and the people whose fates they determine when they use language to translate brute facts into the reality of the legal narrative. Third, this Article investigates and critically responds to literary theorists’ various views on narrative and narratology, explaining which elements can be fruitfully incorporated into a legal narratology. I argue that jurists, while acting as authors and readers of legal narratives, all too often disregard what literary theory and the humanities more generally have to offer to legal practice, which is to highlight points of misunderstanding in our interdisciplinary literary-legal discussions. Here, too, scholarly opportunities remain to be seized for further clarification and theoretical elaboration of the bond of law and narrative.
“The perplexity of judges becomes the scholar’s opportunity.”¹

“Si bene facta notes, consultus, jura sequuntur. Factum praecedens ordine jus sequitur.”²

“But what do you think of supporting a cause which you know to be bad? Sir, you do not know it to be good or bad until the judge determines it.”³

A. The Facts of My Case

Benjamin Cardozo’s succinct reminder—that theory and practice are intertwined in the law—prompts this article. Academic scholars receive opportunities to research new topics when it becomes apparent that judges need guidance in a specific area of law, particularly where judges delve into a myriad of precedent. Viewed differently, given that the process of adjudication itself—at least in civil law jurisdictions—is the most prominent feature of this intertwinement, it is important that legal practitioners provide theorists with topics that may go beyond the traditional focus of academic legal scholarship. Here is an opportunity for interdisciplinary co-operation as one aspect of the pluralities of the law—no doctrinal strings attached. It is one that can illuminate its foundation in the broader cultural framework of which law is only a part.

To continue from my own perspective and to add a caveat, as a judge in a continental European civil law setting, my practical roots are, first, in the idea of the textuality of law; as a consequence, I believe judges as readers and writers do well to be hermeneutically well-informed, with hermeneutics taken to be both an interpretive methodology and a philosophical mode of inquiry into text and human agency. This is the case because judges always try “to figure out” the variety of meanings of the narratives before them and deal with these in terms of their intended consequences.⁴ Second, what judges do finds its foundation in the methodology of the dialectic movement between facts and legal rules and norms, or as the Roman maxim goes, Da mihi facta, dabo tibi ius—meaning “give me the facts and I will give you the law”—and its elaboration Ex facta ius oritur— translating to “the

³ JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON LL.D. 168 (1830) (asking Johnson’s view).
⁴ This is the main topic of Jeanne Gaakeer, Configuring Justice, 9 No FOUNDATIONS 20 (2012).
law arises from the facts." Facts are often mistaken to be objective; however, the facts also need a hermeneut, and not a iudex deductor, who subsumes the facts under the rule as if the meanings of both were given a priori.

Taken together, Cardozo’s observation and my own reflections as a justice in a civil law jurisdiction bring me to the topic of narrative analysis and narratology as methods of gaining cultural access to law. These are methods that literary and legal theory can share in order to possibly be incorporated in a judicial methodology. I must immediately add yet another caveat: I received my first training in literary theory, narratology included, in the late 1970s: Wellek and Warren’s seminal Theory of Literature (1949) was still de rigueur; Todorov built on the Aristotelian definition of a story’s elements as a beginning, middle, and end, and introduced the term “narratology,” and Greimas and Courtès delineated the concept of narrativity as the organizing principle of any discourse; not incidentally, Greimas was one of the first scholars to apply semiotic insights to legal discourse, claiming that law as code is omnipresent. All of these theorists paid homage to Vladimir Propp’s seminal work on the morphology of fairy tales, Morphology of the Tale. It was only when I became a judge that I began to understand much of what had—until then—remained purely theoretical, even in my own research on law and literature. Theory became practice when I had to make sense of, and assess, the narratives of authors and/or characters that stood before me as defendants in actual cases.

5 On the topic of what Karl Larenz, following Karl Engisch, in his Methodenlehre der Rechtswissenschaft called “das Hin-und-Herwandern des Blickes” (the wandering back and forth of the gaze). KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 204 (1991). See also Jeanne Gaakeer, European Law and Literature, in Dialogues on Justice 44, 15 (Helle Porsdam & Thomas Elholm eds., 2012); Jeanne Gaakeer, On the Study Methods of Our Time, in Intersections of Law and Culture 131 (Priska Gisler et al. eds., 2012). The original maxim ex facto ius oritur was coined by the Italian jurists Bartolus and Baldus in the thirteenth century. BARTOLUS DE SAXOFERRATO & BALDUS DE UBALDUS, DIGESTS D.9.2.52.2.

6 The idea of the iudex deductor is closely connected to the positivist separation thesis of fact and norm that is guided by the view that judging is the unmediated application of objectively existing legal norms to the (so-called undisputed) facts.

7 See MIÈKE BAL, NARRATOLOGY 227 (2009) (arguing that “narrative is a cultural attitude, hence, narratology a perspective on culture.”). One of Bal’s theses concerns the use of narratology for cultural analysis; she advocates differentiation with respect to the place of narrative in different fields.

8 ARISTOTLE, POETICS § 1450b (1999) (explaining that an action of event should be whole, for example, “[a] whole is that which has a beginning, middle, and end.”). Narratology is the translation of narratologie, the French term introduced by Tzvetan Todorov. See generally TZVETAN TODOROV, GRAMMAIRE DU DECAMERON (1969).


In what follows, two views from the literary-legal perspective inform my argument. First, the ontological view that, as humans, one of our fundamental characteristics is to tell stories. Second, the epistemological view that humans use narrative to impose structure on human experience. From the perspective of legal theory, I want to emphasize the need for conceptual clarity when it comes to the project of developing a legal narratology, or more modestly perhaps, of developing narratological insights that are geared to application in legal research and legal practice. Legal clarity is essential, given differences between legal systems and the specifics of their procedures, as distinguished according to subfields of criminal law, trade law, or administrative law, for instance.

From the perspective of narratology, too, much can be gained by exemplifying what the term “narrative” means in a specific context. Definitions of “narrative” and “narratology” abound, but when it comes to topics for further investigation, many narratology studies do not include law as a possible field for exploration when dealing with the epistemological view of narrative. To name a few, definitions range from the abstract—as in Jan Christoph Meister’s statement that “narratology is a humanities discipline dedicated to the study of the logic, principles and practices of narrative representation” or the succinct description by Wilhelm Schernus that “narratology is a theory of narrative”—to distinctions applicable to more concrete situations. These distinctions include Christy DeSanctis’s division of three interrelated trends in the field: (1) The “narrative” or “story” (terms used interchangeably by DeSanctis) as defined against hard logic; (2) the actual practice of storytelling as distinguished from narrative theory as the study of the nature and process of storytelling, and; (3) the combination of these two trends, for example, the equation of narrative and storytelling with an emphasis on how narratives are received by the audience (ideally with an empathetic mode).

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11 See James Boyd White, Heracles’ Bow 169 (1985) (One fundamental characteristic of human life is that we all tell stories, all the time, about ourselves and others, both in the law and out of it. The need to tell one’s story so that it will make sense to oneself and others may be in fact the deepest need of that part of our nature that marks us as human beings, as the kind of animal that seeks for meaning.);

Jerome Bruner, The Reality of Fiction, 40 McGill J. Legal Educ. 55, 58 (2005) (“[N]arrative is also our simplest mode of imposing a moral structure on experience” and “a principal function of narrative is to explore alternative versions of the human condition, ‘possible worlds’ as it were.”).

12 See Greta Olson, Futures of Law and Literature, in RECHT UND LITERATUR IM ZWISCHENRAUM/LAW AND LITERATURE IN-BETWEEN 37, 43 (Christian Hiebaum et al. eds., 2015) (“The term ‘narrative’ is often used in an undifferentiated fashion in work on the narrative properties of law to include a number of phenomena.”). See also Wilhelm Schernus, Narratology in the Mirror of Codifying Texts, in CURRENT TRENDS IN NARRATOLOGY 277, 290 (Greta Olson ed., 2011) (“The disciplinary status of narratology appears unclear or at least somewhat uncertain.”).
reaction). Yet, when Stefan Iversen discusses narratives in rhetorical discourse, which is in my view also a profoundly legal subject, he does not mention law as a topic for further investigation even though he poses the epistemological question about the reach of narrative effects within rhetorical discourse. Further, when narratological studies mention the law, it is usually oriented to common law settings; obviously, the narratological findings that are applicable in common law settings cannot immediately be translated to civil law surroundings.

I aim to offer a modest preliminary investigation of narrative from a legal practitioner’s perspective for the purpose of beginning to answer the question posed by Peter Brooks of whether law needs a narratology. This is to ask whether it is important to develop a legal narratology that has a status as a legal methodology rather than making do with specific elements derived from literary narratology per se. Further, I ask what form—if at all—a legal narratology should take. I pose these questions because both the practice of law and of legal theory are—for obvious reasons—very much attached to the concept of the rule of law rather than the rule of men. The very idea of the role of narrative in judging when viewed from a traditional, doctrinal, and legal positivist perspective would seem to open the door to subjective elements that supposedly threaten logocentric reasoning and rationality, and cherished principles of law such as judicial impartiality, objectivity, and equality before the law. This, too, is a specific viewpoint in and of itself as far as the “whatness” of law is concerned. My voice is that of a legal practitioner in the field of criminal law in a civil law jurisdiction who has immediate experience of narrative’s failures and successes at various levels. This praxis-oriented perspective may help to inspire narratologists to turn to law—another aim of this article.

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16 See Peter Brooks, *The Law as Narrative and Rhetoric*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 14, 16 (Peter Brooks & Paul Gewirtz eds., 1996) (warning that “[s]torytelling is a moral chameleon, capable of promoting the worse as well as the better cause every bit as much as legal sophistry.”).
B. Law and Narrative

I. Reading for the Plot

Studying the field of narrative from the perspective of a judge has often made me feel as Monsieur Jourdan did in Molière’s play *Le Bourgeois Gentilhomme*. As a judge, I have been reading for the plot all my judicial life. Yet, I am often perplexed and look for more guidance. At the same time, I suggest that the narrative turn in law needs more congruity and articulation as far as its focus is concerned, even though the pioneering works of the 1970s have now been supplemented by sophisticated views on how legal discourse is narratively organized at different levels. “The glaringly obvious fact,” that legal theory and practice depend on tools of rhetorical and linguistic analysis, has still not yet been fully internalized, not even in the various interdisciplinary subfields of Law and Literature. More importantly, narrative is not the panacea to all our legal woes. As Ruthann Robson and James Elkins have noted, citing narrative can both restrict inquiry as well as open it up, because narratives—similar to legal rules—do not come with built-in explanations: “Instead, [I think] narratives are particularized explorations of particular people (or non-human forms of existence) in particular situations, and at their best they illuminate the ambiguities, the contradictions, and the un-theorizability of life.”

This is an important point given that many intuitive notions of narrative are part of the law due to historical connections between law and narrative. For example, think of the etymological significance of the old terms to denote the function of advocate in Middle English, namely “narrator” and “counter,” derived from the French *conter*—which means to tell a story and plead in a court of law. Because jurists have told stories since time immemorial, one might argue against bothering with the intricacies of narrative. Viewed from a different angle, consider the late Cornelia Vismann’s point about the German judge’s traditional responsibility to convert the disputed *Ding*, that is to say, the disputed matter, into some “thing” that could be spoken about. She claims this development gained momentum with the spread of Roman law in Europe in the twelfth century and the subsequent theoretical development of an emphasis on punishment rather than damages in criminal law. In other words, the matter under dispute evolves into a matter of fact to be adjudicated by means of judicial narration.

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20 Cornelia Vismann, Die unhintergehbare theatrale Dimension des Gerichts, in MEDIEN DER RECHTSPRECHUNG 19, 20 (Vismann ed., 2011) ("Sie konvertieren das strittige Ding in eine aussprechbare Sache."). Compare the Icelandic term *Althing* and the German *Thingstätten* for the place where people gathered to render or receive justice.
This historical fact also provides a good reason to focus on the judicial function as important for research geared to developing a legal narratology. On the view that to judge is to choose (and this includes the selection of what, at the end of the day, are called the facts of the case), the turn to literature, or more specifically, the turn to narrative in the field of Law and Literature has redirected attention within legal discourse to a belief in the strength of the essentially human characteristic of the need to tell stories; it has also epitomized the link between human beings and their products in law and in literature as cultural artifacts. Importantly, this turn to narrative in law or, more broadly, the turn to interpretation in both the social sciences and law, functioned for a long time as an antidote to the one-sided focus on technicalities in legal formalism and positivism: It thus indicates a loss of faith in science. This first revaluation of narrative within jurisprudence did not, however, find its way into the courtroom, remaining entirely academic.

In narratology, one can see a comparable development in the fact that the early narratologists “privileged narrative in general over individual narrative.” Thus, it comes as no surprise that narratologists did not immediately treat legal topics as topics for consideration until recently. Or, as David Herman has put it, “In essence, the narratologists looked to language theory for model-building purposes.” Herman offers a list of topics, derived from Wellek and Warren, that might have already included law as a target field in the 1970s. For example, Wellek and Warren posit that narrative fiction is only one subtype of narratively organized discourse, “narrative’s fusion of sequence and consequence”; from the legal perspective, this insight can immediately be connected to the problem of temporality in evidentiary settings; further, “the notion that the ‘truth’ of narrative fiction arises from the way its components hang together to form a Kosmos sufficient unto itself, whereas the truth of a historical account depends on the extent to which it matches, in some sense, the way the world is,” can be translated into questions of veracity and verisimilitude in legal settings.

Another reason to focus on the work of the judge relates to the topic of temporality mentioned above: The judge was not present when the events, that would later be the facts of the case, took place. Hence, “this world of action,” as Paul Ricoeur calls it, in other words, the actions that occasion the lawsuit, can only be re-enacted before the judge by means of a variety of

21 See Olson, supra note 12 (providing an overview of the “narrative turn”).
22 David Herman, Histories of Narrative Theory (I), in A COMPANION TO NARRATIVE THEORY 19, (James Phelan and Peter J. Rabinowitiz eds., 2005).
23 Id. at 31.
24 Id. at 21.
25 Paul Ricoeur, 1 TIME AND NARRATIVE xi (Kathleen McLaughlin & David Pellauer trans., 1984).
narratives that may differ as far as their story time and their discourse time is concerned. This demands an understanding on the part of the judge of the temporal order of an action that is itself informed by other cultural and professional narratives, including the pre-understanding that we have of the order of an action that is based on “the pre-narrative quality of human experience.” Importantly, this understanding of narrative re-enactment entails a departure from the correspondence theory of language as an objective vehicle for communicating information, including, for law, the mimetic theory—the theory that facts are entities that can be transmitted by means of words as the encoded perceptions of those very same facts. In other words, facts, too, are largely products of our points of view. It is precisely because of this awareness of the influence of our conceptual frameworks on our valuation of the world that work needs to be done on the concept of narrative in legal surroundings.

II. The Narrative Paradigm: Probability and Fidelity

Recently, I suggested that Walter Fisher’s concept of the narrative paradigm, developed in the early 1980s, is undeservedly underrated in contemporary research. It provides a good starting point for interdisciplinary discussions because Fisher’s narrative paradigm can be employed in the interpretation and assessment of a text in which there are claims to knowledge, truth, or reality. This aim is intimately connected to the quest in law and elsewhere to determine “whether or not one should adhere to the stories one is encouraged to endorse or to accept as the basis for decisions and actions.” Fisher’s work ties in with continental European philosophical hermeneutics insofar as it examines what occurs at the very moment

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26 Story-time is defined as the narrated time within the story or “the sequence of events and the length of time that passes in the story,” and discourse-time, as “the length of time that is taken up by the telling (or reading) of the story.” See Anglistik der Universität Freiburg, Time Analysis, http://www2.anglistik.uni-freiburg.de/intranet/englishbasics/Time02.htm (Mar. 26, 2015).


28 Riffaterre’s statement remains poignant that: “The narrative need not be judged true because it corresponds to an external image of the world, but because it is consistent with the linguistic usages current in a given social context, at a given moment in time.” MICHAEL RIFFATERRE, FICTIONAL TRUTH vii–viii (1990).

29 See Jeanne Gaakeer, Futures of Law and Literature: A Jurist’s Perspective, in RECHT UND LITERATUR IM ZWISCHENRAUM/LAW AND LITERATURE IN-BETWEEN 71 (Christian Hiebaum et al. eds., 2015); Walter R. Fisher, Narration as a Human Communication Paradigm, 51 COMM. MONOGRAPHS 1, 2 (1984) (denoting narrative paradigm as “a dialectical synthesis of two traditional strands in the history of rhetoric: the argumentative, persuasive theme, and the literary, aesthetic theme.”). Compare James Boyd White’s emphasis at the start of Law and Literature that jurists should be able to bridge the difference, in themselves and when recognized in others, between the narrative and the analytical, or the literary and the conceptual. White calls this the difference between “the mind that tells a story, and the mind that gives reason,” because “one finds its meaning in representations of events as they occur in time, in imagined experience; the other, in systematic or theoretical explanations, in the exposition of conceptual order or structure.” JAMES BOYD WHITE, THE LEGAL IMAGINATION 859 (1973).

that something is said or written. It thus highlights the question of the relation between human action and communicative experience, the nature of the rationality of this experience, and the contents of its values.\textsuperscript{31}

To Fisher, “people are as much valuing as reasoning animals.”\textsuperscript{32} To demonstrate this, his project draws on Aristotle’s view of metaphor as developed in the Poetics and on the cognitive aspects of rhetoric in relation to reality. The representation of reality in literary works represents “not exactly our own world,”\textsuperscript{33} but nevertheless bears a relationship to it at the very moment that we claim to recognize and understand the literary reality, because in doing so we make use, consciously or unconsciously, of the concept of mimesis as representation. The narrative paradigm aims to achieve a synthesis of argumentative reasoning and its literary-aesthetic counterpart. It does so by contrast with the rational-world paradigm of the natural sciences, in that it thrives on “symbolic actions—words and/or deeds—that have sequence for those who live, create, or interpret them.”\textsuperscript{34} As a paradigmatic mode of human decision-making, it is founded on “good reasons”\textsuperscript{35} that are both medium and context dependent. The paradigm embraces a concept of stories as the symbolic interpretations of aspects of the world shaped by history, culture, and character in the sense of personal qualities.

So narrative “rationality is determined by the nature of persons as narrative beings—their inherent awareness of \textit{narrative probability}, what constitutes a coherent story, and their constant habit of testing \textit{narrative fidelity}, whether the stories they experience ring true with the stories they know to be true in their lives (narrative probability and narrative fidelity, it will be noted, are analogous to the concepts of dramatic probability and verisimilitude).”\textsuperscript{36} To Fisher, “Narrative probability refers to formal features of a story conceived as a discrete sequence of thought and/or action in life or literature (any recorded form of discourse); for example, it concerns the question of whether or not a story coheres or “hangs together,” whether or not the story is free of contradictions” and “[n]arrative fidelity concerns the ‘truth qualities’ of a story, the degree to which it accords with the logic of good reasons: The

\textsuperscript{31} Id. at 355 (expressing his indebtedness to Ricoeur, whose “recent writings inform and reinforce the narrative paradigm.”).


\textsuperscript{33} Id. at 347.

\textsuperscript{34} Fisher, \textit{supra} note 29, at 2.

\textsuperscript{35} Fisher, \textit{supra} note 29, at 7.

\textsuperscript{36} Fisher, \textit{supra} note 29, at 8.
soundness of its reasoning and the value of its values.”

His philosophical argument is an epistemological one, as can be seen from the phrase “they know in their lives.” Furthermore, narrative rationality, so conceived, posits the concept of narrative as an independent meta-or master discourse that can be put to use outside its original rhetorical surroundings.

The point about narrative rationality as “an account, an understanding, of any instance of human choice and action” alerts us to the question of mimetic re-presentation of human actions. The importance of the topic of mimesis in its connection to the nature of fiction in the sense of referentiality in and outside literature cannot be emphasized enough for law. The following example represents this significance of mimesis here.

Foreigners seeking British citizenship must take a test involving a variety of questions, including the question “Where does Santa Claus live?” Obviously, only one answer is possible to the positivistically inclined, namely that Santa does not exist. For others, however, the question alerts us to the problem that the value of literature for law is often quite diminished on the basis of literature’s lack of a referential character. That is to say that, while the comparison of literature to fiction may not be a revolutionary notion in the humanities, in the legal community and it law itself, its wisdom has not yet been received. What the question British citizenship question also shows is that “[h]uman beings do not go to work on a raw, inert environment but on one always already ‘textualized’, traced over with meaning.” Or rather, we understand the fictional aspect of Santa Claus (as much as that of unicorns, mermaids or artificial legal persons such as corporations, for that matter) but nevertheless accept the truth-value of Santa Claus as a fact within the context of the narrative.

Something that has already been richly documented in narratological research with respect to the reader generally, for example, as the person who takes decisions a judge of a literary narrative, is that her own background is in need of critical attention in itself. This insight should be applied to the judge or justice. It is the judge who, after the act of reading and attaching meaning to what she reads, subsequently constitutes a new state of affairs as “reality” with at least a minimal presumption of the re-presentation of wie es eigentlich

37 See Fisher, supra note 30, at 349. See James Phelan & Peter J. Rabinowitz, Introduction to NARRATIVE THEORY 3, 7 (David Herman et al. eds., 2012) (“Audiences develop interests and responses of three broad kinds, each related to a particular component of the narrative: mimetic, thematic, and synthetic.”). This is to say that as far as the mimetic is concerned, the questions are, Is this world possible? Are these people possible, either hypothetically and conceptually?

38 See Werner Wolf, Narratology and Mediality, in CURRENT TRENDS IN NARRATOLOGY 145, 156 (Greta Olson ed., 2011).


41 Id. at 171.
gewesen ist—of how it really was, at the moment that the judge writes her decision.\textsuperscript{42} As Fisher notes, we thus require both knowledge of agents in order to find which is reliable or trustworthy, and knowledge of objects in order to discover what has the quality of veracity.\textsuperscript{43} This observation can be seamlessly transposed to the study of narrative in and for law.

\section*{C. Dichtung oder Wahrheit? Fiction or Verisimilitude?}

\subsection*{I. Phronèsis and Good Judgment}

We need to determine precisely how the narrative paradigm may be employed in texts with truth claims, the texts of law in court surroundings being prominent amongst them. Before I address this question from the perspective of criminal law in practice, I want to highlight some examples of hermeneutical and narratological scholarship that help guide the envisaged project of creating a narratology of European civil law.

Fisher’s thesis about the determination, by means of the narrative paradigm, of whether or not to adhere to the stories one is encouraged to accept as the basis for decision making and action, combined with a foundation in good reason, is rooted in the Aristotelian tradition of emphasizing the quality of \emph{phronèsis} or practical reason as one that is indispensable to good judgment.\textsuperscript{44} The \emph{phronimos}, or prudent man, is “able to deliberate well about what is good and advantageous . . . as a means to the good life in general.”\textsuperscript{45} \emph{Phronèsis} is not only the virtue of knowing the ends of human life; it also encompasses knowledge of how to secure them.\textsuperscript{46} It therefore includes the application of good judgment to human conduct and, as such, constitutes a form of “knowing how”—a \emph{praxis} tied to the realm of what we would now call professional practice. Unlike \emph{épistêmê} or theoretical knowledge, which is conceptual and propositional in nature and aimed at “knowing that,” \emph{phronèsis} pertains to the probable in the sense of provisional truths. Here, we find the connection to Fisher’s narrative probability and fidelity.

\begin{itemize}
\item \textsuperscript{42} See Richard J. Gerrig, \textit{Conscious and Unconscious Processes in Readers’ Narrative Experiences}, in \textit{Current Trends in Narratology} 37, 39 (Greta Olson ed., 2011) (“Readers’ general knowledge is critical to narrative processing.”).
\item \textsuperscript{43} Fisher, \textit{supra} note 29, at 18.
\item \textsuperscript{44} Fisher, \textit{supra} note 30, at 354 (noting that narrative rationality resembles, “Aristotle’s view of phronesis, which recognizes a contingent world, the particularities of practical existence and the possibility of wisdom—a virtue that involves an interest in matters that transcend immediate circumstances.”). See Gaakeer, \textit{supra} note 4, at 24–27, for an extensive discussion of \emph{phronèsis}.
\item \textsuperscript{45} \textsc{Aristotle, The Nicomachean Ethics}, V.v.1, 1140a24–29 (2003).
\item \textsuperscript{46} \textit{Id.} at VI.v.3-4, 1140a32–1140b7.
\end{itemize}
Perceptual and dispositional in nature, *phronēsis* is the capacity to see and act upon what the situation demands. If we connect this to narratives as “the product of agency” in the sense that “they are the means by which someone communicates a story to someone else,” then the argument follows that narratives can best be tested by exercising one’s phronetic ability where the goal is to ascertain the degree of narrative rationality, not least of all because *phronēsis* has a “truth-attaining rational quality” as its basis. The latter quality is connected to the cognitive-epistemological aspect of narrative—that is, as a form of knowledge, which is albeit different from the logos favored by the natural sciences.

**II. Paul Ricoeur: The Connections Between Phronēsis and Narrative**

To justify this argument, I find inspiration and justification in Paul Ricoeur’s views on narrative. In a nutshell, his views on narrative are the following. To Ricoeur, the first connection between *phronēsis* and narrative can be found in the ability to understand and appreciate metaphor, which is defined as the ability to appreciate resemblances; the ability to effectively use metaphors constitutes the good *phronimos*. A contemplation of similarities ideally leads to insight into what is deemed a likeness, and into for what reasons this likeness is perceived. It requires imagination as “the ability to produce new kinds by assimilation and to produce them not above the differences . . . but in spite of and through the differences.” Ricoeur states that metaphor “implies an intuitive perception of the similarity in dissimilars.” Obviously, such imaginative perception requires testing. Yet, to my view, the very concept of this quality of perception is linked to the imagination as it is conceived in the continental European hermeneutic tradition, in the sense attributed to it by Immanuel Kant in his *Critique of Judgment* (1790), for example, as *Einbildungskraft*

47 *Id.* at VI.viii.9, 1152a26–28.

48 GREGORY CURRIE, NARRATIVES AND NARRATORS 1 (2010).

49 ARISTOTLE, supra note 45 at VI.v.3-4, 1140a32–1140b7.


52 *Id.* at 148.

53 RICOEUR, supra note 50.
imaginatio. And why is this the case? Because Kantian imagination is linked with the idea of metaphor as the connection or linchpin between two fields of meaning.\textsuperscript{54} Through the individual’s imagination, the texts she reads are recognized in their similarities, and these similarities are subsequently translated into specific images, mental pictures, and, finally, into a reflective judgment.

As transported to a legal context, the metaphoric contemplation of (dis)similarities adds something new to the reservoir of accepted meanings and can help provide insight into the jurisprudential development of law as well as the rule of law in both common law and civil law jurisdictions. I maintain this because Ricoeur suggests that “to understand a story is to understand both the language of ‘doing something’ and the cultural tradition from which proceeds the typology of plots.”\textsuperscript{55} To me, this idea of the cultural tradition suggests that if we translate Ricoeur’s work into a legal typology and setting, the concept of understanding the story would include its procedural aspects as well as the evidentiary settings in specific jurisdictions.

1. Metaphor in Action

Understanding the way in which legal categories and concepts are coined and developed by means of such comparisons is but one example of where a perceptive attitude is crucial. Given the reciprocal relation between theory and practice in law, I believe that it is justified to suggest that insight into the ways in which metaphor works is important to the formation of legal concepts, the development of legal doctrine, and for success in legal practice. Thus, we should carefully consider the way in which the rule of metaphor works by means of analogical reasoning,\textsuperscript{56} because the introduction of a new metaphor in a specific field, for example, when “the ship of state” is introduced in public law, entails the generation of new meanings; as a side effect, the original meaning may be suppressed if only for a time, given that meaning in law is dynamic, never static.

Allow me to provide just one example from Dutch criminal law on the development of the concept of theft. Article 310 of the Dutch Penal Code reads,

> A person who removes any property belonging in whole or in part to another, with the object of unlawfully

\textsuperscript{54} Compare Kantian *imaginatio* as the faculty to bring about a synthesis between intellectual attitude, intuition, and deliberation, and thus, a link between the essential requirements for lawyers, for example, sympathetic understanding and necessary detachment, as set forth in Anthony Kronman, *Practical Wisdom and Professional Character*, 4 SOCIAL PHILO. & POL’Y 203 (1986).

\textsuperscript{55} RICOEUR, supra note 25, at 157.

appropriating it, is guilty of theft and liable to a term of imprisonment of not more than four years or a fine of the fourth category.57

Originally, the concept of property was understood to refer only to tangible objects. But in 1921, the Dutch Supreme Court ruled that electricity, intangible as it is, could also be viewed as property because it has an economic value. In 2012, the Dutch Supreme Court then faced the question of whether a digital amulet and a mask in the online computer game Runescape were also objects that could be unlawfully appropriated under the provision of Article 310.58 The facts of the case were simple: A boy who was very wealthy in terms of Runescape paraphernalia was threatened by another boy into giving him the data from his Runescape account, allowing the coercive boy to transfer the digital amulet and mask to his own account. The Supreme Court ruled that the virtual character of the objects under consideration had real value for game players and that these objects were the fruits of a prolonged time investment in the game. Thus, digital objects were included in the concept of property. In view of these metaphorically-based mini-narratives concerning the status of digital objects, it becomes obvious that judges must have a pre-understanding of the order in which an action takes place, one that is based on “the pre-narrative quality of human experience” described above. This judicial pre-understanding is itself informed by other cultural as well as professional narratives on what may be good reasons for specific decisions.

2. Mimesis

To understand the temporal order of human action, Ricoeur offers a threefold model of mimesis. This Article, however, only summarizes its main elements. What matters to me here is to show that both law and narratology could greatly benefit from an enlarged appreciation of the iconic moment that philosophical hermeneutics provides when it illuminates similarities in both fields.59 Ricoeur first distinguishes the stage of prefiguration that he calls mimēsis 1. This denotes the temporality of the world of action, or as jurists would call it, the brute facts that need to be named, understood, and weighed based on pre-understandings of the narratives of human actions. This hermeneutic trajectory represents a vicious circle, as Ricoeur admits, because if and when human life and action are thought of in terms of stories,


58 Hoge Raad (Dutch Supreme Court), 31 January 2012, ECLI:NL: HR:2012: BQ9251. See DeSanctis, supra note 13, at 161 (providing an example of a “story of the evolution of the law,” the case of United States v. Martinez-Jimenez, 864 F.2d 664 (9th Cir. 1989), which considered whether a toy gun counts under the relevant statute, for example, in the doctrinal development of the federal armed-bank-robbery statute on the use of “a dangerous weapon or device,” because this counts as an aggravating circumstance leading to an increase of penalty. Another field where metaphorical insight is of great importance is in questions of intellectual property rights).

59 See Gaakeer, supra notes 4 and 29, for an elaboration of this argument. For a general introduction to Ricoeur’s views on narrative, see WILLIAM C. DOWLING, RICOEUR ON TIME AND NARRATIVE (2011).
as “an activity and a desire in search of a narrative,” then human experience is inescapably always “already mediated by all kinds of stories we have heard.” The circularity involved here should alert us to the task of acknowledging the human proclivity to stick to a story once it has been satisfactorily situated or when it has been told by ourselves in law and elsewhere; accordingly, for professionals in particular, there is a risk of maintaining bias.

The next stage is mimēsis, or configuration as the narrative emplotment of events. As a form of composition, or poiēsis, it is connected to phronēsis: Because the activity of jurists is poiēsis, they should cherish the imaginative challenge that unfolds in emplotment and ask what they themselves as professionals bring to it. Emplotment is grounded in mimēsis, and demands knowledge of the “meaningful structures, symbolic resources, and temporal character, of this world of action.” In short, emplotment is the operation that draws a configuration out of a simple succession and creates a story out of a number of events. In law, the idea of pre-understanding is constituted equally by both law’s institutional characteristics and the general foundational principles influenced by the cultural aspect of, what James Boyd White called, the invisible discourse of law. Thus, we need to force ourselves to remain critical when considering the possible effects of this discourse on our view on, for example, narrative probability, in case we accept the basis of pre-understanding unconditionally.

Refiguration, or mimēsis, refers to the moment when the reader appropriates the text for her or his own world. Translated into law, the sole aim of emplotting in judicial praxis is to arrive at a decision. The judicial configurational act constitutes the (re)structuring of reality by means of a decision which is then followed up by a written judgment; after the

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60 Ricoeur, supra note 27, at 129.
61 RICOEUR, supra note 25, at xi.
62 Id. at 54.
63 Id. at 54, 65.
64 In Heracles’ Bow, White distinguishes between legal vocabulary and law’s “cultural syntax” or “invisible discourse”: “Behind the words, that is, are expectations about the ways in which they will be used, expectations that do not find explicit expression anywhere, but are part of the legal culture that the surface language simply assumes.” JAMES BOYD WHITE, THE INVISIBLE DISCOURSE OF LAW, IN HERACLES’ BOW 169 (1985).
ruling has been written, the world of the parties involved changes, as does the world of law in terms of what the decision adds to doctrine, if only to confirm it. In difficult cases, this re-structuring of reality may take the form of an unexpected jurisprudential paradigm shift. Thus when \textit{mimēsis}_1 and \textit{mimēsis}_2 interact, the stage of application has been reached; as a result, our earlier pre-understanding has also been changed by the act of configuration. This is why Ricoeur claims that “to tell and to follow a story is already to reflect upon events in order to encompass them in successive wholes,” and “to narrate is already to explain.” In bringing together heterogeneous facts and circumstances that are woven into competing narratives of opposing parties, the judge draws on the written and unwritten sources of law that are themselves part of the stage of \textit{mimēsis}; as much as they are the result of an earlier application, \textit{mimesis}_3, if viewed as part of the dynamic process of law’s development. The connection between narrating well and \textit{phronēsis} as good judgment is imperative for the conclusion of the judge’s narrative in the form of the decision to be deemed acceptable.

In literary theory, Ansgar Nünning and Michael Basseler take up the challenge provided by Ricoeur’s model of mimesis, and they have looked for the ways literary works draw on pre-figured knowledge of the textual repertoire—for example, the stage of \textit{mimēsis};—with the view that there is a reciprocal relationship between \textit{mimēsis}; and \textit{mimesis}_3, because “on the one hand, literary life knowledge is directly linked to and shaped by extra-literary forms of life and ways of living,” while “on the other hand, life itself is shaped by literary representations.” This is an argument on the plane of narrative knowledge with which I wholeheartedly agree. Simultaneously, I maintain that broadening the scope of the application of Ricoeur’s model is necessary if we are to take up the interdisciplinary task of thinking through the implications of developing a legal narratology. In law as much as in literature, the construction of narratives is based on the idea that there are acceptable, or at least feasible, renditions of what happened, if only at the moment in which they are transmitted in court and elsewhere. Therefore, the

\begin{quote}
the recipient’s activation of the narrated actions and his or her realization of the ‘synthesis of the heterogeneous’ manifested in \textit{mimēsis}. Subsequently, this activation may influence and change the reader’s actions, including the models that determine his image of himself and of the world in which people act, and may become the subject of another narration, another ‘synthesis of the heterogeneous.’.
\end{quote}

See also Michael Scheffel, \textit{Narrative Constitution}, in \textit{The Living Handbook of Narratology} (May 16, 2010) http://www.lhn.uni-hamburg.de/article/narrative-constitution [explaining that “\textit{mimēsis} (refiguration) concerns the recipient’s realization of the \textit{mise en intrigue} manifested in \textit{mimēsis}.” This realization influences “his image of himself and of the world in which people act.”].

\begin{footnote}
\textsuperscript{67} Paul Ricoeur, \textit{Narrative Time}, 7 \textit{CRITICAL INQUIRY} 169, 178 (1980); Paul Ricoeur, \textit{The Human Experience of Time and Narrative}, 9 \textit{RES. IN PHENOMENOLOGY} 17, 24 (1979). See also Eagleton, supra note 40, [suggesting that this is done in “an always-already ‘textualised’ environment.”].
\end{footnote}

\begin{footnote}
\textsuperscript{68} Ansgar Nünning & Michael Basseler, \textit{Literary Studies as a Form of “Life Science.” \textit{NEW THEORIES, MODELS AND METHODS IN LITERARY AND CULTURAL STUDIES} 189, 197 (Greta Olson & Ansgar Nünning eds., 2013).}
\end{footnote}
phase of configuration of mimēsis that Nünning and Basseler conceive of as the presentation of alternative forms of knowledge and life in the literary work, and as a test case in the form of an alternative fictional world that reflects as much as challenges the actual world, now finds its legal counterpart. Refiguration or mimēsis opens up new horizons of expectancy in law as to what will, to return to my example above, be categorized under the concept of theft. Refiguration changes the interpretation of a chain of precedents when arguments rejected earlier are suddenly deemed feasible. In common law and civil law alike, a phase of determinative judgment follows the reflective effort to seek the relevant legal norm to apply to precisely the case at hand. This phase of judgment ends the process of the parties’ dialectical argument. Reflective judgment as such is, moreover, not limited to the end of a trial. In the sense that a decision becomes an authoritative precedent, the act of judging in a specific case does not exhaust the meaning of the act itself. In short, any text of law can potentially be de-contextualized and re-contextualized. This process then requires attention to what the circumstances demand, and for this act to be satisfactorily executed, imagination and phronēsis are both required.

3. Consequences for Law and the Humanities: Two Examples

3.1 Peter Brooks

Law and Humanities studies have made a significant point: Jurists should be imaginative about both the law and the people whose fates they determine when they use language to translate brute facts into the reality of a legal narrative. If the way jurists narrate the facts of a case, and more specifically, the order in which the jurists narrate, determines the outcome of a case to a large extent, then jurists need to develop and to value narrative knowledge, for no small reason because the events that did not become “the facts” may be of equal importance.70 This has also been Peter Brooks’ consistent argument. He defends the epistemological view on narrative when he claims that “narrative appears to be one of our large, all-pervasive ways of organizing and speaking the world—the way we make sense of meanings that unfold in and through time.”71 He is, however, also critical of this process as it


70 The Honorable Justice I.D.F. Callinan, AC, Symposium: The Power of Stories: Intersections of Law, Literature, and Culture: Stories in Advocacy and in Decisions: The Narrative Compels the Result, 12 TEX. WESLEYAN L. REV. 319, 323 (2005) (“It is . . . not only the way the actual facts are narrated that determines the case, but also the order in which they are narrated and the facts that are omitted.”).

71 Brooks, supra note 15, at 14. See ANTHONY G. AMSTERDAM & JEROME S. BRUNER, MINDING THE LAW, 110, 115, 117 (2000) (differentiating between “endogenous theories of narrative” [the central claim of which “is that narrative is inherent either in the nature of the human mind, in the nature of language, or in those supposed programs alleged to run our nervous systems”] and “a second sort of theory” that argues “that narratives and genres of narratives serve to model characteristic plights of culture-sharing human groups,” the latter being the form to which legal narrative tends to conform).
unfolds in legal practice because—while law always concerns competing stories—competing stories may deliberately mislead. Further, Brooks warns us not to forget that law “is a social practice which adjudicates narratives of reality, and sends people to prison, even to execution, because of the well-formedness and force of the winning story.” His lament is that, “if the ways stories are told, and are judged to be told, makes a difference in the law, why doesn’t the law pay more attention to narratives, to narrative analysis and even narrative theory?” These considerations lead to a quest guided by the question, “Could one say that law needs a narratology? What would be its elements?”

Brooks’s methodological emphasis resembles that of Ricoeur. This can be seen in Brooks’s remark that: “Narrative plots appear to be a certain formal organization of temporality, and need to be seen in their structuring cognitive role: a way of making sense of time-bound experience.” His definition of “narrative glue” as “the way incidents and events are made to combine in a meaningful story,” as well as in his argument that “[t]he substance of this narrative glue depends in large part on the judges’ view of standard human behavior, on what words and gestures are to provoke fear, for instance,” ties in with what Ricoeur claims about the mediation of human experience through prior narratives. On this view, the doxa, i.e. that which is commonly believed, that Brooks finds in Roland Barthes’s definition—arguably, however, Aristotle discovered this long before him—as “that set of unexamined cultural beliefs that structure our understanding of everyday happenings” has to be incorporated in this “narrative glue.” In other words, “[t]he 'facts' take on their meaning only within and by way of a thoroughly perspectival narrative.” Such perspectival narrative should depend on its specific procedural surroundings—for example, within an adversarial or inquisitorial setting as well as on the basis of a set of expectations constituted by a judge’s professional culture.

72 Brooks, supra note 15, at 3–4 (discussing Robert Burns’s view that “the bedrock of human events is not a mere sequence upon which narrative is imposed but a configured sequence that has a narrative character all the way down.” (citing ROBERT BURNS, A THEORY OF THE TRIAL 222 (1999))).

73 Peter Brooks, Narrative in and of the Law, in A COMPANION TO NARRATIVE THEORY 415 (James Phelan and Peter J. Rabinowitiz eds., 2007).

74 Brooks, supra note 15, at 3.

75 Id. at 24.

76 Id. at 24.

77 Brooks, supra note 73, at 417.

78 Id. at 418.

79 Brooks, supra note 15, at 10. See AMSTERDAM AND BRUNER, supra note 71, at 110–11, for the comparable view that law lives on narrative so that “the administration of the law and even much of its conceptualization rest upon ‘getting the facts.’”
On the basis of these theoretical considerations, Brooks analyzes Justice Benjamin Cardozo’s opinion in *Palsgraf v. Long Island Railroad Company*, and he criticizes Cardozo’s statement of facts with respect to Helen Palsgraf’s injuries: “Cardozo, like many judges, only appears to tell the story of the event under adjudication. He recasts the story events so that they make a legal point, rendering it a narrative recognizable in terms of legal principle.” In other words, Brooks blames Cardozo for stacking the deck by beginning the opinion with the doctrine of foreseeable harm and then, in a Procrustean exercise, telling the story to fit the doctrine, thus introducing narrative coherence *ex post facto*. The point made here about the construction of a story is a salient one when it comes to developing a general theory of legal and/or judicial narratology. Yet, Ayelet Ben-Yishai quite rightly suggests that:

What Brooks finds problematic—“only appears to tell the story”—I regard as instructive. Narrative analysis is indeed as important an analytical tool for legal studies as Brooks claims it is. However, I argue that its importance lies not in revealing how legal stories *should* be written, but rather in revealing the judicial, historical, political and social stakes in their having [been] written the way they were.  

This important observation pertains to the direction interdisciplinary narratological research should take. More specifically, this suggests that a diachronic analysis of law’s story within specific national jurisdictions needs to be developed and then used for comparative purposes. To my knowledge, this research has not yet been taken up.

### 3.2 Monika Fludernik

Brooks’s suggestions have, however, already been taken up in narratological studies in a different way. Monika Fludernik points out that the effect of the narrative turn in literary theory, since Roland Barthes, has been that “narrative theory needs to come to terms with the

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80 Brooks, *supra* note 73, at 419; Brooks, *supra* note 15, at 14. I would also like to point to Justice Rehnquist’s opinion in DeShaney v. Winnebago County Department of Social Services [DSS], 489 U.S. 189 (1989), on the question of whether the DSS, who knew that four-year-old Joshua DeShaney was repeatedly beaten by his father, was responsible for his ultimate brain damage since they failed to intervene: “The facts of this case are undeniably tragic,” an opening statement followed by a cold enumeration of reasons why DSS was not responsible, one that Justice Brennan in his dissent refers to as “the Court purport[ing] to be the dispassionate oracle of the law, unmoved by ‘natural sympathy.’ . . . But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts,” as, for example, Rehnquist’s narrative is driven by doctrine.

deployment of its concepts in nonnarratological contexts.”

One such contemporary extension of the term “narrative” has been in legal studies that “narratology is now held responsible for explaining narrative in general—and this includes . . . narrative representations in . . . legal contexts . . . .”

Fludernik engages with Brooks’s analysis of *Palsgraf* in terms similar to Ben-Yishai. Along with her observation that “Brooks highlights the problems with narrative reasoning. Narrative presumes a logic of events that may not happen in real life. [W]e . . . may base our judgments on fictions that have no purchase on what really was the case[.]”

Fludernik’s analysis underlines a salient point for the development of a legal narratology: Namely, cultural acculturation may render jurists oblivious to their choices with respect to the facts; however, it also alerts us to another problem, namely what indeed is meant by “real life” or “what really was the case?” Not only may views of the facts and the case differ depending on one’s disciplinary background, but differences in substantive and procedural law as well as accompanying theories of evidence are also constitutive.

Fludernik’s discussion of law as code renders this point poignantly clear. As she rightly claims, code is “a much more difficult area of the law, where narrativity has traditionally been regarded as non-existent.” In her analysis of the New York Penal Law Section 10—which defines offenses, violations, felonies, and crimes—for example, she writes: “Note that the definition of the transgression is related not to a particular act but to the punishment imposed.” To a jurist this is not at all notable, because the addressee of a statutory provision in a criminal code is not the individual citizen but the judge, at least in civil law jurisdictions. Yet, this is likely not different in common law jurisdictions in which sentencing is the judge’s prerogative after the jury’s decision on whether or not a defendant is guilty. Fludernik concludes that: “[In other words,] transgression of the law is not defined as an issue of morality but as an issue of bureaucracy and of the imposition of rules that need to be obeyed.”

From the point of view of legal theory, this remark about transgression not being defined because a moral issue seems to refer to a view, inspired by a conception of natural law, of the interrelation between law and morality, whereas, paradoxically, in its reference to bureaucracy, it seems to imply a view of judging as an automatic application of a given

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83 Id. at 50.

84 “One of the key features of such narratives is not (only) cultural preconceptions about ranges of causality, but the various narrators’ deliberate [or perhaps sometimes unintentional] selection of circumstances, that is to say their neglect or repression of other important evidence,” Fludernik, *A Narratology of Law?*, 1 CRITICAL ANALYSIS OF L., 87, 88 (2014).

85 Id. at 89. See Edwards, supra note 56, for an early, path-breaking account of the concept of narrative reasoning.

86 Id. at 92. See Olson, *Narration and Narrative in Legal Discourse*, in *The Living Handbook of Narratology*, supra note 13 (last visited on December 15, 2014), arguing that “the legal code represents a form of narration involving if-plot.”

87 Fludernik, supra note, 84 at 102; Fludernik references the N.Y. Penal Law § 10.00 et seq. (2009).
set of rules, the outcome of which is known beforehand. Furthermore, it does not take into consideration the difference in law and legal theory between norms and rules. The norm is thou shalt not steal,” the codified rule tells us, “[b]ut if you do, this is what will happen to you, if and when your act is discovered and there is enough evidence to convict you.”

While I fully agree with Fludernik that “crime is necessarily agentive and therefore can be conceived of as a narrative,”88 I also remain puzzled by her contention that “more contemporary law codes are deliberately non-narrative; they suppress the narratives that abound in the courtroom and outside it and try to transform the defendant even before conviction into the anonymous representative of a category.”89 As Aristotle observed early on, and as twentieth-century hermeneutics from Heidegger to Gadamer and Ricoeur later endorsed, the statutory rule is necessarily always general, because the legislator cannot think of all of the possible situations to which it might apply. Thus, the legal rule finds its meaning only in its application in the individual case. Furthermore, the fact that the addressee of the rule is the judge who must determine its application does not mean that “the stories that have been told in court” are “denarrativized . . . once the sentencing project takes over.”90 Rather, a general division of tasks occurs in the legal process. To be clear: This is not to quibble or take an esteemed colleague to task, but to offer a cautious reminder that attention needs to be paid to the quidditas issue, that is to the “whatness” of law or any other discipline. Interdisciplinary co-operation is urgently needed to undertake this task, or we run the risk of forgoing the chance to implement highly relevant observations in the project of outlining a judicial or legal narratology. In other words, European jurisdictions deserve the kind of careful and considered narratological analysis that Fludernik has performed on American statutes.

D. The Pathologies of Legal Narratology

I. The Influence of the Master Narrative

On the basis of the conceptual framework provided by Fisher, Ricoeur, and Brooks, we can fruitfully engage in interdisciplinary law and narratology research on the theoretical plane concerning topics noted above, such as narrative rationality, emplotment, and narrative glue. This is especially the case if we connect these topics to the requirement that judges possess narrative intelligence and deliberative judicial phronēsis—the situational knowledge Ricoeur suggested. Why? From a methodological point of view these are the elements that inform the hermeneutic movement from the facts to the legal rule and from the legal concept to the judicial decision, always a back-and-forth. They guide the way in which the judge

88 Fludernik, supra note, 84 at 108.

89 Id. at 109.

90 Id.
develops her own “perspectival narrative” that in turn allows her to engage in the decision-making process. Put differently, judicial emplotment and application when taken literally as ad plicare—the folding of the fact and the legal rule into a reciprocal union in order for a new meaning to unfold—requires a narratology. First of all, this process is guided by one’s interpretive framework. Second, because of the similarity between narrative and legal interpretation, they do not constitute the application of the abstract rule to the story of the case, but involve a judgment about probability, verisimilitude, and truth on the basis of one’s whole knowledge of the world. Third, throughout the process, judges act as those who bring about a reversal of fortune, a peripeteia for others, and they may fall short of the necessary quality of recognition, the anagnorisis, of what is indeed the truth in a specific case. This is especially true because judicial “narrative understanding is retrospective.” Nothing can be done if parties to a case negligently fail to incorporate relevant elements in their narratives. Because judicial fact-finding is always performed ex post facto, judges need to be fully informed on the functions and effects of narrative to the greatest extent possible.

For narratological research to actually impact the law, some pitfalls need to be avoided. From a jurist’s point of view, the first of these is the false dichotomy frequently made between common law and civil law reasoning. It is certainly the case that common law reasoning has an affinity for the concept of narrativity because it is normatively based on precedent of the stories heard before the case at hand. Yet, it is often ignored that civil law reasoning also includes precedent as a source of law; precedent, however, is given less weight than in the common law context. Here we find a comparable rather than a dissimilar situation. This point is emphasized for interdisciplinary reasons: In discussions with scholars from other humanities disciplines, there is often the misconception that civil law reasoning is mere syllogistic rule application deductive in nature; it supposedly moves from abstract codified legal norms to a decision about a specific case. In contradistinction to common law reasoning, civil

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91 Brooks, supra note 15, at 10.

92 Aristotle claims in Poetics that plots are subject to the laws of probability and necessity; see also Halliwell’s Introduction to Poetics, supra note 8, at 12. In the situation of a criminal trial, Ricoeur writes that “[t]he application consists both in adapting the rule to the case, by way of qualifying the act as a crime, and in connecting the case to the rule, through a narrative description taken to be truthful,” RICOEUR, REFLECTIONS ON THE JUST 55–56 (2007). See Francis J. Mootz III referring to Gadamer on human experience as interpretive, “within legal practice we can understand a binding norm only within a practical context: understanding and application are a unified pact,” see Foreword to the Symposium on Philosophical Hermeneutics and Critical Legal Theory, 76 CHI.-KENT. L. REV. 719, 721 (2000). See also Jerome Bruner, The Narrative Construction of Reality, 18 CRITICAL INQUIRY 1 (1991); JEROME BRUNER, MAKING STORIES, LAW, LITERATURE, LIFE (2002).

93 Brooks, supra note 73, at 425.


95 See François Ost, Towards a Critique of Narrative Reason, in LIVING IN A LAW TRANSFORMED: ENCOUNTERS WITH THE WORKS OF JAMES BOYD WHITE 37, 38 (Julen Etxabe and Gary Watt eds., 2014), on one of the disqualifications of narrative for law:
law reasoning supposedly espouses the idea of law as a mere set of codified propositions. As shown in this Article, from a hermeneutical point of view, this is hardly true.

At the same time, a second pitfall may entail the risk of overlooking procedural differences between common law and civil law systems as often happens when scholars use the word “law” loosely. For example, in discussing storytelling at the appellate level in civil cases in U.S. courts, a contradistinction needs to be made to most civil law systems as well as to U.K. courts of appeal where a second level of consideration of both questions of law and fact occurs; this includes hearing defendants and (new) witnesses and sentencing. By contrast, in the U.S. system, the facts can be considered only to the degree that they have already been mentioned in the appellate brief. The appellate judge reviews the factual and evidentiary context of the verdict against which an appeal is brought. The same risk can be found on the substantive law level when differences between civil law and common law jurists’ mental pictures involved when dealing with legal concepts may cause us to act like ships passing through the night. To give one example, in nineteenth-century English common law, when, in order to start a lawsuit, the writ system evolved into a “cause of action” system, old classifications, such as trespass, evolved into torts. Torts are actions ex delicto, whereas the writ of assumpsit (damages) was brought under the heading of contract, that is, an action ex contractu. By contrast, a civil law jurist thinks more in terms of rights, and in the Dutch system, civil damages to be paid in case of an onrechtmatige daad, a figure that is often (all too loosely, which is precisely the point) translated as torts, are not thought of as arising out of contract. Thus, Stephen Paskey is correct when he suggests that the dichotomy between rule-based reasoning and narrative reasoning is a false one—

[a] modern one, going back to the philosopher David Hume. It stems from the great divide between facts and norms, between describing and prescribing, between the “is” and the “ought,” and from the prohibition which goes with that—that is, it is forbidden to pass from one to the other. In this case the disqualification of narrative is a double one: as well as being denied any role either in positing a fact or prescribing a norm, in consequence of the first repression, it is also denied any role as a mediator between these two ontological realms, since any possibility of a logical passage from one to the other is prohibited.

96 See Greta Olson, De-Americanizing Law-and-Literature Narratives: Opening Up the Story, 22 LAW AND LITERATURE 338, 352 (2010), “legal reasoning proceeds through a process of deduction from abstract norms of codified law to the particular case at hand.” See also Olson, supra note 12. See Helle Porsdamp, FROM CIVIL TO HUMAN RIGHTS, DIALOGUES ON LAW AND HUMANITIES IN THE UNITED STATES AND EUROPE 174 (2009), “Civil law starts with certain abstract rules, that is, which judges must then apply in concrete cases.”

97 “[A] cause of action” being a factual situation that one person stated in order to obtain a remedy against another person.

98 For these examples I draw on Geoffrey Samuel, A SHORT INTRODUCTION TO THE COMMON LAW 55–56 (2013).
the legal rule can also be read as a story and, more specifically, as a stock story. Of course, stock stories differ depending on the specific rule and the legal system.\textsuperscript{99}

A third pitfall is that in the criminal context, most civil law countries have an inquisitorial approach that favors a process of verifying evidence, with written evidence gathered before the case comes to trial. At this stage the falsification principle is honored more in the breach than in the observance, even though the aim is to arrive at the substantive truth. This is markedly different from an accusatorial approach because evidentiary standards and processes differ. Yet, unlike professionally appointed judges who have to legitimize their decisions by stating legal grounds as well as the grounds for conviction,\textsuperscript{100} the common law jury represents a black box: It provides no reasons for its decision.\textsuperscript{101} Furthermore, in a system where the search for the truth is laid more prominently in the hands of the involved parties and lay people—in other words, in a system that includes cross-examination and the jury—the judge’s role is more passive. Plea-bargaining also strengthens the idea of a partial truth. On this view, we may safely assume that the rhetorical and discursive strategies that contribute to narratives in court may differ depending on the respective legal system in which they occur. I specifically use the word “strategies” here. When it comes to determining


\textsuperscript{100}The greatest Dutch legal theorist of the twentieth century, Paul Scholten, once observed:

\begin{quote}
The judge does something other than observing in favor of whom the scales turn, he decides. That decision is an act, it is rooted in the conscience of he who performs the act. That which is expected of a judge is a deed. It is not without meaning that in our judicial decrees, after much thinking and weighing, after sometimes infinite “re-weighing” of that which is advanced pro and con, the words “delivering judgment” are inserted before the dictum. After the long chewing-over of the deliberations, there is this word, which demands attention for the decision and thereby defines its nature—[and] then the ruling itself: short and decided. It is the task of the judge to deliver judgment. I think that there is more than merely observation and logical argument in every scientific judgment, but in any case, the judicial judgment is more than that—it can never be reduced to those two. It is not a scientific proposition, but a declaration of will: this is how it should be. In the end it is a leap, just like any deed, any moral judgment is.
\end{quote}


\textsuperscript{101}See Richard Lempert, \textit{Telling Tales in Court}, 13 CARDozo L. REV. 559 (1991), for an account of a study on the difference in the rate of guilty verdicts depending on whether (mock) jurors were presented with information in story order or in witness order: 78% of guilty verdicts were made on the basis of story order.
what facts are legally relevant, opposing narratives may for obvious reasons focus more on explaining away contradictory evidence, and this may lead to ignoring other, equally, or even more relevant facts. In situations in which forensic evidence such as blood samples, DNA tests and so forth are lacking, this pattern proves even more problematic, for example, when the basis for judging is narrow to begin with.

Greta Olson takes up the *quidditas* issue and notes that jurists’ notions on narrative “are insufficiently critical and lacking in theoretical acuity.” No doubt this applies to my own argument so far. She urges us not to use the term “narrative” for all kinds of phenomena that must be properly differentiated if the narratological project for law is to be successful. To repeat a list of definitions provided by Olson which she, however, also recognizes as contested within narratological studies: “Narration” is the term used to describe the act of relating, “story,” when used in a legal setting, denotes the facts and/or the sequence of events, whereas the term “discourse” should be taken to refer to the form of the telling. “Narrativity,” then, “denotes the degree to which a text or object possesses qualities that elicit thinking structures that help to explain it as a narrative,” while “narrativization” refers to “the procedure in which a text is processed in someone’s mind in response to its narrativity, or story-like qualities.” These are very helpful distinctions, and we need to focus more on the specific forms of the narrative structures in texts and procedures of the law.

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103 Olson, supra note 12, at 37.

104 See Olson, supra note 86, that “narration plays a central role in legal discourse . . . and that legal narration in the narrow sense as the act of telling a story is a contestation of narratives such as witness testimony, defense and prosecution statements.” Note that again the Anglo-American common-law settings is the default.

105 See Floris Bex, *Arguments, Stories, and Criminal Evidence: A Formal Hybrid Theory* 12 (2011), “[t]he facts of the case often denote the events or states of affairs that are assumed, at least for the moment, to have happened or existed.”

106 Olson, supra note 12, at 44, discourse includes “[t]he perspective from which the story is told, for example, the often non-chronological order in which events are told, and how directly or indirectly it is related. Discourse, or the form of the telling, is typically used in contradistinction to ‘story’ (what happened).” See Currie, supra note 48, at vi, for the distinction between “the story told,” for example, events and characters, and the vehicle of telling, for example, narrative, so that “narratives convey stories.”

107 Olson, supra note 12, at 44. See Fludernik and Olson, *Introduction, in Current Trends in Narratology*, supra note 12, at 15, referencing Marie-Laure Ryan who differentiates “[b]etween text originally composed as a narrative and a text that has qualities which allow its recipient to read it as a narrative, for example, the difference between a text ‘being a narrative’ and its ‘possessing narrativity.’”

108 Olson, supra note 12, at 44.
To tie the above arguments together and illuminate the theoretical considerations, turning to criminal law helps elaborate on the interdisciplinary requirement that more work be done on a narratological-legal theoretical plane. This should then serve as a basis for research on legal practice that would also include empirical research.

II. Pathologies of Narrative in Criminal Law

1. Choices

“To judge” is “to choose”: Between events and human acts considered legally relevant facts or not (in civil law systems without juries, it is the judge who decides what the relevant facts and circumstances are); between stories plausible in a legal context and those that are not; between narratives to which a legal value can be attached, or not, and for what reason, because at the end of the day the judge as narrator tells the world how she interprets and evaluates what others have told her; and between the consequences of different choices. What weight should be attached to specific facts? What pieces of evidence should be valued as sufficient proof? The success of this evaluative and interpretive process depends on the quality of the judge’s phronetic discernment. If we follow Kant in his Critique of Judgment, the first stage of any judgment is the imaginative one, which includes reflecting upon what is “not there.” This is to acknowledge what may not have risen to the surface among the available materials and arguments as much as what has been simply overlooked or missed because of how judges are influenced by different cultural, personal, and professional backgrounds. The latter is important given the weight of judicial

109 See generally W. LANCE BENNETT AND MARTHA FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM (1981) on “story grammar” in a legal context; BERNARD JACKSON, LAW, FACT AND NARRATIVE COHERENCE (1988) and MAKING SENSE IN LAW (1995); WILLEM A. WAGENAAR, PETER J. VAN KOPPEN AND HANS F.M. CRONMBAG, ANCHORED NARRATIVES: THE PSYCHOLOGY OF CRIMINAL EVIDENCE (1993), the premise of the theory of anchored narratives is that a “good story” in criminal law is not only compatible with the evidence but also “anchored: in our general knowledge of the world around us.”

110 See Uri Margolin, Narrator, in THE LIVING HANDBOOK OF NARRATOLOGY, supra note 13 [retrieved 10 February 2015].

111 See Fludernik and Olson, supra note 107, at 5, on the subject of cognitive narratology that addresses “how narratives reveal the phenomenology of perception . . . how they control the decision-making processes by which we intuit how stories are most likely to turn out.”

112 See Linda H. Edwards, Once Upon A Time In Law: Myth, Metaphor, and Authority, 77 TENN. L. REV. 883, 913 (2010) (“Stories are true or false, depending not so much on what they say as on what they omit and what they imply.”). See Philip N. Meyer, The Darkness Visible: Litigation Stories and Lawrence Joseph’s Lawyerland, 23 SYRACUSE L. REV. 1311, 1314–15 (2003) (on the “subtext of a case,” the stories of the parties that matter to them but are filtered away in the course of the legal proceedings. It should be noted that in Kant's Critique, the second stage is reflection on the sensus communis that is to be taken into consideration in judging. As important as this is for legal decision-making, it falls outside the scope of this article.).

113 See Kim Lane Scheppel, Telling Stories, 87 MICH. L. REV. 2073 (1989) (that all that courts have is stories; Cicero’s De Inventione already deals with the topic of the plausibility of narrative; the topic of how to influence the judge’s mind and decision has been with us since Aristotle.).
narrativization and research in cognitive narratology. This is even more the case when broadening the scope to include the visuality and mediality of law, because focusing on what Kenneth Chestek calls the “judicial sweet spot” by means of narrative, can easily be translated to persuasion by means of images in order to activate judicial narrative empathy.\textsuperscript{114} Psychological proclivities to which we are all prone, such as cognitive dissonance,\textsuperscript{115} belief perseverance, and confirmation bias,\textsuperscript{116} may easily lead to serious errors of judgment and a miscarriage of justice when a judge explains away as incorrect anything inconsistent with the story. In hindsight, this confabulates and creates the illusion that there were all kinds of good and conscious reasons to decide as she did. After all, chunks of evidence always diverge, and the environment is always dialectical. Obviously, a judge’s past experience with specific people and situations leads her to construct trait patterns with respect to stereotypical behaviors that she applies to future situations. The prejudice trap always looms large.

Let us turn to another aspect of judicial “choosing.” The awareness of the constraints brought about by legal principles and rules of procedure is all too easily forgotten in the focus on legal narrative; for example, consider \textit{Nullum crimen, nulla poena sine lege}, or the principle that human conduct is punishable only when there is legal basis, such as in a codified rule designating it as a crime.\textsuperscript{117} The wording of the criminal charge—the allegations with respect to the defendant’s actions at a certain point in time and in a certain place—guides the search for relevant facts and circumstances, and these points in turn all have to be established. In short, what matters is the legal qualification of the criminal act: The qualification of facts such that they fall under the provision of a specific article of the criminal code and the modality of the deviation from the legal norm as exemplified in the (codified) rule that is the point of reference. The search for this qualification governs the act of reading.

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\item[\textsuperscript{114}] See David Herman, \textit{Cognitive Narratology}, in \textit{HANDBOOK OF NARRATOLOGY} 30 (Peter Hühn et al. eds., 2009); David Herman, \textit{Cognitive Narratology}, in \textit{THE LIVING HANDBOOK OF NARRATOLOGY, supra} note 13 [retrieved 1 December 2014] (on the focus of cognitive narratology “[…]mental states, capabilities, and dispositions that provide grounds for—or, conversely, are grounded in—narrative experiences.”). See Fludernik and Olson, supra note 107, at 10 (“Frames, and particularly scripts, for example, culturally recurring sequences of actions or processes, are even more important to narratology, since they concern ingredients of plots”); Kenneth D. Chestek, \textit{Judging by the Numbers}, 7 J. OF THE ASS’N OF LEGAL WRITING DIRECTORS 1, 34 (2010) (“Focusing on the story of the case is the most likely route to finding that sweet spot where a deep frame is activated (becoming the foundation of persuasion) without it being so obvious that the reader’s natural defenses are triggered.”). See Gerald Prince, \textit{Reader, in \textit{THE LIVING HANDBOOK OF NARRATOLOGY, supra} note 13 [retrieved 16 February 2015]}, and Catherine Emmot and Marc Alexander, \textit{Schemata, in id.} [retrieved 16 February 2015]) (on how texts guide the production of meaning and gap-filling done by readers.). For narrative empathy, see Suzanne Keen, \textit{Narrative Empathy, in \textit{id.} [retrieved 15 February 2015].}
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\item[\textsuperscript{115}] See LEON FESTINGER, \textit{A THEORY OF COGNITIVE DISSONANCE} (1957).
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\item[\textsuperscript{116}] See the seminal article by Amos Tversky and Daniel Kahneman, \textit{Judgment under Uncertainty: Heuristics and Biases}, 185 SCIENCE 1124 (1974).
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\item[\textsuperscript{117}] The idea was first brought forward by CESARE BONESANA, MARCHESE BECCARIA, \textit{DEI DELITTI E DELLE PENE} (1764 trans. Edward D. Ingraham, \textit{OF CRIMES AND PUNISHMENTS} (1778)).
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Thus, once you have “named” the fact, you’ve “got” it. This is important to note because criminal law is a highly specific mode of regulating human behavior in a social context that aims at restoring the social balance disrupted by the criminal act.

To complicate legal-narratological matters further from an epistemological point of view, we find in the jurist reader-narrator a subject who, in establishing the facts of a case, not only describes the world as she finds it, but also the world on which she shall pronounce judgment. Knowing subject and known object converge. It is this specific form of agency that guides the dialectic movement between fact and legal rule that, as noted above, forms the constitutive structure of legal thought and methodology. It is the reason why law is like literature, as James Boyd White has consistently argued since the publication of The Legal Imagination in 1973. That the referential world of criminal law, as the legal translation of the pre-legal reality is constituted by criminal law, opens up a field for interdisciplinary research. Such research includes, for example, the question of whether or not this pattern implies a return to a descriptive view of language. It also comprises research on how legal narrative represents reality on the view that the interpretive process constitutes the move from the ambiguous to the unequivocal, and research on sequentiality within the narrated story, for example, narrated time and narrative time.

2. Suggestions

What else should we keep in developing the interdisciplinary project of a narratology of law? I would like to offer some suggestions that are by no means exhaustive. First of all, the pre-trial and the trial stage of the proceedings need to be differentiated. In the pre-trial stage of police interrogations, narratological research should focus on plot and narrative constitution as well as narrative coherence. The most important reason for doing so is because it is not

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118 See Richard Weisberg and Jean-Pierre Barricelli, Literature and Law, in INTERRELATIONS OF LITERATURE 150, 162 (Jean-Pierre Barricelli and Joseph Gibaldi eds., 1982) (“The legal process, like the literary, moves from an experience in life towards a narrative re-creation of that experience.”); see Mônica Sette Lopes, Clarice Lispector and Forgiveness, in DOSSIER LAW AND LITERATURE, DISCUSSION ON PURPOSES AND METHOD 43, 46 n.3 (M. Paola Mittica ed., 2010) (that when Clarice Lispector told her law professor that she opted for criminal law, he replied “You became interested in the literary part of Law,” referring to CLARICE LISPECTOR, CADERNOS DE LITERATURA BRASILEIRA (2004)).

119 I adopt this term from BEN-YISHAI, supra note 81, at 43.

120 See Hühn, Event and Eventfulness, in THE LIVING HANDBOOK OF NARRATOLOGY, supra note 13 [retrieved 10 February 2015].

121 I draw on Cleanth Brooks and Robert Penn Warren’s definition of plot as “[t]he structure of an action as it is presented in a piece of fiction, not the structure of an action as we happen to find it out in the world but the structure within a story. It is, in other words, what the teller of the story has done to an action to present it to us,” as cited in Scheffel, supra note 66, at par. 3.1. Scheffel defines narrative constitution as “the composition of narratives.” Kukkonen, supra note 66, distinguishes between plot as a pattern yielding coherence to a narrative and plot as authorial design. See also Melissa H. Weresh, Morality, Trust, and Illusion, 9 LEGAL COMM. & RHETORIC: JAWLD 229, 251 et seq. (2012), for an account of how “[p]ersuasive narrative relies on three psychological properties:
immediately obvious to the reader who it is who has structured the order of the actions in the recorded action, and how they did so. The leading narrating voice is that of the interrogator, but the written record does not always give information on the form, length, and circumstances under which the interrogation actually took place. The interrogator is the one who selects what goes into the record. If the record does not show the questions asked and is presented as a first-person narrative, or if the record consists of only selected legally relevant passages and the narrative is presented as a unified whole, the judge-qua-reader cannot know whether the story suggests a linearity of events and a chronology where there in fact was none, or whether parts of the defendant’s account were left out, and if so, for what reasons. Were these elements justifiably left out because they were not legally relevant or because they were not what the police wanted to hear? The judge cannot check the gaps if there is no audio(-visual) recording.

The record invites the judge to accept the narrative account as real, as having evolved organically, and as Aristotle claimed in *Poetics*, as subject to the laws of probability and necessity, noted above. Yet, all too often the record is a form of “hint fiction,” a short story that may or may not be true (but how is the judge to know?), suggestive of a larger, complex story, and this makes the judge’s decision based on the *facta probanda* even more difficult. This point must be made to highlight procedural differences that are dependent on jurisdiction; for example, it matters a great deal whether the written file forms the basis of the trial proceedings or whether all witnesses are questioned by the judge(s) in open court.

The same consideration applies to the trial stage with regard to witness testimony and the need to be able to recognize perjury and equivocation strategies. It also applies to victim

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122 See Brooks, supra note 15, at 7, for the related example of Justice Potter Stewart in *Bumper v. North Carolina*, 391 U.S. 543 (1968), lamenting that: “The transcript of the suppression hearing comes to us . . . in the form of narrative; for example, the actual questions and answers have been rewritten in the form a continuous first person testimony. The effect is to put into the mouth of the witness some of the words of the attorneys.”

123 On gaps and the assumption that in the real world, as opposed to fictional narratives, there are no gaps, see Sten Wistrand, *Time for Departure?*, in *DISPUTABLE CORE CONCEPTS OF NARRATIVE THEORY* 15 (Göran Rossholm and Christer Johansson eds., 2012); see also Marie-Laure Ryan, *Cheap Plot Tricks, Plot Holes, and Narrative Design*, 17 NARRATIVE 56 (2009), on “plot holes” and “cheap plot tricks” in stories used to cover up problems of linearity, chronology, and logic.

124 See also *ARISTOTELE*, ART OF RHETORIC 159 (2006), I.xv. 17, 1376a, “In regard to the confirmation of evidence, when a man has no witnesses, he can say that the decision should be given in accordance with probabilities, and that this is the meaning of the oath ‘according to the best of one’s judgement.’”

125 A *factum probandum* is a fact that is the subject of proof; a *factum probans* is the fact from the existence of which that of the *factum probandum* is inferred. See BEX, supra note 105, at 12 for the inclusion in the “facts of the case” of “propositions the truth of which is unknown,” for example, the “*facta probanda*,” and the “*facta explananda*” [as] “that which has to be explained”.
impact statements, including aspects connected to their scope. Similarly, it applies to whether or not the defendant testifies in court which also depends on procedural factors. What is the value of a confession story, troubling as it may be in the pre-trial stage, as Brooks has noted? Should a confession affect the judge’s valuation of the evidence and ultimately her conviction, which, taken together, form the basis of her ruling? If conviction and proof are dissociated as in legal systems with a jury not formally required to justify its decision, the valuation of narrative takes place in a situation markedly different from the one in legal systems—such as the Dutch one, where proof and judicial conviction are the two pillars on which the judgment rests, or the French one, in which the conviction intime is accepted in the Court d’Assises as justification for the judgment. Thus, as Elaine Scarry warns us: “The confession . . . may eliminate the need for dispute and adjudication. And this should make us worry.”

In the competition of narratives in the trial, conceived of as a fact-finding process, narrative competence is presumed. But what if the defendant remains silent? Either because the defense lawyer advised it or because she or he is unable to tell the story of what happened in an adequate manner? How, then, is the battle of competing stories to recognize this voice? In the trial stage, criminal law’s specific truth conditions and procedural constraints, including the rules of evidence, have their own impact on the stories that are

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126 Brooks, supra note 15, at 17. With respect to scope, is a victim impact statement literally just that, for example, only about the impact of the crime on a victim’s life? Or is the victim allowed to say something about evidence and sentencing? And if so, how would this influence the judge?

127 See Brooks, Storytelling without Fear?, in LAW’S STORIES, supra note 16, at 114; BROOKS, TROUBLING CONFESSIONS (2000). Brooks discusses the circumstances in which confessions are obtained and calls confessions 'troubling' when the defendant’s rights (such as the right not to incriminate oneself) are (deliberately) violated.

128 See Brooks, supra note 73, at 416, “‘Conviction’—in the legal sense—results from the conviction created in those who judge the story[,]”; Brooks, supra note 16, at 18; BEX, supra note 105, at 79, “one of the main dangers of stories is that a coherent story is judged as more believable than an incoherent story, regardless of the actual truth of the story.”; WAGENAAR ET AL., supra note 109, at 40, that a good story is more likely to be believed to be true than a weak story.

129 See AMSTERDAM AND BRUNER, supra note 71, at 118, for a hilarious story of a jury verdict gone wrong: “A jury in Alabama was called to try a poor farmer charged with stealing a mule from a rich one. The jury’s first verdict was: ‘Not guilty, provided he returns the mule’. The judge refused to accept the verdict . . . . The jury . . . rendered a second verdict: ‘Not guilty, but he has to return the mule.’ The judge again rejected the verdict . . . the jury came back with a third verdict, which the judge finally accepted: ‘Not guilty, let him keep the damn mule.’”


132 See Brooks, supra note 73, at 417, reflecting on the O.J. Simpson case, All the “rules of evidence”—including the famous “exclusionary rule” barring illegally seized evidence—touch on the issue of rule-governed
The presumption of innocence confers an individual’s right to a fair trial. But what if the narrative strategy the defense lawyer employs backfires? Obviously, a defendant needs a lawyer to translate his or her view of the facts into legal terms. The story needs to cohere with the semantic demands of the legal qualification of his act on the basis of the charge, but also stay clear of them at the same time. Summarily, if defendants honestly try to tell their stories in their own words, they do not always understand the legal consequences.

Viewed differently, another narrative problem area arises. While an appeal to the right to remain silent may not be used as proof, a defendant who fails to offer an explanation for an incriminating witness statement will find that this circumstance can and will be used against him or her. Thus, a failure in litigation skills and narrative strategies may trigger a judicial conviction and "libido puniendi;" this factor needs to be reckoned with, especially in those cases without a clear jurisprudential tradition such as charges for terrorist acts.

When the panel of judges in a felony case finally has to decide about the value and force of the evidence laid down in competing stories, still another complication may arise as far as narrative is concerned. It arises from Genette’s question of “Qui parle?” The narrative perspective of the judicial decision is that of an impersonal, omniscient third-person narrator whose authorial voice speaks with authority. The agency of this voice pretends not to be storytelling. The judge must know and enforce these rules. And when stories are culled from the trial record and retold on the appellate level, it is in order to evaluate their conformity to the rules. Appellate courts are not supposed to second-guess the “triers of facts” in the case, but to judge the framework in which the verdict was reached.”

In Europe, the term that is generally used is “fruits of a poisonous tree”.

133 “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law,” states Article 6 of the EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS. It rests on classical principles from Roman law: nemo tenetur prodere se ipsum (no one is obliged to incriminate himself); nemo tenetur edere contra se (no one is obliged to speak against himself); and nemo tenetur se accusare (no one is obliged to accuse himself). As a legal right this right is indissolubly connected to the rule of law in a democratic society in the protection that it guarantees against unlawful intrusions into people’s lives. As a prohibition against putting pressure upon a person suspected of having committed a crime, it refers to the deference for the defendant in criminal proceedings when it comes to respecting human dignity in the sense of both the free will and physical and mental integrity. See the Miranda rule in American law, Miranda v. Arizona, 384 U.S. 435 (1966).

134 The point is made by the late Willem J. Witteveen in his analysis of Pirandello’s short story “The Truth”: this is the story of the farmer Tararà who kills his wife after he catches her in bed with another man; he admits that he knew about the affair but did not act on this knowledge until his wife dishonored him by having sex in the marital home. Willem J. Witteveen, De waarheid, onschuldig opgebiecht, in VERBEELDINGSMACHT 277 (Witteveen and Sanne Taekema eds., 2000).

135 E.g., Eur. Court H.R. Krumpholz v. Austria, Final judgment of 18 March 2010, Application no. 13201/05. Note that when the witness statement is that of an expert, the narrative relevance and the credibility are often judged higher.

that of individual persons; judging, however, is a human activity, and this third-person-narrator mode conceals several first-person narratives. What, then, if a panel of judges finds that it cannot get its set of first-person narratives to cohere with one another? Where common law and supra-national European courts offer the solution of having concurring and dissenting opinions, rendering poly-narration acceptable, there is no such problem for the individual judge as narrator. If a panel of judges has to speak in one voice, that of “the Court,” and opinions differ, writing a decision as a judicial narrative of compromise becomes a very difficult task indeed.

E. Coda

As this Article has argued, narratives legislate meaning in many different ways: This ranges from the influence of narrative probability and fidelity to the influence of resemblance and representation, and extends from the pre-trial stage to the verification of evidence. Because these narratives are always evaluated against the background of one’s local knowledge of a specific legal system and a specific set of legal practices, narrative intelligence is a prerequisite for judges. While no judge can plead innocence for disciplinary parochialism, my argument here has been that we should work not to privilege one discipline—law or narratology—over the other. In order to honor law’s plurality in terms of narrative, we must try to engage in truly interdisciplinary work in case we run the risk of methodological shallowness and end up on an intellectual compost heap. As this Article has argued, such interdisciplinary and theoretical work on law and narratology is best begun by addressing specific jurisdictions; it should then move on to address comparative aspects of common-law and civil law legal systems.

Building on this basis, viable research combining theory and practice shall follow, and it will include empirical research on legal practices. Whether investigative efforts will lead to a full-fledged legal narratology that also addresses the specificity of legal systems, and the various types and procedures of law practiced within them, remains undecided. Yet, hope remains for the fruition of legal narratology if Cardozo’s dynamic view of law is kept in mind: “Law never is, but is always about to be.”

137 MARIA ARISTODEMOU, LAW AND LITERATURE, JOURNEYS FROM HER TO ETERNITY 3 (2000), “narratives are not neutral: they investigate but also suggest, create, and legislate meanings.”

Imagining the Foundations of Law in Britain: Magna Carta in 2015

By Martin A. Kayman*

Abstract

The 800th anniversary of Magna Carta offers a study in how the foundations of law have been visualized in the United Kingdom. The fact that the British sense of identity as a free nation has historically been based on its commitment to “unwritten” law means that it lacks a foundational text and has hence traditionally figured the law through a plurality of images without a core. The absence of a singular image on which to focus national identity became acute in the early twenty-first century as the multiplication of sources of legality and justice in a globalized and multicultural world put pressure on the United Kingdom’s sense of sovereignty. The tensions manifest in this crisis can be seen across a range of images produced for the anniversary, each bearing different values. Yet the rival narratives are able to coexist in the same commemorative space, their differences subsumed within Magna Carta’s status as a postmodern “icon,” the consecration of the reciprocal identification between the protection of liberty and the rule of law. The Article concludes by examining a court battle over land on the borders of the commemorative site, and at another commissioned artwork. Both, in their different ways, bring into view the boundaries and bonds imposed by the rule of law that the iconic image elides.

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Fig. 1. “Magna”: Diggers and others near Runnymede Eco-Village, reproduced with the permission of Diggers2012

“Forget not, after all these years,
The charter signed at Runnymede.”
— Rudyard Kipling, “The Reeds at Runnymede” (1912)

A. Envisaging the Unwritten Law

This Article uses the commemorations of the 800th anniversary of Magna Carta as a case study to investigate how the foundations of law are imagined and visualized in the United Kingdom (U.K.). The question is the more acute in that the commemorations took place at a time when the national consensus regarding the sovereignty of its law and confidence in a shared national identity were under strain from a multiplication of sources of legality and justice in a globalized and multicultural world. At the time of the commemorations in 2015, few anticipated that the crisis would manifest itself so dramatically in the outcome of the referendum on the U.K.’s membership of the European Union the following year.

One commonly thinks of legal foundations as documents: commandments, constitutions, declarations, conventions, or codes. As such, they are objects of textual hermeneutics for those professionally engaged with their application. Hence it was that the textual turn of the last part of the twentieth century laid the ground for law-and-literature to bring new critical

protocols to bear on the way the law is read. That said, foundational documents also do their work, particularly for the population at large, in the way of something more like a mantra or a sacred object, and here, arguably, a literary approach would seem to have little to contribute. In these circumstances, texts become not documents to be interpreted but aural or visual images of what they represent, to be intoned, gazed upon, or, in a literal sense, admired in rituals of identification. Sound bites—“trial by a jury of one’s peers,” “habeas corpus,” “an Englishman’s home is his castle,” “the right to bear arms”—become deployed as a sort of incantation as if each is, indeed, a self-evident truth of the nation’s law that identifies one as a free individual. By the same token, the public exhibition of legal documents enables the text to be displayed in a form that gives it a quasi-devotional status. Such is the case, for example, with the Constitution of the United States. Housed in the National Archives in Washington DC, the original copy is, as Linda Colley observes, an object of “pilgrimage” for citizens for which nothing comparable exists in the U.K.2 The lack is remarkable, given the image that Britain has of itself—and has projected across the globe—as a nation where unrivaled liberty is secured by a preeminent devotion to law.

The reason for the absence is, plainly, the decisive insistence, at least since the struggles of the Common Lawyers against the absolutist pretensions of the Stuart monarchs, on English law’s grounding not in an originary text but in the unwritten law.3 The non-existence of a foundational document issued by a princely authority substantiates the superiority of an unwritten constitution by figuring “the rule of law” not as obedience to the sovereign’s command, but as a spirit of justice that pervades national life and is safeguarded by an independent judiciary. Consequently, the Common Law does not have a singular image of itself ready to be displayed to the gaze of a devoted public. Indeed, to do so would compromise the sublime qualities that the law draws from the impossibility of reducing it to a foundational text or confining it within a particular visual image.4 Clearly, that does not mean that the law is literally invisible any more than it is literally unwritten. The spirit of English law, then, has historically presented itself through a plurality of verbal and visual images, without a core.


3 See also the chapter on Edward Coke in RICHARD HELGERSON, FORMS OF NATIONHOOD: THE ELIZABETHAN WRITING OF ENGLAND 63-104 (1992). Following the “Glorious Revolution” of 1688, the myth of the ancient unwritten constitution was canonically elaborated by William Blackstone in his epic COMMENTARIES ON THE LAWS OF ENGLAND (1797) (1765–69). This myth also informs the confrontations between Edmund Burke and Thomas Paine around the French Revolution, which Costas Douzinas associates with modern law’s suspicion of visual images. Cf. Costas Douzinas, PROSOPON AND ANTIPROSOPON: PROLEGOMENA FOR A LEGAL ICONOGRAPHY, IN LAW AND THE IMAGE 56 (Douzinas & Lynda Nead eds., 1999).

4 See Douzinas, supra note 3.
Peter Goodrich has argued that, during the period the myth of the unwritten law was first being consolidated, its foundational maxims were made visible through the serial combinations of discrete images and texts that characterized the “emblem” and “emblem book.” While the image catches the eye and the words explain the image, neither is subordinate or reducible to the other. Rather, they interact in a complex and complementary fashion to frustrate the seduction of the gaze by either of their surfaces. In sum, emblems provide a visual figuration of an invisible law. As Goodrich demonstrates, word and image work together on the page to direct the eye inward and upward, beyond both the written and the seen: “[T]he words lead to the image, and the image to the message that cannot be seen or stated.” The emblem thereby establishes what Goodrich terms a “visiocratic regime,” a mode of visual governance that, he maintains, continues to prevail today.

In contrast, the argument in this Article starts from a strong sense of crisis in the regime of visual governance and, at the same time, of radical changes in the ecology of word and image. As Goodrich has argued consistently, the “visiocracy” he describes is decisively allied to the supremacy of the Anglican nomos and its theology of the Word and Image. Although much survives in a nation with an established Church whose bishops still sit in the legislature, the same supremacy cannot be assumed in postmodern Britain, with its jostling plurality of secular and post-secular nomoi of diverse origins that—as we shall see shortly—are perceived to have unsettled many of the assumptions of that regime. As confidence diminishes in the nation’s identification with a shared spirit of English law and constitutional arrangements, the resulting tensions have put the commitment to an unwritten constitution under pressure but have not led to a new fundamental law. On the other hand, I shall argue,

6 Id. at 252.
8 Peter Goodrich, LANGUAGES OF LAW 53 (1990) (“The legal tradition had its basis, its foundation, in a notion of tradition and of polity that was borrowed directly from the Anglican Church.”). Central to that foundation was the Church of England’s doctrine of the Eucharist as “a theory of the sign . . . and of interpretation.” Id. at 55. Similar theological configurations can be seen from Manderson’s analysis of images from the same period, particularly that of Blind Justice:

The figure of blind justice is a myth of modern law in just this sense. It takes the underlying cultural oppositions that had been central to the contested emergence of modern law for centuries—between law and justice, letter and spirit, particular and general, local and universal, spiritual and temporal—and finds a new accommodation, transforming these dichotomies from the underlying critique of modern law to the condition of its authority.

Manderson, supra note 5, at 216.
what they have done is to encourage the pursuit of a fundamental image on which to focus identification with the spirit of the British legal regime.

At the same time, if the theological and political semiotics of the visiocracy have changed, so too has the ecology of the print tradition in which the emblem flourished. Indeed, as an object of commemoration, Magna Carta particularly suited the increasing preeminence of visual over verbal artifacts in twenty-first century culture, not least in digital form. Historians appeared to relish correcting the common error that Rudyard Kipling himself makes in the poem quoted as an epigraph to this Article when he writes of the “signing” of the Charter, rather than its “sealing.” The authorizing act that took place at Runnymede in 1215—whose anniversary was celebrated at the event’s historic site in 2015—is the attachment of a pictorial image to the text, not a written signature, and this, arguably, is reflected in the importance given to visual images in the celebrations themselves and the role of the internet in the construction, management and dissemination of those images.

In particular, as we shall observe, in place of a new substantive legal text for the twenty-first century, a core was provided by transforming Magna Carta itself into a visual image. In his study of how legal images operate in times of socio-legal change, Desmond Manderson observes that “the movement from pre-modern to modern is marked by the transformation of the function of images from icons whose meaning is simply present, like an aura, to artworks whose meaning requires, and is therefore subject to, interpretation.” While, as Manderson’s article clearly indicates, the early modern image of which he speaks is modelled by Goodrich’s emblem, we shall see that Magna Carta has been presented to our sight as a postmodern “icon.”

The meaning of a foundational image is hence related to the sort of image it is. What, then, is a postmodern icon of law? As we interrogate Magna Carta as a self-styled “icon,” I shall argue that, lacking concrete substance at its core, the foundational image can do no more than engender a proliferation of images that refer back to itself. Indeed, the analysis of two commemorative artworks will show that such “images of an icon” may express politically incompatible narratives of law. And yet, notwithstanding conflicts of substance, the core image of Magna Carta itself unites the various images it generates to promote and reinforce a shared faith in a fundamental principle: the rule of law as the guarantee of liberty. In sum, what the vacuous heart of the “icon” embodies is the unproblematic doctrine that liberty is what “the rule of law” provides, and it is what only “the rule of law” can provide. Rather than an expression of transition or triumph, like the early modern emblems analyzed by Manderson and Goodrich, the more the core relies on a text transformed into an image of

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9 Manderson, supra note 5, at 218.
itself, the more effectively Magna Carta translates into a visual register the contemporary regime in which “law is increasingly law because it calls itself law.”

With the assistance of a court case set on the edge of Runnymede and adopting its metaphor from Cornelia Parker’s commemorative work, Magna Carta (An Embroidery), the Article will conclude by suggesting that when the apparent seamlessness of law and liberty made visible in the image of Magna Carta is unpicked, what we then glimpse are the brittle institutional bonds and boundaries of the rule of law otherwise concealed beneath the ideological identification with the defense of liberty embellished by the other commemorative images.

B. From a New Bill of Rights to Magna Carta

The lack of a foundational text came strongly into view in the early years of the millennium in the context of a perceived threat to the identity of the U.K. as a nation united by a distinctive spirit of liberty under law. While views on the predominant sources of the threat and the degree and nature of constitutional reform required differed across the parties, there was widespread agreement that a new foundational document had a major part to play. Many tensions were identified, each in its way reflecting a multiplication of jurisdictions and normative cultures crossing an increasingly multicultural national space and a globalized world. At the time, these included a perceived threat to unified national sovereignty from European law, as well as from the growing impact of the 1998 devolutionary settlements for Scotland, Wales and North Ireland. In addition, according to the Labour Government’s Green Paper on The Governance of Britain, the crisis reflected a growing diversity of identities resulting from immigration and settlement, along with a noticeable disengagement from conventional politics by young people, many of them the offspring of earlier generations of immigrants. The latter had become a particular concern following the attacks on New York in September 2001 and on London in July 2005, as attention turned to the challenge to national loyalty allegedly resulting from the religious allegiances of young


13 THE SECRETARY OF STATE FOR JUSTICE, supra note12, at 40.
Muslims. The government’s repeated attempts to combat terrorism by increasing the periods of time during which suspects could be detained without charge were, on the one hand, seen as undermining belief in the role of law as protecting the individual from the state. On the other hand, the rulings of the courts overturning these regulations and parallel measures regarding deportees and asylum seekers were interpreted as a threat from foreign-derived human rights law to the defense of the nation.

Colley’s observation quoted above about the absence of a written document arose, then, in the context of a campaign aimed at resolving issues of common identity in the constitution of a multicultural nation.\textsuperscript{14} Although The Governance of Britain paper did not go as far as proposing a written constitution, it did give a central role to a foundational document in which national identity would be described as a bundle of individual legally enforceable rights and obligations. Although Magna Carta was referred to in these debates, it was clearly felt that a document that revisited “the birth of the modern British Constitution” would be more suitable: The Bill of Rights of 1689.\textsuperscript{15} According to the Government, a new “Bill of Rights and Duties” would furnish a “British statement of values” that encompassed “the ideals and principles that bind us together as a nation.”\textsuperscript{16} By offering people “a clear definition of citizenship,” the Bill would promote “a better sense of their British identity in a globalised [sic] world.”\textsuperscript{17} The proposal was broadly endorsed by the other parties in similar terms. However, for the Conservatives, its main contribution would be to “restore British parliamentary supremacy as against law made elsewhere.”\textsuperscript{18} A modern British Bill of Rights would, in sum, replace the foreign-inspired Human Rights Act with “a new solution that protects liberties in this country that is homegrown and sensitive to Britain’s legal inheritance.”\textsuperscript{19} Although the vision of national identity and the substance of its core values were quite different for each of the major parties, they were all nonetheless in agreement that a document that made these values visible would help resolve the tensions between multiple jurisdictions, nomoi, and identities, and thereby contribute to a renewed national coherence.

\textsuperscript{14} See Colley, supra note 2 (noting that the UK does not have any document comparable to the Constitution on display in Washington, DC). An organization entitled Charter 88 had campaigned for a written constitution since 2005. Cf. Linda Colley, Writing Constitutions into British History, BRISTOL UNIVERSITY CENTENARY LECTURE (July 21, 2009), http://www.bristol.ac.uk/centenary/listen/lectures/colley.html (audio recording). For further context, see also infra note 43.

\textsuperscript{15} See The Secretary of State for Justice, supra note 12. The original Bill of Rights was a key part of the constitutional settlement known as the “Glorious Revolution” that ended the contest between monarch and parliament under the Stuarts and assured the Protestant succession in Britain.

\textsuperscript{16} Id. at 58.

\textsuperscript{17} Id. at 54.

\textsuperscript{18} Cameron, supra note 12.

\textsuperscript{19} Id.
The devil, as it turned out, was in the political substance of the legal rights and duties of citizens, the specific powers and limits of the state, and relations between "British" and European or "human" rights. By the 2015 election, the Labour Party had effectively abandoned the project in favor of a broad "Constitutional Convention." The Conservatives, meanwhile, have repeatedly postponed acting on their longstanding commitment to replace the Human Rights Act. While the Queen’s Speech opening the 2016 Parliamentary session promised, as it had the year before, that “[p]roposals will be brought forward for a British Bill of Rights,” the most recent published proposal no longer pretended to offer any substantive changes to the rights enshrined in the Human Rights Act.20 Rather, it envisaged re-importing the European Convention into primary legislation in order to strip out the interpretative glosses of European case law.

The fact is that the constraints of the internationalization of law mean that the U.K. can no longer imagine a national Bill of Rights that is in any substantial sense different from the European Convention without a radical dissolution of its ties to Europe. A new foundational law based on rights would therefore not be able to provide the clear image of liberty under law that its multicultural citizens could identify as distinctively British. But it was not as if the issues had become any less urgent—as demonstrated by the moral panic over the radicalization of Muslim youth consistently expressed by the government’s “Prevent” campaign in terms of allegiance to “British values” (from 2011), procedures for “English votes for English laws” (adopted in 2015), and the expansion of the security state proposed in the Counter-Terrorism and Security Act (2015) and a promised Counter-Extremism Bill (2016).21 In addition, constitutional pressures have led to an unprecedented series of referenda on different aspects of governance: proportional representation (2011), reform of the House of Lords (2012), Scottish independence (2014), and membership of the European Union (announced in 2013 and enacted in 2016). Although each event up to 2014 produced a clear outcome, none had effectively resolved the issue it was designed to address.22 The concerns that had given rise to proposals for a British Bill of Rights remained

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21 “Prevent” was the name given to a key element in the Government’s strategy from 2010 for combating terrorism and extremism. The latter term was defined in 2011 as “vocal or active opposition to fundamental British values.” H.M. GOVERNMENT, REVISED PREVENT DUTY GUIDANCE: FOR ENGLAND AND WALES 2 (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445977/3799_Revised_Prevent_Duty_Guidance__England_Wales_V2-Interactive.pdf (emphasis added). Further promised legislation has been hampered by difficulties in defining these values in a culturally inclusive and legally robust manner.

22 The indeterminate implications of the outcome of the referendum on E.U. membership held on June 23, 2016 was reflected in the phrase “Brexit means Brexit.” The slogan was first used by Theresa May at the launch of her successful campaign to succeed David Cameron as Prime Minister following his resignation. Jessica Elgot & Rowena Mason, Theresa May launches Tory leadership bid with pledge to unite country, THE GUARDIAN, June 20, 2016, https://www.theguardian.com/politics/2016/jun/30/theresa-may-launches-tory-leadership-bid-with-pledge-to-unite-country. It was much repeated in subsequent months by supporters of the “Leave” vote as the answer to any
acute when, in 2015, the commemorations of the 800\textsuperscript{th} anniversary of Magna Carta offered an alternative opportunity to create a unifying foundational image of law in Britain without needing to produce an agreed substantive text.\textsuperscript{23}

From a British point of view, nothing is more British than Magna Carta. The popularity of the opaque titled document written in an ancient language is positively assisted by the fact that its legal content is so archaic and, at best, only vaguely recalled. A massive gap exists between the context and meaning of its concrete legal provisions in the thirteenth century and today.\textsuperscript{24} What nonetheless survives is a national attachment that can be heard reverberating in the call for justice in an episode of the popular British television comedy, \textit{Hancock’s Half Hour}, devoted to a parody of Sidney Lumet’s Oscar-nominated courtroom drama, \textit{12 Angry Men}: “Does Magna Carta mean nothing to you?” cries Tony Hancock to his fellow jurors, “Did she die in vain?”\textsuperscript{25}

Undoubtedly Magna Carta has affective meaning, but what does it mean in intellectual terms? The question famously arose when David Letterman, host of CBS’s \textit{The Late Show} in the United States, asked David Cameron the straightforward question: “Latin for what? Big

questioning of the meaning of the electoral act. The tautological explanation of one opaque but emotive neologism by reference to itself is consistent with the argument elaborated below regarding the way in which the self-referential character of the postmodern icon obscures the absence of a core of substantive meaning.

\textsuperscript{23} For a “rhetorical analysis” of the exploitation of Magna Carta as a “founding myth” for Britishness by the leaders of both major parties, see Judi Atkins, \textit{(Re)imagining Magna Carta}, \textit{PARLIAMENTARY AFFAIRS} (2015), http://pa.oxfordjournals.org.abc.cardiff.ac.uk/content/early/2015/11/30/pa.gsv057.full.pdf+html.

\textsuperscript{24} Magna Carta was as much a peace treaty as a foundational legal text. The original Charter commemorated in 2015 followed an uprising of the Barons against King John in 1214 and resulted from negotiations brokered by the Archbishop of Canterbury at Runnymede in June 1215. The provisions in the sixty-three clauses of the original Latin text included regulations relating to freedom of navigation of rivers, the standardization of weights and measures, taxation, the rights of heirs and widows, the administration of the law, reparations to the Welsh, relief from the payment of debts to Jews, and limits on access to the law for women. Only four clauses now remain on the statute book. Two guarantee the ancient liberties of the Church, the City of London and some other towns, and the other two have been amalgamated into the commitment to “the rule of law” discussed below. When people refer to “Magna Carta” with any precision at all, they are referring to the latter clauses. Some thirteen copies were made of the foundational text of Magna Carta, of which four survive. But the original document celebrated in June 2015 was in fact repudiated a few months after the sealing by the King, who was supported by the Pope. Following King John’s death, a new version, accompanied by a “Charter of the Forest,” was issued in the name of the infant King Henry III. It was only in 1225, now in his majority, that Henry promulgated—for the first time of the sovereign’s own will—definitive new versions of both charters, which were finally placed on the statute book by Edward I in 1297.

The Prime Minister explained that “[t]he big moment of the Magna Carta was basically people saying to the king that, you know, other people have to have rights it is very important that you respect.” The exchange came after a series of similarly disingenuous questions from Letterman about “the days of colonization,” the incomprehensible relations between the devolved nations of the United Kingdom, and the authorship of “Rule Britannia.” In short, Magna Carta appeared, like the Bill of Rights, on the same fraught terrain of rights in the context of the nation’s post-devolutionary identity and post-imperial place in world history. Unsatisfied by Cameron’s anachronistic language and chaotic syntax, Letterman pressed gently for a more philological account: “and the literal translation is what?” he asked; “You have ‘Magna’ . . . ?” Given his education, the Prime Minister’s inability to respond must have had the character of a parataxis.

By the time of the commemorations in 2015, Cameron had worked out a more elaborate response. His statements placed the ancient document in the very space that the proposal for a new British Bill of Rights had failed to fill and made it central to the resolution of the tensions between “British” and “human” rights as well as between the imperial past and Britain’s present position in the globalized world. Notably, Magna Carta shifted focus from rights discourse to the rule of law and due process themselves: “The limits of executive power, guaranteed access to justice, the belief that there should be something called the rule of law, that there shouldn’t be imprisonment without trial, Magna Carta introduced the idea that we should write these things down and live by them.” Speaking in loco, the Prime Minister began by drawing attention to Runnymede itself and hence the organic nativeness of liberty in England: “We talk about the ‘law of the land’ and this is the very land where that—and the rights that flow from it—took root.” Though rooted in its place and time, Magna Carta was from its origin “a document that would change the world.” Like the pageant reenacting the event at the commemorations held in 1934, the speech brings the image of the barons repeatedly to mind. “Did those barons know,” Cameron invited the audience to “wonder,” “how its clauses would echo through the ages?” As we follow its echo, the flow of empire transformed into a stream of liberty. We travel through America, India, and South Africa, and beyond: Magna Carta survives still as an image of “what others are crying out for, hoping for, praying for.” But, the Prime Minister pointed out, “here in Britain, ironically, the place where those ideas were first set out, the good name of ‘human

26 David Letterman, The Late Show (CBS television broadcast Sept. 26, 2012), available at https://www.youtube.com/watch?v=zQwWriP5ToSQ.


29 Cameron, supra note 27.
rights’ has sometimes become distorted and devalued.” Again, Britain stands ready to correct the distortion of the true meaning of liberty through the superiority of its law: “It falls to us in this generation to restore the reputation of those rights—and their critical underpinning of our legal system. It is our duty to safeguard the legacy, the idea, the momentous achievement of those barons.”

The medium for this vision could hardly have been more traditional or more contingent: Spoken words solemnly proclaimed at a commemorative occasion. Put another way, it was the product of a political performance, and what it presented was a verbal image, not a doctrine: Magna Carta was the foundation of justice and liberty through the rule of law and legal procedures based on the English common law tradition. Although ephemeral, the speech was part of a vast number of events organized throughout the country during the anniversary year, many of which left more permanent traces, including the artworks we will be analyzing in due course. To be sure, it was not the only narrative available at Runnymede in 2015. To the left of the main stage can be seen a concrete image that predates the one conjured by the Prime Minister’s performance by over half a century.\(^{30}\)

The Magna Carta Memorial at Runnymede was designed by Edward Maufe, a respected English architect specializing in religious buildings (notably the Guilford Cathedral nearby) and war memorials (including one to the Air Force at the same site). Erected in 1957, the Memorial was granted Grade II listing by Historic England in December 2015 as “the only specifically designed structure to commemorate the signing [sic] of the Magna Carta.”\(^{31}\) The temple-like building consists of a neoclassical circular colonnade surrounding a two-meter high cylinder of English granite bearing the words “Magna Carta Symbol of Freedom under Law.” The pillar also bears an American lone star and lettering around the inside of the cupola records that the Memorial was sponsored by the American Bar Association (ABA). The monument thus reminds us that Magna Carta has, arguably, been at least as central to American identity as it has to British identity. Certainly, the American presence has always been in the background at Runnymede, whose quintessentially English soil was itself acquired for the nation with American money in 1929.\(^{32}\) The Memorial was rededicated on June 15, 2015 shortly after Cameron’s speech in a ceremony patronized by the Princess Royal, the Attorney General of the United States, and the President of the ABA. In other

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\(^{30}\) The structure is visible in the background of the photograph featuring the Runnymede Eco-village Diggers above in Figure 1.

\(^{31}\) Magna Carta Monument, HISTORIC ENGLAND (Dec. 18, 2016), [http://www.historicengland.org.uk/listing/the-list/list-entry/1430723](http://www.historicengland.org.uk/listing/the-list/list-entry/1430723).

\(^{32}\) The land was acquired and gifted to the National Trust in 1929 by the American widow of Urban Hanlan Broughton, a British-born engineer who had made his fortune in the USA before returning to the UK and becoming a Conservative MP. For details, see Nicholas Vincent & Steven Franklin, Runnymede and the Commemoration of Magna Carta (1923–2015), THE MAGNA CARTA PROJECT (July 2015), [http://magnacarta.cmp.uea.ac.uk/read/feature_of_the_month/Jul_2015](http://magnacarta.cmp.uea.ac.uk/read/feature_of_the_month/Jul_2015).
words, the rule of law memorialized at Runnymede is not only that of the Prime Minister’s resolutely English narrative, but equally that curated by the professional corporation of U.S. lawyers. The Memorial’s republican neoclassicism rubs against the usual gothic associations of the feudal event as the written constitution contrasts with the unwritten. Nonetheless, I would argue, the two images are able to coexist pacifically in the space of Runnymede because the treatment of the document as an image—in the mind’s eye or as a structure—subordinates the actual properties of the law in question to the label inscribed by the American Bar on English stone in an English meadow purchased with American money: “Freedom under Law.” Magna Carta can serve as an image of both a law based on the written U.S. constitution and on the unwritten British constitution since ultimately what is envisioned by the image is simply the grounding of liberty in law and of law in the defense of freedom, regardless of its specific provisions and administration.

C. An Icon of Liberty

![Magna Carta Icon of Liberty](http://iconofliberty.com)

Fig. 2. Screenshot from the website *Magna Carta: Icon of Liberty*, reproduced with the permission of the American Bar Association.

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33 American Bar Association, Homepage, MAGNA CARTA: ICON OF LIBERTY, [http://iconofliberty.com](http://iconofliberty.com) (last visited May 20, 2016). The site was created by the American Bar Association Division for Public Education through a grant from the Magna Carta Trust as a legacy project to commemorate the 800th anniversary of Magna Carta.
This image of Magna Carta was both fleshed out and given a global dimension by the website launched by the ABA as part of its contributions to the commemorations. Through digitization, the image is deracinated from Runnymede and relocated within a multiplication of images across virtual space. Magna Carta’s “original time and place” is invoked only to establish the site’s principal theme: that the Charter has “transcended” its origins “to become one of the world’s most recognized and enduring symbols of liberty under law.”

The images and their labels establish a set of visual and verbal associations between Magna Carta, global freedom, and—less immediately apparent—the American constitution. The title of the opening page—“The Great Charter of Liberty”—looks like the simple translation into plain English that Letterman had sought from the British Prime Minister; the phrase links it, for some viewers at least, with the three “Charters of Freedom,” as the American Declaration of Independence, the Constitution, and the Bill of Rights are known in the U.S. Furthermore, as we can discover elsewhere on the site, the banner spelling out “Magna Carta” in the background is taken from a 1768 painting by Christian Remnick portraying a “Perspective View of the Blockade of Boston Harbor.” Beneath this, “Magna Carta’s global presence” is introduced by the sub-heading “An International Symbol,” which in turn is topped by a small, stylized image of the globe. This image of the world displays not the conventional design centered on the Atlantic used in most parts of the world but the outlines of North and mainland Central America customarily employed in the U.S. The global reach of the subtly Americanized charter is then pursued elsewhere on the site through a “gallery” of visual allusions in a variety of media and international locations that, on examination, prove to be drawn exclusively from the white Anglophone world. None of this rhetoric is surprising, and I quote it in part to qualify Cameron’s British narrative and to demonstrate

34 Id.

35 See Letterman, supra note 26 and accompanying text [recounting the interview between David Letterman and David Cameron about Magna Carta].

36 American Bar Association, *Protest Art Invokes Magna Carta*, MAGNA CARTA: ICON OF LIBERTY, http://iconofliberty.com/gallery/perspective-view-of-the-blockade-of-boston-harbor-by-christian-remnick-1768/?link=main-gallery (last visited May 20, 2016). From a global point of view, at the time when negotiations were underway regarding the Transatlantic Trade and Investment Partnership, perhaps the most important measure of the Magna Carta was indeed the safeguards against unlawful taxation invoked in modern times by the Boston revolt.

37 American Bar Association, *Images of an Icon*, MAGNA CARTA: ICON OF LIBERTY, http://iconofliberty.com/main-gallery/ (last visited May 20, 2016). Images depicted include the door and frieze of the US Supreme Court and the constitutions of American States, along with “Magna Carta Shares Space at Fort Knox” and, auspiciously, “Magna Carta makes a splash at 1939 Worlds Fair” (http://iconofliberty.com/icon/manuscript/). The images selected in the area of popular culture are, with the exception of the British folk band “Magna Carta” and a link to a TED talk by Tim Berners-Lee, entirely American (http://iconofliberty.com/icon/culture/), as are the two exhibitions included in the section “Exhibits” (http://iconofliberty.com/icon/exhibits/). Under “Display” we find images referring to Magna Carta in stained glass windows in Boston, Mass., Philadelphia, and Worcester Cathedral; the pulpit of the National Cathedral, Washington DC; the frieze of the British Supreme Court; the façade of the Supreme Court of Colorado, and murals from Indiana, Ohio and Wisconsin; a replica of Magna Carta itself at the US Capitol, and monuments from Australia, Canada, and South Africa (http://iconofliberty.com/icon/display/).
how the Charter is able to subsume as well as convey different national claims to its ownership as it universalizes its Anglo-Saxon vision of law and liberty. What is really interesting about the website is the title given by the ABA: “Magna Carta: Icon of Liberty.”

The digital image of Magna Carta brings us then to the question raised in the introduction about the type of image that the Charter presents in 2015. If, as Goodrich has shown, the emblem was central to the visualization of the bases of law in the seventeenth century, I want now to examine how the notion of the icon can help us understand the way legal foundations are imagined in the twenty-first century.

The “icon” has certainly long played an important role in thinking about law and the image. Further, the term had been applied in connection with the Charter in the years before its promotion by the ABA website in two different contexts. Recalling Manderson’s reference to the early modern transition from images as icons “whose meaning is simply present, like an aura” to visual objects that require interpretation, the return of the language of the icon today clearly cannot imply a simple return to its original ontology without a return to the theology that supported that sense of presence. Indeed, the way the term is deployed on this website alerts us to the fact that if Magna Carta is an icon, it is an icon of a particular sort. This icon is apparently of a kind that can fit into the syntax used in the title given to the internationally-sourced gallery of reproductions of the Charter, of memorials, and of representations of the scene at Runnymede: “Images of an Icon.” Because an icon is itself an image, the self-reference here is key. For citizens of the U.S., the multiplicity of images of the icon takes one beyond the “Charter of Liberty” itself towards the set of “Charters of Freedom,” the true scriptures at the U.S. core of “freedom under law”—the foundational laws of the state. In contrast, as I pointed out at the opening of this Article, from the British point of view there is no ultimate legal scripture of this sort to which the icon directs our reverence. The unwritten law becomes visible in a multiplicity of images without a core. If, following the failure to produce a new legal document on which to refocus national identity in post-imperial Britain, Magna Carta was able to offer a foundational core for a plurality of images, it is because the core is, in effect, empty. It images not a living law, but only itself as a symbol: an image of the foundation of liberty in the rule of law as such.

Making Magna Carta into this sort of icon depends, in the first place, therefore, on the treatment of the written document not as an eventually problematic discursive text but as

38 American Bar Association, supra note 33.

39 See Douzinas, supra note 3. Goodrich himself draws a parallel between his notion of “visiocracy” and Marie-José Mondzain’s influential theory of “iconocracy.” See Goodrich, supra note 5, at 16 n.16; Marie-José Mondzain, Can Images Kill?, 36 CRITICAL INQUIRY 20 (2009).

40 Manderson, supra note 5.

41 American Bar Association, supra note 37.
a visual image of what it represents made of itself. It is, in this sense, an “auto-icon,” to use Jeremy Bentham’s term for his effigy of and to himself. The transformation from verbal to visual artifact draws away from the philological and juridical content of the text towards its abstract value as a symbol of what it is held to mean in the context in which it is made visible. Magna Carta had already been referred to in this way as an “icon of liberty” in the context of an exhibition curated by Linda Colley at the time of the debates in Britain over national identity and law reviewed above. Commissioned by the British Library, Colley had assembled a collection of documents and images into a historical narrative of the struggle for and on behalf of political freedom in Britain under the eloquent title *Taking Liberties*. Integrated into a gallery exhibition, the historic documents were displayed to the public gaze alongside engravings, posters, and banners like artworks or objects in traditional exhibitions. Shaped by their arrangement and labeling, the meaning of the exhibits lay not so much in their content but, like many art historical displays, in what they stood for in a cultural narrative and the contemporary debate. In that sense, according to the website that accompanied and prolongs the life of the exhibition, the “Star items” from the display which the site reproduces in digital form constitute “40 key icons of liberty and progress, from Magna Carta to the Declaration of Human Rights.”

Along with its character as a signifier of a presence, the term “icon” customarily implies a quality of attention or attitude expected from the viewer. The text being displayed in the Library’s exhibition as an image of what it represents is iconic in the sense that it brings with it an aura as an authentic relic of a historical moment. That was the moment, as the Prime Minister sought to bring to our minds’ eye at Runnymede, when the foundational principle of the rule of law was, to use his words, “written down” to be “lived by”—incarnated, in a sense. The ceremonious presentation of the Charter in a privileged space like the British Library exhibition gallery exploits the aura of an original, rarely seen document that, while unreadable to the common spectator and still incomprehensible when transcribed, is of decisive significance to their identity. In this case, though, the relic is not unique; it is an

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42 In the context of his campaign in favor of the 1832 Anatomy Act, Bentham proposed that utility would be further maximized through a system of post-mortem dissection if the remains were used to allow everyone to have a memorial to themselves constructed out of their own skeleton, dressed in their own clothes, and surmounted by their preserved head. See JEREMY BENTHAM, BENTHAM’S AUTO-ICON AND RELATED WRITINGS (James E. Crimmins ed., 2002); Martin Kayman, A Memorial for Jeremy Bentham: Memory, Fiction, and Writing the Law, 15 L. & Critique 207 (2004). Bentham’s own “auto-icon” can be seen in a corridor of University College London. UCL Culture, University College London, https://www.ucl.ac.uk/museums/jeremy-bentham (last visited May 20, 2016).

43 The exhibition took place from October 31, 2008 to March 1, 2009. See MICHAEL ASHLEY, TAKING LIBERTIES (2008); Colley, supra note 2; Kayman, supra note 12 notes the contrasts between this exhibition and the 1988 commemorations of the 300th anniversary of the Glorious Revolution and the “Bill of Rights.”


45 Cameron, supra note 27.
image of an absent core. Along with the phrase “images of an icon” goes another: “[A]n original copy.” The parchment on display in the 2008 exhibition is one of four surviving transcriptions: An image of an image. In 2015, the aura of the textual images of Magna Carta was further intensified when, with the support of the “global law firm Linklaters,” the four surviving copies of the original 2015 charter were brought together, for the first time, to be viewed at the British Library over three days by scholars and by the magical number of 1,215 members of the public, selected by ballot.

Making a digital copy of Magna Carta available online and styling it an icon expands its global iterability while also bringing with it, I would suggest, the expectation of reverence theauratic presence of the “original copy” had in the “live” exhibition. Taking Liberties was the second of the Library’s shows whose existence was prolonged and expanded through an online presence. The previous year, an exhibition on the foundations of the major religions, entitled Sacred, was accompanied by a website featuring a selection of images from a range of “Sacred Texts.” Although, no doubt, the employment of the term “icon” in 2008 owed nothing directly to the previous exhibition, the religious association was certainly present in a third description of Magna Carta as an “Icon of Liberty” twenty years previously. Magna Carta: Icon of Liberty was the title given to a booklet produced for the touring display of the Lincoln Cathedral’s original copy of the Charter at the commemorations of the bicentennial anniversary of the United States Constitution in 1987 and at the World Expo in Australia the following year.

In the introduction, John S. Nurser recalls his response to assuming responsibility for the parchment upon his appointment as the Canon Chancellor of Lincoln in the following terms:

Class ‘A’ mythic objects in world history are very few: it was as if I was being asked to take over the guardianship of the two stone tables Moses had brought down from Mount Sinai, or the crown of the Emperor Charlemagne, or the axe that had cut off King Charles’s head.

While the Canon locates Magna Carta in a fascinating list of world-mythic objects of law, sovereignty, and liberty, the editor of the booklet and sub-dean of the Cathedral, the Reverend Rex Davis, felt that the use of “icon” in this context was unfamiliar enough to require an explanation. Writing, as it were, canonically himself, Davis explains that an icon

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47 Id.


49 MAGNA CARTA: ICON OF LIBERTY (Rex Davis ed., 1988).

50 John S. Nurser, Introduction, MAGNA CARTA 12.
is a "likeness . . . [that] could be a visible way of explaining the invisible truths of religion."\textsuperscript{51} In this way, he concludes, "it is not altogether a mistake to see the frail ageing document preserved so long at Lincoln Cathedral to be an . . . Icon of Liberty."\textsuperscript{52}

Here, then, one might think, we find evidence of the survival of the “visial line” of Anglican theology described by Goodrich,\textsuperscript{53} but Davis’s hesitation ("it is not altogether a mistake") alerts us to the problem behind the confident title adopted by the booklet. The effectiveness of the religious icon relies on faith in the institution and its doctrine and on the subject’s identification with a community of believers.\textsuperscript{54} In contrast to the reverence that is found towards the Constitution in the U.S., the problem that a foundational document is supposed to resolve in Britain, as I argued above, is precisely the collapse of a shared faith in the traditional “nomos and narrative” of national law.\textsuperscript{55} So, between the references to an “icon of liberty” by the Canons of Lincoln Cathedral in 1998 and the lawyers of the ABA in 2015, via the British Library’s “Star items” of 2008, what allows Magna Carta to do its work promoting reverence for the rule of law without regard to agreement concerning the concrete content, structure, and administration of that law is the way in which it sits indeterminately within two senses of the icon: The digitized image of the text on the one hand and the venerated religious image on the other.

In truth, then, as should be apparent from the above, “icon” isn’t exactly the right term to describe the Charter. I have commented on the gap in substance between Magna Carta as thirteenth-century law and its invocation in the current context. But from a formal point of view too, reproduced through multiple copies and historical iterations as it crosses languages and media from Latin manuscript parchment to visual exhibit, via diverse print formats to digital form, it isn’t clear what type of signifier the Charter actually is and what therefore it can be said to mean besides a general faith in the rule of law as the source of liberty. As we shall see below in the case of the Runnymede Diggers, the one thing that with certainty the commemorations were not celebrating is an original, still active, legal text, like the American Constitution. But it is harder to say with equal accuracy what Magna Carta actually is.

\textsuperscript{51} DAVIS, Epilogue, MAGNA CARTA 54.

\textsuperscript{52} Id.


Indeed, as people seek to characterize Magna Carta, terms proliferate like the visual images themselves. Taking just one document, the introduction to the catalogue produced for the British Library’s 2015 exhibition entitled *Magna Carta: Law, Liberty, Legacy* refers to Magna Carta as a “myth and totem rather than . . . [a] historic reality.” Nicholas Vincent continues, “Magna Carta remains a document more mythologized than read.” As the theme is taken up by other contributors, the terms describing what kind of text is being commemorated simply multiply. Thus, Alexander Lock and Justin Champion see the “potency” of the document in the eighteenth and nineteenth centuries not in terms of its provisions but precisely its deployment “as a visual invocation of liberty.” They observe that “Magna Carta was rarely read and barely understood by those who used it. It had become little more than a heroic symbol of English liberty” whose value lay not in the words it contained but in “its iconic significance.” By the nineteenth century, “Magna Carta had become a slogan calculated to stir patriotic emotions and mobilize public support.” Moreover, free from the constraints of textual detail, its indeterminate status has been accompanied by the plasticity of the political position it could be made to stand for. As Vincent puts it, it has been used “as a symbol of the rights of the oppressed to resist their oppressors. Meanwhile, with no less enthusiasm, it has been embraced by conservatives who lay claim to it as proof of a stable and unchanging legal consensus.” Finally, then, Joshua Rozenberg opens his contribution on “Magna Carta in the Modern Age” by proclaiming the Charter simply “a world-class brand.” Pursuing the analogy, Rozenberg points out that the Charter does not actually mention any of the things it “stands for” today; like Coca Cola and Apple, he says, “Magna Carta is . . . iconic: regardless of what it says on the parchment, it enjoys instant recognition as the most important legal document in the common law world.”

In sum, Magna Carta’s “iconic” potency derives from the fact that, as a document transformed into a visual image of itself, it does not mean what it mentions and can be effective “regardless,” to use Rozenberg’s word, of “what it says.”

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57 *Id.*


59 *Id.* at 161.

60 *Id.*

61 *Vincent, supra* note 56, at 15.


63 *Id.*
Carta, what words mean (including “iconic”) is not as important as what they can be made to signify in visual configurations of themselves. It is ultimately in this sense, then, that we should understand the tautological reference on the ABA website to “images of an icon”: the proliferating generation of images that refer not outwards but back to the image of a legal relic as “an icon of Liberty.”

D. Images of an Icon

So far we have observed this phenomenon at a meta-level: the different but complementary presentations of the Magna Carta as an image of British or U.S. identity and global ambition. Let us turn now to the two “images of the icon” ceremoniously inaugurated in 2015 as permanent registers to the legacy of Runnymede: Hew Locke’s sculpture entitled The Jurors and James Butler’s statue of Queen Elizabeth II. The artworks, we will find, take us back to the heart of the tensions in British identity and its narrative of law that we discussed above as they illustrate how the images of Magna Carta were able to both present and accommodate those tensions within the national context.

With the exception of the figure of Lady Justice herself, sculptures have not generally received the same attention from critical lawyers as two-dimensional visualizations of law. Nonetheless, it is to be recalled that the first written Senate decrees in fourth- and fifth-century Athens were originally published on stone stelae, often accompanied by visual images. Statute and statue share a common root in standing something up, establishing something. Both set a body in place that creates and configures social space, directing the relations of the bodies of citizens to the norms and narratives stood up in their midst and to other citizens moving within that shared space.

In the dispersed economy of legal images in Britain, public sculptures have traditionally played a role within the civic landscape as, to adopt the term used by eighteenth-century jurisprudents for the documentary records of the “unwritten” law, “monuments” to the spirit of the common law. Consider, for example, the proliferation of nineteenth-century neo-classical statuary to national military and civic virtues that adorn most British cities. Although such monuments to a largely masculine, white, and Anglican imperial culture became anathema to modernist artists for much of the twentieth century, the period we have been concerned with here has seen a revival in both public art and in representations of the human body in Britain, often with deliberate political

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64 For a comprehensive study of Lady Justice, see Dennis E. Curtis & Judith Resnik, Images of Justice, 96 YALE L. J. 1727 (1987).


66 See Matthew Hale, The History of the Common Law of England: Written by a Learned Hand 23 (1713) and Blackstone, supra note 3, at III. 379. For further discussion of sculpture and law, see Kayman, supra note 65 and Kayman, The Bill of Rights, supra note 12.
intent and effect. The works installed at Runnymede, as we shall see, offer the spectator quite opposed visions of Magna Carta that map directly onto the tensions we noted earlier.

Nonetheless, I shall argue, as both monuments to and images of the icon that coexist in the same commemorative space, their political differences are subsumed under—and thereby arguably reinforce—the idea of the rule of law as the foundation of liberty and its identification with the nation. We will conclude by analyzing a case involving Runnymede itself and viewing a third commemorative artwork that disturbs this accommodation by bringing into sight the bodies of individuals and communities directly engaged at present in or by the rule of law in Britain.

Commissioned by Surrey County Council and unveiled by the Duke of Cambridge just before Cameron’s speech, the official monument, Hew Locke’s The Jurors, has a complex relation to the tradition of public statuary. Locke is a British artist of mixed-race origin, brought up in Guyana. He works in a range of media and on a variety of public topics, including treatments of royal portraits and coats of arms. Here, rather than providing us in a traditional way with human figures to literally look up to, Locke has cast “12 bronze chairs, each decorated with images and symbols relating to past and ongoing struggles for freedom, rule of law and equal rights.” The two faces of each backrest carry a sharply detailed pictorial image in relief, marked by hand-made scratches and embellished with keys, flowers and other symbols. The designs depict buildings, ships, small objects, and lettering in various languages and scripts, and historic portraits drawn from existing graphic images, mainly of notable but not widely-known women. Together, the images draw on episodes from across history and around the world to allude to the struggle for the rights of women, gays, children, the disabled, and indigenous peoples; for freedom of speech, in public, and on the internet; against the slave trade, apartheid, the traffic in refugees; the risk of ecological disaster, secret police, political imprisonment, and extra-judicial abductions. One celebrates the emancipation of the serfs. The designs also include images of justice from China and Ancient Egypt, the Golden Mean, and the clause from Magna Carta that, Locke tells us in a video on the site, inspired the work.

To assist them in understanding the images, spectators are provided with a leaflet containing short explanations. Again the work is supported by a website reproducing each

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67 In relation to public art, see both Igor Toronyi-Lalic, WHAT’S THAT THING?: A REPORT ON PUBLIC ART (2012), and the official designation of forty-one new listed works by the body responsible for England’s historic environment, Historic England, in January 2016, of which nearly half involve the human figure, Post-War Public Art Listed, HISTORIC ENGLAND (Jan. 22, 2016), https://historicengland.org.uk/news-features/news/Post-War-Public-Art-Listed. For an account of the cultural politics associated with return of the human body in contemporary British sculpture, see Martin A. Kayman, Bodies of Law and Sculptural Bodies, 24 TEXTUAL PRAC. 799 (2010).


69 Id. at http://artatrunnymede.com/introductory-video/.
component with further narrative detail, as well as videos explaining the intention behind the work and the story of its making.\textsuperscript{70}

Locke maintains that “The Jurors is not a memorial” but an invitation to on-site discussion.\textsuperscript{71} The chairs are arranged not in the passive position of onlookers familiar from courtroom proceedings, but in an oblong, as they might be in the jury room—or a seminar room perhaps. As chairs rather than pedestals, the space they create is not occupied by bodies to be admired as one walks round them but by the spectators themselves, on the same level with the images.\textsuperscript{72} We are invited to respect and engage with the images and each other like a jury of equals. In short, Locke’s work embodies the sort of democratic multicultural rights culture that troubled the early twenty-first-century debates around national identity, security and sovereignty. The images present a comprehensive, not to say encyclopedic, corpus of international moments of oppression and liberation and of noble ideals and protagonists of justice drawn from a broad range of human history for us to sit together among. The work is both site-specific and global. Constructed of noble material suitable to the international causes it, pace Locke, undoubtedly memorializes, it is anchored both physically and institutionally to the site of Magna Carta.\textsuperscript{73} At the same time, access to its imagery and narratives is amplified through the website.

Although one may find the work aesthetically unadventurous, as a piece of public art it has many virtues. Yet, given its purpose in commemorating Magna Carta, a number of questions arise regarding its relationship to jury trial, the association of jury trial with the Charter, and with liberty. In the first place, the space created by The Jurors is hardly that of a trial. What is actually at issue for those who sit in the jury seats, other than their capacity to recognize the references and symbols? The model of discussion proposed by the roll of good causes, victims of oppression, champions of liberty and unexceptionable principles of justice is likely to resemble more the didactic engagement of a school classroom than the eventually “angry” debates over evidence portrayed in their different registers by Lumet’s dramatic and Hancock’s parodic performances of the jury room.\textsuperscript{74} Furthermore, only three of the images

\textsuperscript{70} The website also offers a film of the dedication showing a group of predominantly young people of various racial origins—of the sort identified in 2007 as alienated from the political process—and some with disabilities perform a reading of Owen Sheers’s poem, “Or In Any Other Way,” in which much of the material alluded to in the sculpture is put into the meter of Wilde’s “The Ballad of Reading Gaol.” \textit{id}. at http://artatrunnymede.com/dedication/.

\textsuperscript{71} Locke, \textit{supra} note 69.

\textsuperscript{72} Compare Anthony Gormley’s \textit{One and Other}, which occupied the vacant Fourth Plinth at Trafalgar Square for 100 days in 2009 with a series of 2,400 volunteers. \textit{ANTHONY GORMLEY, ONE AND OTHER} (2010). Daniel Berset’s \textit{Broken Chair} (1997), a monumental wooden sculpture with a broken leg, sponsored by Handicap International for the Palace of Nations, Geneva, offers a contrasting, and arguably more disturbing, use of the chair.

\textsuperscript{73} The chairs are built on an underground frame and their arrangement cannot be reconfigured.

\textsuperscript{74} \textit{Supra} note 25.
actually relate directly to courtroom trials, and, in each case, the evidence regarding the role of juries in assuring a just outcome is decidedly mixed. If it is true that Nelson Mandela was condemned to Robben Island without the benefit of a jury, that was certainly not the case with Oscar Wilde’s imprisonment in Reading Gaol.\textsuperscript{75} In the 1783 trials concerning the death of 133 African slaves thrown off the Zong by its crew, it was the jury who approved the owners’ claim for compensation for the loss of “cargo,” and the Lord Chief Justice who ordered the case to retrial.\textsuperscript{76} Neither the images nor supporting texts convey anything of the problematic issues here. Meanwhile, the title, disposition, site and occasion of the work all associate the idea of jury trial with the rule of law in the struggle for freedom.

\textbf{Fig. 3. Photograph by Max McClure of a chair from Hew Locke’s *The Jurors*, reproduced courtesy of Situations\textsuperscript{77}}

\textsuperscript{75} Following the failure of Oscar Wilde’s libel case against the Marquis of Queensbury in 1895, Wilde was tried for the crimes of sodomy and gross indecency. The jury in the first trial in 1895 was unable to come to a verdict; at his retrial, however, Wilde was found guilty and sentenced to two years’ hard labor. See H. MONTGOMERY HYDE, THE TRIALS OF OSCAR WILDE 222 (1962).

\textsuperscript{76} The Zong became calm on its journey to the Caribbean and according to the owners, with water running out and disease spreading, the crew had, “of necessity,” thrown the slaves overboard in order to save the ship. Returning to Britain, the owners, the Gregson syndicate, claimed compensation for loss of cargo against their insurers. In the first trial, in 1783, the jury found against the underwriters on the grounds that the transported Africans were indeed a form of property, similar to a cargo of horses. On appeal, however, Lord Chief Justice Mansfield agreed with the insurers, who maintained, according to legal custom, that only when a slave is killed in the course of suppressing an insurrection was compensation due to the owners. Although a re-trial was ordered, the owners dropped their case. The affair played an important role in the growing campaign to outlaw the slave trade in Britain. Cf. JAMES WALVIN, THE ZONG: A MASSACRE, THE LAW AND THE END OF SLAVERY (2011).

\textsuperscript{77} More images are available from the website dedicated to the artwork. See *The Jurors*, supra note 68.
The link between these struggles and Magna Carta itself is embedded in the work via a facsimile image of words taken from the original Latin text on a chair that faces an ancient image of Egyptian scales topped by the goddess of justice.\textsuperscript{78} As we observed above,\textsuperscript{79} only four clauses from the original Charter remain on the statute book, condensed into three: those regarding the freedoms of the Church and of the City of London, and the provisions amalgamated in 1225 into what, in the spirit of the above discussion, we may call the “iconic” words of clause 39:

No free man shall be seized or imprisoned or stripped of rights or possessions or outlawed or exiled or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals; or by the law of the land. To no one will we sell, to no one shall we deny or delay right or justice.\textsuperscript{80}

However, contrary to popular opinion and the implication of its inclusion in this work, Magna Carta does not necessarily mandate trial by jury, least of all in its modern sense. What was being referred to here was not the criminal trial but an obligation for the monarch to take advice from barons when adjudicating on matters of property. Besides the ability of landowners to influence the outcome of disputes over land, what Clause 39 mandates is that the executive must do things according to “the law,” which, of course, has the capacity to deny access to jury trial as and when it determines.

On the other hand, jury trial has traditionally been celebrated as a particularly British institution and sits at the heart of the myth of the common law as a protector of liberty. William Blackstone himself identified jury trial as no less than “the glory of the English law,”\textsuperscript{81} while proponents of its introduction for civil cases in early nineteenth-century Scotland described it as “The Dearest Birth Right of the People of England.”\textsuperscript{82} The Jurors hence promotes a visual association between its record of the multicultural, global struggle against injustice and the rule of law itself by identifying it with what the British regard as a fundamental national institution. Furthermore, as the cases cited above testify, trial by jury

\textsuperscript{78} See Figure 3.

\textsuperscript{79} Supra note 24.

\textsuperscript{80} MAGNA CARTA, cl. 39 (1215).

\textsuperscript{81} BLACKSTONE, supra note 3, at III. 379.

does not guarantee justice any more than civil systems that function largely without them are by that token necessarily less just in their outcomes.

Fig. 4. The inauguration of James Butler’s statue to Queen Elizabeth II at Runnymede on June 14, 2015, reproduced by permission of Mirrorpix/Eleanor Davis.

As if to demonstrate the “iconic” value of Magna Carta, “regardless” of what it “mentions,” the image of the same clause is precisely what links The Jurors to the otherwise ideologically and aesthetically entirely different monument unveiled by the Speaker of the House of Commons on the eve of the formal anniversary ceremony: James Butler’s four-meter-high statue of Queen Elizabeth II, based on the popular portraits made in 1954 and 1969 by Pietro Annigoni. Here the words from Clause 39 are in fact made clearly visible, engraved in English on a plaque of light-colored tiles that contrasts markedly with the darker flagstones on which it rests. The plaque is positioned where the spectator would ideally stand to look up at the statue. Here Magna Carta does not face a mythical Lady Justice, but is looked over by the figure of the sovereign—reminding us, perhaps, of what Locke’s work forgets: that “trial by jury” is in reality a trial by jurors and an administrator of Her Majesty’s Justice. This statue is

83 In addition to local dignitaries, the unveiling party included the local member of parliament for the area—and Foreign Secretary—the local member of the European Parliament, and the Speaker of the House of Commons. “Lined up for the Unveiling,” from Magna Carta: “Fabulous” Statue of Queen Elizabeth II Unveiled, GetSURREY (June 14, 2015, 2:42 PM), http://www.getsurrey.co.uk/news/surrey-news/magna-carta-fabulous-statue-queen-9450484 (providing this and other images of the ceremony) [hereinafter Magna Carta: “Fabulous” Statue of Queen Elizabeth II Unveiled]

84 See Figure 4, where the tiles are visible in the foreground.
an icon in the classical sense, the image of the ruler projecting their aauratic presence throughout the empire.85

Besides the fact that both are cast bronzes and both commemorate Magna Carta, the contrast could hardly be starker between Locke’s chairs and this highly traditional statue. If _The Jurors_ reflects the multicultural axis of the crisis of governance and identity we described in early twenty-first century in Britain, the _Queen Elizabeth II_ project is unambiguously linked to the right’s concern with state authority and national sovereignty. In addition, while Locke’s artwork was supported by public money, Butler’s work was made possible by private contributions via the Runnymede Magna Carta Legacy Trust. The statue itself had been launched in 2013 to commemorate the sixtieth anniversary of the current reign. The declared aim of the “Her Majesty’s 60th Anniversary Statue” project was to promote cultural cohesion both in the UK and abroad through the sale of castings in various sizes to British municipalities and overseas governments.86 The promoters, Peter Brown and Simon Puzey, are both associated with the New Culture Forum, an organization founded in 2006 by the spokesman on culture for the UK Independence Party (UKIP) to oppose what it portrayed as a left-wing cultural establishment.87 The appeal for sponsors for the Runnymede monument was led by Daniel Hannah, a Conservative Eurosceptic MEP and leading member of the official 2016 referendum “Leave” campaign. Filmed in the meadows at Runnymede, Hannah commemorates Magna Carta as the moment when

people decided that there was something bigger than the government, something so powerful that it stood above the barons and the bishops and the king, something that you couldn’t see or hear or touch or taste but that bound the monarch as surely as it bound his meanest subject—that something was the law.88

Asserting that all other key elements of the rule of law around the world were “overwhelmingly developed in the language I am now talking,” Hannah concluded his appeal by claiming that, even if British power were to wane, “as long as English is spoken, and as long as we recall what happened here, we will never be just another people.”89 Although it is difficult to conceive of two images of the same thing that were more opposed, both works

85 For the icon in imperial Rome, see Douzinas, _supra_ note 3, at 46–7.
86 See _News, Her Majesty’s 60th Anniversary Statue_ (2013), [http://www.queenjubileestatue.co.uk/](http://www.queenjubileestatue.co.uk/).
87 The Forum sponsored the critical account of public art by TORONYI-LALIC, _supra_ note 67.
88 View the appeal at [http://www.runnymedemagnacartalegacy.org.uk/about/](http://www.runnymedemagnacartalegacy.org.uk/about/).
89 _Id._
occupy the same commemorative space and cite the same textual image of Magna Carta in celebration of liberty and the British rule of law.

The statue made by Butler is self-confessedly derivative and aesthetically unremarkable, except for the inclusion in its architecture of a set of four matching engraved texts. In addition to Clause 39 of Magna Carta, we can also see a timeline of British monarchs lining the pathway to the statue; a title plate on the plinth; and a fourth plaque in the same format listing a number of sponsors, to which the title plate explicitly directs the spectator. The main funder was Sheikh Marei Mubarak Mahfouz bin Mahfouz, a philanthropist and member of a leading Saudi financial family. In addition, among the two members of Runnymede Council who established the Trust, various City of London financiers, former Conservative party treasurers and donors, and local corporations, one finds listed a company called Orchid Runnymede. This exotic mix of tropical flower and temperate meadow brings two other radically contrasting images of Magna Carta into the local frame, and radically alters the terms in which Magna Carta is associated with both “the rule of law” and the making of iconic images.

E. In the Background: Magna Carta’s Underside

Fig. 5. The Runnymede Eco-Village, reproduced by permission of Diggers 2012.

90 Magna Carta: “Fabulous” Statue of Queen Elizabeth II Unveiled, supra note 83.

91 Id.

On the very day that the 800th anniversary was being commemorated, Guildhall County Court granted an eviction order on behalf of Orchid Runnymede against a group of activists connected to the Occupy movement, who in 2012—adopting the seventeenth-century “fundamentalist” title of Diggers—had established an eco-village in the woods a few hundred meters from the ABA monument and the new artworks.93 The area had been home to a series of educational institutions before it was sold for development in 2007. In 2011, Orchid Runnymede was given planning permission for a mixture of student accommodation, care facilities for the elderly, and luxury homes. In 2015, the latter were being advertised by Art Estates as “Magna Carta Park.”94

A week after the eviction order, the High Court granted a stay on the grounds that, without a complete transcript of the proceedings, it was not possible to determine whether the Diggers had received a full and fair hearing on June 15, 2015. It was important they did so, Justice Knowles acknowledged, given the exceptional location and the history associated with [Runnymede & Coppers Hill Coppice], and the competing and directly differing interests—one seeking possession of ancient forest [for private development] the other side seeking to remain on a site occupied for three years [and to continue to subsist in common from the land].95

Following hearings in early September 2015, however, the Court of Appeal dismissed the appeal and the bailiffs moved in.

In the context of this discussion, what makes the case “exceptional” is that it raised the question of whether the nomos of a group of individuals who had chosen to live “off-grid” was worthy of consideration within the rule of law.96 The appellants argued that the court

93 Orchid Runnymede, Ltd. v. James Hampson & Persons Unknown (2015); see infra note 96.
94 An image of the planned development can be viewed at http://www.artestates.co.uk/magna-carta-park/ (last visited Mar. 11, 2017).
95 Runnymede Eco-Village Get Stay of Execution in Eviction Proceedings so High Court can Consider Whether They were Given an Adequate Hearing in “Exceptional Case,” OCCUPY DEMOCRACY (June 24, 2015), https://occupydemo.wordpress.com/2015/06/24/runnymede-eco-village-get-stay-of-execution-in-eviction-proceedings-so-high-court-can-consider-whether-they-were-given-an-adequate-hearing-in-exceptional-case/.
had erred in summarily granting the order and treating them thereby as simple trespassers.\(^97\) It had failed to consider whether they had a “seriously arguable defence” in terms of Article 8 of the European Convention on Human Rights (ECHR) on the right to privacy, family life, and home, as had recently been allowed in other situations.\(^98\) Recognition would warrant a trial regarding the proportionality of a possession order on behalf of the owners relative to its impact on the rights of those in occupation. In their argument, the Diggers relied explicitly both on the ECHR and on Magna Carta itself. Confronted by Orchid’s corporate legal team and unable to obtain legal aid, they raised the issue of equal access to the law and asserted that the criminalization of squatters amounted to detention without trial. Additionally, they invoked the spirit of the Charter in relation to the values of commonality and ecology and the need to limit executive power and they claimed could be found in the document, not least in regard to its clauses relating to the forest. The argument they were making was not just for their personal rights but against the monetization of nature and the privatization of the commons—issues of broad political resonance at the time. They reinforced their case by drawing on the 1217 Charter of the Forest, which had been consistently paired with Magna Carta since the thirteenth century and co-published in the first reliable edition of both documents by William Blackstone in 1759.\(^99\) The Forest Charter had only been repealed in 1971 when its surviving provisions were incorporated into new legislation. The two charters, the Diggers’ lawyer argued in Blackstonian vein, were “founding documents of our British so called unwritten constitution [which] cannot be dismissed as merely background material.”\(^100\)

The Appeal Court did not, however, feel that these sources supported a case that reached the standard of seriousness required to mandate a consideration of proportionality.\(^101\) In this way, the court avoided having to weigh the rights of the owner—an off-shore property developer seeking profits from the sale of luxury housing—against those of the effective occupiers—a group of indigent individuals and families who were pursuing an off-grid, self-sustaining, ecologically sound and essentially private existence. Crucially, the case reminds us that, after all, Magna Carta explicitly protects only “free men,” a powerfully open image of popular liberty, but historically a restrictive legal category long related to property ownership and increasingly to national citizenship. It is surely no surprise then that in this case the law’s image as the defender of private property prevailed over that of the ecological and communal spirit that the Diggers saw in the ECHR, Magna Carta, and the ancient

\(^{97}\) Id.


\(^{100}\) Hampson, supra note 96, at 7.19 (focusing on Phoenix’s argument).

\(^{101}\) Id.
constitution. Nonetheless, I would argue, precisely because their arguments were disregarded by the courts, the image of the eco-villagers a few meters away from the commemorative site, in an engagement with the law initiated on the very day of the solemnities, “cannot,” like the texts the Diggers relied on, “be dismissed as merely background material” to the celebrations of Magna Carta as an image of the rule of law. On the contrary, seeking to establish an alternative nomos on the literal boundary between the property owned by the National Trust and private property, they denounce the universality of that image and the “free men” it purports to defend.

The sculptural artworks, like the litigation, constitute bodily experiences that take place in specific times and spaces, eliciting concrete reactions and allegiances among their spectators. These experiences oblige the individual to take positions. However, as I have argued, in their commemorations, neither The Jurors nor Queen Elizabeth II position the viewer to question Magna Carta as a foundational image signifying the normative guarantee of liberty by law. Hinged by the same “iconic” textual image (the one in Latin, the other in English) their very disagreements put the foundational status of the Charter and of the English institutions of the rule of law beyond dispute. On the other hand, rather than making an image of and to Magna Carta and anchoring it in the soil of England like Locke and Butler, the eco-villagers stood on the Charter as living law and the forest at Runnymede as their actual home. As a result, their experience turns attention from visible images of law as the global defense of justice and liberty to images of the law grounded in the actual administration of legislative and jurisprudential texts and state violence by judicial institutions, courts, lawyers, police, and bailiffs as they manage conflicting interests and values.

Something similar can be seen with the last of our commemorative artworks, Cornelia Parker’s Magna Carta (An Embroidery), commissioned by the Ruskin School of Art at Oxford in collaboration with the British Library. With a background in sculpture and performance, much of Parker’s work consists not so much in making images of things or ideas as of their translations from one form or state into another—what she herself refers to as “creating new histories for objects (by changing them through a physical process).” Alongside material processes, the play between title and image has a crucial role in these translations and transformations. Thus, for example, what is perhaps her most famous work hitherto, Cold Dark Matter: An Exploded View (1991), consists of the pieces of a garden shed after it had been blown up with Semtex by the British Army School of Ammunition, reassembled and suspended in the gallery as if radiating out from a “Big Bang”; while, topically enough,

102 Id.

103 IWONA BLAZWICK, CORNELIA PARKER 85 (2014).
Measuring Liberty with a Dollar (1998) consists of a skein of silver drawn into a wire the height of the Statue of Liberty.104

Parker thus brings us back to the issue of the novel configurations of word and image in contemporary media raised in the first part of this Article. I drew attention at the time to the role played by digitization in the development of new regimes of the visual and verbal, and we have seen the contribution of digitized textual images in the construction of Magna Carta as an "icon of liberty." For her commission, Parker took the entire Wikipedia article on Magna Carta as it stood on the date of the 799th anniversary and had a detailed and exact facsimile made on a 13-meter long piece of cloth in hand-stitched embroidery. Among the reasons for this choice was a recognition that corresponds to our starting point for the value of the Charter as icon: "we know [Magna Carta] stands for something important, but we don’t know exactly what."105 Furthermore, Parker observes, "if we want to find out about something, [Wikipedia] is the first place we go."106 Conceived as an image of a commentary rather than of the original text, Magna Carta (An Embroidery) contrasts with the other works we have considered. First, it remains true to the tradition of "unwritten law" exemplified by our reliance in determining the content of that law on works like Blackstone’s Commentaries and Edward Coke’s Reports.107 Second, it foregrounds the fact that what is being imagined is not Magna Carta itself but what, through purportedly authoritative commentaries, it is held to be representative of. Parker gives this process a name in her title, and proceeds to literalize that name in the work itself: it is "the idea," as she puts it, "of embroidering history."108 Parker associates this idea, and the constantly changing digital text of Wikipedia itself, with the historicity and manufacture of the image: the authority of the Magna Carta that is ideologically embroidered on Wikipedia is the result of an invisible and seamless collaboration of many apparently anonymous hands. The powerful impact of Parker’s embroidery, however, is that the contribution of human hands is foregrounded, and along with that its locatedness and historicity.109

104 Id. at 48–61, 126. Note that Exploded View was made at a time when the Provisional IRA was also using Semtex in a series of attacks on the British mainland.

105 Cornelia Parker, We All Make our Own Little Embellishments of the Truth: Cornelia Parker in Conversation with Tim Marlow, in MAGNA CARTA (AN EMBROIDERY), (Paul Bonaventura & Cornelia Parker eds., 2015). This un-paginated publication documents an exhibition of Parker’s artwork at the British Library from May 15 to July 24, 2015.

106 Id.

107 Cf. Coke, supra note 3; Blackstone, supra note 3; THE REPORTS OF SIR EDWARD COKE KT. IN ENGLISH, COMPLEAT IN THIRTEEN PARTS (George Wilson trans., 1727).

108 Parker, supra note 105.

109 When contrasted with the noble practices, materials, and subject-matter associated with the media employed by other artworks we have discussed, Parker’s choice of a practice traditionally regarded as a domestic decorative craft practiced mainly by women is of course not without significance.
Elsewhere, Parker has addressed what she describes as clichés, using the display of physical objects as material traces to question notions of, for example, “Freudian” and “Turneresque.” As she says, by using such elements, “I’m trying to trigger whatever the association is, but it’s not only about them. It’s about the underside, the inverse of what they represent.”¹¹⁰ This underside is quite literally made available here by mirrors situated beneath the cloth so that “you can look at the underside of the embroidery and view the way it is constructed; see the backstory, the history of the work.”¹¹¹ Thus, as the eco-villagers’ struggle with Orchid Runnymede provides a “background” image to the commemorations, Parker’s work gives us a view of the broken and knotted threads that make up the irregular “backstory” or “underside” of the construction of Magna Carta’s meaning.

The process of turning a polished textual image from the internet into an exact but visually dissonant copy in artisanal form thus becomes central to the artwork itself: It makes visible the narrative of its own manufacture. In viewing Magna Carta (An Embroidery), we are not interested in what the digital text of the anonymous electronic encyclopedia tells us that Magna Carta means (in any case, it is already out of date in relation to the entry post-commemorations). Rather, what the tapestry manifests is the relationship between the textual image and the people who reproduce it with their hands. Listed in the exhibition and the published text, the latter are revealed to be actual agents and victims of the administration of the law, named. They include contemporary “barons”—or, as Parker points out, baronesses—like Sayeeda Warsi and Doreen Lawrence, along with a selection of largely liberal judges and barristers, legislators, journalists and writers.¹¹² In many cases, particular elements were distributed with deliberate purpose: Edward Snowden was charged with embroidering the word “liberty”; one of the falsely convicted Birmingham Six stitched “freeman”; Moazzam Begg was given “held without charge”; and the lawyer Clive Stafford Smith, who had visited Begg at Guantanamo, embroidered “law of the land” while he was visiting the detention camp.¹¹³ Some of the technically most complex passages were

¹¹⁰ Parker, supra note 105.
¹¹¹ Id.
¹¹² Jamaican-born Doreen Lawrence was made Baroness Lawrence of Clarendon in 2013 in recognition of her work as a community activist and a campaigner for police reform following the murder of her son in a racist attack in 1993. Sayeeda Warsi, the daughter of immigrants from Pakistan, was made a Conservative peer in 2007 to allow her to participate in the shadow government and, in 2010, became the first Muslim to serve as a member of the Cabinet.
¹¹³ Edward Snowden was responsible for a massive leak of secret documents from the US National Security Agency in 2013. The Birmingham Six were the victims of perhaps the most significant miscarriage of justice in the UK during the twentieth century. Imprisoned for life in 1975 for the 1974 bombing of a public house in which twenty-one people had been killed, the Birmingham Six were finally able, in 1995, to demonstrate that at their trial evidence had been falsified or suppressed. Moazzam Begg spent nearly three years in the Guantanamo Bay detention camp before being released in 2005; he successfully sued the British government for complicity in his detention and
stitched by members of the Embroiderers’ Guild but a great deal of the work was executed by prisoners who had been taught needlework by a charity called Fine Cell Work.\(^{114}\) Magna Carta is not only about the protection of freemen; it is also about imprisoning them. As Parker points out, the inmates “have all been subject to the rule of law.”\(^{115}\) One of them, it appears, “was embroidering a section that included the words ‘Habeas Corpus’ and he left them out.”\(^{116}\) Parker asked a former Lord Chief Justice to provide the missing words: “I love the idea that word omitted by a prisoner have been finished off by a judge.”\(^{117}\) Prisoners and judges; normally it is the former who complete the latter’s sentences.

I have argued that, in the early modern period, the emblem’s articulation of word and picture presented an image of English unwritten law within the Anglican nomos. In contrast, I have shown that, in the commemorations of Magna Carta, the new configurations realized through digitization and the sculptural artworks have resulted in a series of images of a postmodern “icon” that, as an image of itself, means what it is made to stand for “regardless” of what it says. Against this background, what Parker’s project uncovers is both the work of interpretation and the tensions and partialities elided by these configurations. Reproducing a virtual digital text-image of Magna Carta in analogical form, Parker envisages Magna Carta not as an “[image of] an icon of liberty” but as an artifact elaborated by a network of individuals sewn together not by the experience of national identity but by a legal institution in which they occupy different positions through, and in relation to, the rule of law and its words of justice and freedom. Some of them, members of the Houses of Parliament, are responsible for writing those laws, others, advocates and journalists, for embroidering them in legal argument and public opinion, while others—“stitched up” or not—live the sentences given them by the law and its agents.\(^{118}\)

If, while offering competing or contrasting narratives, the commemorations of the 800th anniversary united to celebrate a foundational “icon of liberty” that referred to a “rule of law” with an empty core—a law that is law “because it calls itself law”—then Magna Carta (An Embroidery) unpicks the seamlessness of the relationship between law and liberty by having the ideological image re-sown by the agents who make and operate the law, with varyingly just outcomes, alongside others who, justly or not, have lost their liberty to the law. In sum, then, the image of the foundations of British law remains radically incomplete

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\(^{114}\) See FINE CELL WORK, \texttt{http://www.finecellwork.co.uk/} (last visited Mar. 16, 2017).

\(^{115}\) Parker, supra note 105.

\(^{116}\) \textit{Id.}

\(^{117}\) \textit{Id.}

\(^{118}\) In popular parlance in the UK, “stitched up” is the equivalent of “framed.”
without ensuring that the institutions which in various ways bind citizens to its rule are part of the picture, and without keeping in view those, normally consigned to the background and underside of the visible law, whom it deprives of liberty or whose way of life it outlaws. There is a similar politics, it may be argued, regarding the visibility of the institutions and technologies that tend to render invisible the interpretative work performed by readers, spectators and programmers involved in translating between word and image and between analogue and digital.

F. Coda

The fragility of the foundational work done by the commemorative images of Magna Carta was revealed over the following year as the crisis in national identity returned with dramatic force. An unpredictable and unsettling referendum campaign culminated on 23 June 2016 in a narrow but significant majority in favor of leaving the European Union.119 Like with the elections for the American Presidency five months later, many analysts were swift to explain the surprising result in terms of voters who felt “left behind” by globalization and who had become invisible in the image of the nation as seen by the mainstream political parties and media.120 Given that a central theme for the “Leave” campaign had been the restoration of “control” over the country’s law and its borders, one might have expected that victory would have reinforced those native traditions of English liberty in law celebrated, for example, by Cameron at Runnymede.121 In truth, however, it has re-exposed, with increased focus, the foundational crises that the coexistence of such images under the “icon of liberty” were intended to reconcile. No sooner did Cameron’s successor, Theresa May, prepare to initiate the process of withdrawal than a conflict arose between the government and the courts over the boundaries of executive action in relation to the unwritten constitution of parliamentary democracy.122


May maintained that the executive had power under the Royal Prerogative regarding treaties to initiate withdrawal proceedings. But the Supreme Court upheld the decision of the High Court in November 2016 that, since withdrawal from the E.U. would affect citizens’ rights in domestic law, the government had no such authority and the process could only be initiated by the Legislature. The High Court judges who initially heard the case were accused in the press of seeking to frustrate the outcome of the referendum, and when the Daily Mail attacked them as “enemies of the people,” Elizabeth Truss, the Lord Chancellor, was criticized for failing to defend the justices, as was her statutory obligation. Similarly, parliamentarians, split within as well as between the major parties, were consistently warned by the government and their supporters not to “defy” the “will of the people,” as decisively manifested in the referendum, by seeking to condition the terms under which withdrawal would be negotiated.

While likewise accusing U.S. judges who decided against him of political bias, President Trump employed similar language to denounce the press as “the enemy of the American People!” As he later clarified, this was not an attack on the media in general but merely the purveyors of what he styled “fake news”: “They dropped off the word ‘fake.’ And all of


124 Id.


127 Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), https://twitter.com/realDonaldTrump. While the United States Court of Appeals for the Ninth Circuit was hearing the government’s appeal against the suspension of the President’s Executive Order, Trump raised the suspicion that the judges might rule against him “maybe because of politics, maybe because of political views.” Remarks by President Trump at MCCA Winter Conference, THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Feb. 8, 2017, 9:18 AM), https://www.whitehouse.gov/the-press-office/2017/02/08/remarks-president-trump-mcca-winter-conference. See also Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM) for the President’s attack on the “so-called judge” who had ordered the original stay.
the sudden, the story became, the media is the enemy.”\textsuperscript{128} In other words, in the sort of self-referential loop we observed in the “icon of liberty,” the press’s accusation against the President was itself evidence of the truth of his accusation against them. In the U.K. the Leave campaign had relied on a similar move, attributing warnings of the likely impact of withdrawal, be they issued by experts or by supporters of “Remain,” to an alleged “Project Fear”: the very fact that the projections pointed out the risks became evidence that they were not true.\textsuperscript{129}

The crisis in legal foundations—the images of Parliament and the judiciary not as the guarantors of democracy but as its elite enemies—has thus been accompanied by strategies that disparage and undermine the trustworthiness of traditional authorities, sources and genres of public discourse. In contrast, alternative digitally-enabled sources of news and information, exemplified by Breitbart, Twitter, Facebook, and the algorithms ranking links on Google, were regarded by many as decisive in both contests.\textsuperscript{130} The campaigns and the subsequent conflicts gave currency to the notion that we had entered a “post-truth” age, promoting the adjective, according to the Oxford English Dictionary, to the 2016 “international word of the year.”\textsuperscript{131}

The above events took place between the acceptance of this Article for publication and the conclusion of the production process. Against this background it is, it seems to me, a humbling paradox of postmodernity that it should have been not the critical left of the textual turn invoked in the opening paragraphs, whose posture and concerns have informed the Article, but precisely the authoritarian right who succeeded in subverting the traditional ecologies of justice and truth by revealing and exploiting the politics of interpretation and mediation from which, I have been arguing, images of the icon of liberty seek to divert the eye.


\textsuperscript{129} Boris Johnson, Don’t be Taken in by Project Fear—Staying in the EU is the Risky Choice, The Telegraph (Feb. 28, 2016, 5:27 PM), http://www.telegraph.co.uk/opinion/2016/03/16/dont-be-taken-in-by-project-fear--staying-in-the-eu-is-the-risky/. The phrase was borrowed from its use in the earlier referendum on Scottish independence.


Öffentlichkeit and the Law’s Behind the Scenes: Theatrical and Dramatic Appearance in European and U.S. American Criminal Law

By Frans-Willem Korsten*

Abstract

In the present situation, law's Öffentlichkeit, or its principal “open-ness to the public,” needs to be distinguished from its being the object of publicity as dominated by modern media. Law’s public open-ness has historically been dependent on, and determined by, two theatrical modes of appearance: The theatrical-proper and the dramatic. Paradoxically, in both cases the jurisdictional “openness to the public” works not only through forms of visibility but also forms of invisibility. These two theatrical modes—and their dynamic play with visibility and invisibility—have been portrayed in works of art that have influenced the way general audiences imagine the law to work. These works also correlate with the different histories and public appearances and openness of the European and the Anglo-American systems of law. Historically speaking, the European system has been more theatrically inclined, in the context of a distinctly imperial trajectory that has been dominated by the desire to stage the law and to follow correct procedure. The Anglo-American one, by contrast, is more dramatically inclined, and has followed a distinctly anti-imperial trajectory—whether anti-royal or anti-state—influenced by the desire to stage trials in which peers determine the dramatic outcome. Although both systems are basically open to the public, they both work via a dynamic of protective invisibility. Yet due to current developments, the elements of invisibility in both systems tend to predominate over the elements of visibility. This suggests that both systems are moving toward a form of legal closure that is averse to the original theatrical and dramatic appearance and openness of law.

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In Dutch and in German, the public nature and testability of legal cases is indicated by comparable terms: *Openbaarheid* and *Öffentlichkeit* respectively. Both terms can be translated as *publicity*. Yet, in both Dutch and German, and in both systems of law, the English term *publicity* as a loanword has produced a pivotal distinction. As the German Duden dictionary indicates, the noun *Die Publicity* means “durch Medienpräsenz bedingte Bekanntheit in der Öffentlichkeit” (“the way in which things become known by means of news media in public openness”). Apparently, there is *Öffentlichkeit* on the one hand and *publicity* on the other. The same distinction is made in Dutch, and has been made by legal scholars studying the relation of law to publicity in terms of both the law’s principal openness to the public and in terms of its being made known to the public via the media. The two imply radically different modes of public visibility and have different implications for the way legal order is perceived as legitimate.

In their study of the Dutch situation, legal scholars Marijke Malsch and Hans Nijboer note that in daily practice only a small part of case material is actually made publicly visible. Moreover, about 90% of all criminal cases in the Netherlands are resolved outside the courtroom by means of dismissal, penalty orders, administrative punishment, or forms of transaction. The situation in the U.S. is similar. At present, 94% of U.S. criminal cases, for instance, are determined on the basis of plea bargaining. This is not to say that cases settled outside the court are not public. They are, in the sense that they are open and can be checked, but they lack the public visibility and collective testability that characterizes cases taken to court. The tiny portion of cases resolved publicly, openly, and visibly in court is thus pivotal—as Marsch and Nijboer argue—for the way citizens perceive the legitimacy of the legal system, especially in the criminal law context.

Publicity is considered, then, as partly incompatible with or perhaps even as contrary to *Öffentlichkeit*. In fact, the very transition from the latter to the former has been considered a threat to the status of legal procedures. The media tends to choose court cases by using criteria of news value and amusement rather than legal correctness. The prospect of trial-by-media may have become a real danger, while a more immediate threat may be that the law’s *Öffentlichkeit* is no longer really open to the public because of the media’s selectiveness. This is nothing new. One could argue that—for decades, even centuries before

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1 M. MALSCH & J.F. NIJBOER, *DE ZICHTBAARHEID VAN HET RECHT* 4–7 (2005). The figure of 90% they give is from 2005; the situation has not changed since then.


4 MALSCH & NIJBOER, *supra* note 1, at 100–06.

5 In the Dutch context, the issue was addressed by, for instance, Y. Buruma, *Invloed van de media op de rechtspraak*, TREMA 305–12 (1979); M.S. Groenhuijsen, *Openbaarheid en publiciteit in strafzaken*, 27.5 DELIJK & DELIJKWENT 417 (1997).
the modern media targeted juicy court cases—newspapers have been doing the very same thing. However, there is a distinction between the modern media and a medium that, from the very beginning, has been intrinsic to the law’s openness in the sense of its public visibility and testability. This basic medium is not so much language as theater.6

In this context, this Article focuses on the way in which the theatrical, public visibility of law—its Öffentlichkeit—has been shaped historically by two distinctly different modes: The theatrical-proper and the dramatic. Specifically, this Article focuses on the unfortunate rhetorical effect of the contrast between Öffentlichkeit and publicity. Rhetorically speaking, the selective publicity of media driven by economic and private interests appears to stand in contrast to the pure transparency of an open and objective legal system. Yet, as will become clear, theatrically speaking, this “openness” of jurisdiction not only works through forms of visibility, but also requires modes of invisibility.

The two theatrical modes at stake and their distinct dynamics of visibility and invisibility have been dealt with in works of art that have influenced the way in which a general audience imagines the law to work. This Article focuses on two iconic works of art: Franz Kafka’s novel Der Prozess, published in 1925 (though written earlier) and Sidney Lumet’s film 12 Angry Men from 1957.7 These works of art find their points of departure in two different systems of law: The European and the U.S. American, each with its own specific history. Both systems have been, and still are, struggling with different aspects of the relation between Öffentlichkeit and publicity. Before delving into these, however, I shall outline the two modes of theatricality at stake.

A. Staging Law: The Theatrical-Proper and the Dramatic

In a seminal article on current developments in the socio-cultural and political representations and practices of law, Julie Stone Peters makes a fundamental distinction concerning the issue of how law should be assessed and made to work. It concerns the distinction between what Plato called theatocracy and nomocracy; the rule of public theater versus the philosopher’s rule of law on the basis of a given nomos. At stake was not just a biased opposition between the uninformed and pathetically inclined multitude, and

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6 The theatrical nature of the law’s appearance through court is evidenced in many scholarly studies. See, e.g., Julie Stone Peters, infra note 8. See also Judith Resnik & Dennis Curtis, Representing Justice (2011); the work of law historian Pierre Legendre, La 90ème conclusion: Étude sur le théâtre de la raison, Lecons I (1998); theatre scholar Jody Ender, Murder by Accident (2009); and media theorist Yasco Horsman, Theaters of Justice: Judging, Staging, and Working through in Arendt, Brecht, and Delbo (2010). Horsman, in turn, based his work on arguments brought forward by Hannah Arendt. On Arendt and law, see Hannah Arendt and the Law (Marco Goldoni and Christopher McCorkindale eds., 2012).

7 Kafka’s novel was written under the title Der Process in 1914–1915, and then published by Max Brod as Der Prozess. The most recent version (Historisch-kritische Ausgabe, Stroemfeld Verlag, 1995) uses the original title again. Sidney Lumet, Twelve Angry Men (Orion-Nova Productions 1957).
the individuality of the well-informed, rational, and stable philosopher. Plato was more concerned with what he called the excess of theater and its possibilities for deceit. To counter this threat, he argued for the preservation of a rule of law that would answer to measure and reasonability. Still, at the end of her assessment of the current situation, Stone Peters calls Plato’s distinction “an ideological ruse” because the individual philosopher or lawgiver does not exist. In the case of nomocracy, law does not appear quasi-magically from one source, but is always the result of informed people acting not just with one another but in the eyes of one another—that is to say, dramatically. Yet, as Stone Peters states:

If the opposition between theatrocracy and nomocracy is false . . . it is nonetheless integral to the theatre of law, internalized as part of—indeed essential to—the experience of legal spectatorship. This opposition operates to sustain the ideology of law’s separateness (its “distinctive temporal and spatial borders,” as Almog puts it), and thus the distinction between law and not-law. Much of law’s legitimacy is, in fact, vested in this distinction, but the barriers are difficult to maintain.

What is hidden in Stone Peters’s argument—or at least not made explicit—is the internal differentiation she makes in describing the double constitution of the “theatre of law”; namely, the theatrical-proper and the dramatic. In the first case, the pivotal question is: How does the law appear on some sort of stage? In the second case, the pivotal question is: How is law acted out on some sort of podium? As discussed below, both relate differently, to spatial and temporal borders, and, more specifically, to the on and the behind the scenes. Put differently, they relate in distinct and separate ways to the law’s necessary visibility and equally necessary invisibility.

Law appears to be primarily textual. This is why Stone Peters argues that originally law is “a domain committed to the sanctity of the verbal text.” Law’s theatricality, however, is almost equally dominant because it is doubly motivated to show how the rule of law works and to open court procedures to the public for independent assessment by the people. The latter point is evidenced by Lord Chief Justice Gordon Hewart’s often-quoted statement from 1924 “[T]hat justice should not only be done, but should manifestly and undoubtedly be seen to be done.” This phrase became far more famous than his New Despotism—

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9 Id.

10 Id. at 39.

The Law’s Behind the Scenes

published in 1929—where Hewart argued that the political powers of the executive were encroaching upon the legal system in such a way as to come close to subordination. Here as well, the key issue was that such encroachment worked against the requirement that justice be seen to be done in the sense that legal responsibility has to be staged in a theatrical manner in order to appear in the public eye—and be put to a public test.

Chief Justice Hewart expressed this requirement for the public visibility of justice in response to a case where—unknown to the defendant—the clerk to the court was affiliated with the accusing party. For Hewart, even if said clerk had not participated in the judges’ consultation, his bias was unacceptable precisely because this affiliation was not disclosed to the public; i.e. it had not been made public—publicly visible, that is. Hewart’s key terms in the quote above are “manifestly and undoubtedly.” These terms both point to the requirement that people must feel certain that a verdict is untainted by doubt, because of bias, for instance. To Hewart, these terms did not, of course, imply that the general public should be physically present at the private conferences of the judges. These conferences have to take place behind the scenes. Still, judges’ decisions that result from these conferences should be manifest. Both the etymology and denotation of this term imply that something must be made evident as if at hand, but—most of all—tellingly visible.

Still, the “manifest” hints at a generic complication. When the law appears and operates theatrically, it works by means of display. At the same time, the law’s very theatrical production is a result of actions behind the scenes. The crucial element of this theatrical behind the scenes production—indexically suggested by the terms “enter” and “exit”—has received relatively little theoretical consideration within theater studies or in discussions of theatricality. Moreover, when Peter Goodrich states that “[w]e have literally to look behind the scenes, into the emptiness that is filled by images and imaginings, to apprehend the staging of law as a theatrical and present drama,” he refers to the behind the scenes of the law’s language, the emptiness of which, apparently, is filled by visual means. When Goodrich claims that the intrinsic theatricality of the law’s language still lacks a general overview, he might also have added that the general history of the law’s theatrical appearance requires much more. In that context, the theatrical behind the scenes—which can only be sensed or disclosed with some effort and, even then, only in hindsight—would be pivotal.

12 The very phrase “new despotism” was not new: It was brought forward by Alexis de Tocqueville in 2 ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA (1840), and in his case, he hinted at the potential that democracy would end up in securing the lives of people against any risk.


14 Id. at 779.
With respect to theatrical invisibility, the first question I want to ask is how the behind-the-scenes that is inherent in court cases relates to the two generic aspects of the law’s theatrical constitution already mentioned: The theatrical-proper and the dramatic—a distinction that also plays a role in Goodrich’s analysis with his “theatrical and present drama.” In the case of the theatrical-proper, the question concerns from whence someone or something appears in terms of the law and where it goes when it leaves the stage. With the dramatic, the question concerns whether or how we can conceive of the legal drama that takes place in or behind the scenes—that is, with or without an audience. This difference between the theatrical and the dramatic is captured paradigmatically in two still images. The first is taken from the 1962 Orson Wells adaption of Franz Kafka’s novel Der Prozess. The second is taken from Sidney Lumet’s 12 Angry Men.

Still from Orson Welles, The Trial.

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15 Id. at 811.
16 Lumet, supra note 7.
In the first image, there is a clear theatrical distribution of roles. The protagonist Josef K. appears in the process of defending himself publicly in a court before a judge and in the presence of an audience, which in turn can be divided into the audience that is made up of the ensemble of legal actors—such as the judge, prosecutor, lawyer, accused, and witnesses—and the audience members watching the action. K. undoubtedly finds himself on some sort of stage. Within the theater that frames the actions on this stage, there are procedural rules to be followed even if K. does not exactly know what they are. He has been brought on to a stage where others are already present, yet where did they come from and where shall they go? Josef K. is clearly in the scene while having no clue what produced the very stage on which he finds himself. He does not know—and will not come to know—what is going on behind the scenes.

In the second image, the protagonists as members of the jury find themselves in an enclosed space—with the door locked—deliberating on whether or not someone is guilty. Their deliberation will have to result in a public disclosure, but the dramatic deliberation is invisible to the public eye and the outcome is uncertain. Yet the members of the jury function as a synecdoche for the public at large, and they know as such that they are acting in the imaginary eye of a public on some sort of (legal) podium. In this case, the actors are clearly behind the scene considering what has happened on the scene in court with the sole purpose of disclosing their verdict back to that very scene. In both cases, then, theatricality

exists in the fact that actors appear or disappear, publicly and explicitly, from a place where they were not to be seen or to a place where they are not to be seen. Yet, there is a generic twist that is pivotal: Theatrically speaking, what occurs behind the scenes is not theatrical. Dramatically speaking, what happens behind-the-scenes can still be dramatic.

In two different legal systems—the European-continental and the Anglo-Saxon, especially as the latter has evolved in the U.S.—law’s theatrical and dramatic aspects have been dealt with in the realm of cultural representation. The two systems just mentioned have been the topic of intensive comparative studies, and one might even sigh, “why compare them again?” because the comparison has been plagued by clichés. In a special issue devoted to this comparison, the clichés are captured in the description of the German-American legal scholar Herbert Bernstein, who is noted for his dislike of generalities, as having “little time for shortcut phrases that described the Anglo-American legal system as ‘adversary’ but the continental systems as ‘inquisitorial’.” In an attempt to be specific, this Article focuses on the aforementioned generic aspects of theatricality that do not so much characterize and separate the two systems, but have marked the ways in which both have been represented iconically in the cultural domain. More specifically, this Article considers the differing forms of the law’s theatricality in dominant modes of cultural representation.

Drama has generally been defined in Aristotelian terms as the development of the plot, which explains why Bertolt Brecht wanted to re-theatricalize theater by dismantling plot. Yet, plot is a distinctly narrative-based concept. The etymology of drama emphasizes something else: Dran means “to do.” The basic distinction, then, is one between actors dramatically acting with one another on a podium, or their actions being seen by an audience, theatrically. When the action is watched by an audience, the podium becomes a stage—as Walter Benjamin made clear. Further, the connecting term between a podium

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19 Mirjan R. Damaskas, The Faces of Justice and State Authority (1986) was a landmark study, which was as favorable to the American System as was John Langbein to the European, or German one: John Langbein, The German Advantage in Civil Procedure, 52 U. CHI. L. REV. 823, 823–28 (1985). I was also inspired by Hein Kötz, Civil Justice Systems in Europe and the United States, 13 DUKE J. COMP. & INT’L L. 61 (2003).

20 Donald L. Horowitz, Foreword: Compared to What?, 13 DUKE J. COMP. & INT’L L. 1, 2 (2003), http://scholarship.law.duke.edu/djcil/vol13/iss3/2. The distinction in play was central to Damaskas, THE FACES OF JUSTICE AND STATE AUTHORITY (1986). Damaska described the continental and Anglo-Saxon or American model as an opposition between an adversarial vs. inquisitorial system with two different ideals of officialdom—the coordinate one and hierarchical one—that had procedural implications: Concentration on proceedings vs. methodical succession. The two systems were characterized, moreover, by different objectives of the legal process in their relation to a reactive state vs. activist state that in turn used legal processes to resolve conflicts or to enforce state policy—in the sense of policy-implementing.

21 See Brecht’s notes to his opera Aufstieg und Fall der Stadt Mahagonny from 1927, published as an essay later; see Bertolt Brecht, Brecht on Theatre (1964).

and a stage would be the floor. One can take the floor, and the very distinction between
taking it and watching it being taken determines whether we are talking about a podium or
a stage.

In the context of law’s theatrical-proper, the law must be formally staged with a distribution
of roles to play; a general audience must be able to see and hear the law enacted, not just
be able to check on whether everything proceeds fairly, but also be able to witness how the
law works. They should be able to see how a case gradually unfolds on the basis of a
procedurally speaking predictable plot aimed at closure—although the outcome itself may
be unpredictable. As Hannah Arendt and—in her line of thinking—Yasco Horsman have
noted, controversial cases will always spill over to the realm of society in a theatrical way.23
For instance, a case may be completed in legal terms but cannot readily be resolved for a
politically divided public.

By contrast, dramatically speaking, there are actors acting with one another on a podium,
and it is probable that an audience is present but not necessary. The actors do not know one
another or what the others are thinking and they are not aware of what the next act is going
to be. There is no clear-cut distinction between those who act and those who witness, and
there is no way of escaping their working toward an outcome that cannot be predicted and
as such is open. Even after a specific case has been completed legally, it can still dramatically
linger on as unresolved business.

In what follows, this Article argues that cultural representations of European-continental
criminal law are colored theatrically, whereas representations of the Anglo-American
criminal law system are colored dramatically. Here, “color” is analogous to its use in
quantum theory where colors indicate not a surface or decoration but a quality or property
that relates one color to a counterpart. The use of the term is also motivated by the fact
that—whether theatrically or dramatically—something must be brought to light, or—in
other words—must be made visible. By implication this means that there must also be
something invisible. This Article traces how different characteristics in both systems provoke
generically colored cultural representations of how things are being brought to light legally.
Here, the two works of art already mentioned—Der Prozess and 12 Angry Men—will be
considered as paradigmatic.

B. Theatrical Display: Stability and Imperial Behind-the-Scenes—the European Case

Kafka’s novel was conceived in manuscript form in the years 1914–1915 under the title Der
Process and then published—as supervised by Kafka’s friend Max Brod—under the title Der
Prozeß in 1925 (see note 7). Tellingly, Kafka’s novel has always been translated in English as

The Trial, which is also the title of the Orson Welles film adaptation. The Trial, however, is an incorrect translation. Yet this incorrect translation signals, as we shall see, the very principal difference between the two generic aspects. Indeed, one aim of this Article is to chart differences between these two in terms of their cultural and generically captured “un-translatabilities.”

Funded by German, Italian and French money, Welles’s film was released in France and Germany in 1962 under the titles Le Procès and Der Prozeß, respectively. The legal term “process” is derived from processus, which is in turn derived from pro cedere, or “to go forth.” The term had its legal birth in medieval church law to indicate the procedural development of a judicial case. In contrast—and “contrast” is used here intentionally to connote the issue of color—the term “trial” is derived from the Anglo-French triet, which means “to test,” “to experiment,” “to put to proof,” or “to try.” As we will see, such testing, trying, or putting to proof, is something that serves the manifest nature of legal procedures, and is—as such—distinctly dramatic. For now, the point is that a process implies a procedure that can be best defined as theatrical because it begins with Act I, Scene 1, and proceeds through subsequent acts and scenes.

The fact that the term process originates in medieval church law implies it is part and parcel of an ultimately imperial understanding of law. Much of Pierre Legendre’s work attempted to show how the Roman Catholic Church appropriated Roman law; Legendre used the term “hostile take-over” to describe this process. The obvious impulse behind this endeavor was to transpose the imperial power of Rome to that of the Church as a papal organization. To make this possible, continental law was shaped in the later Middle Ages on the basis of Roman emperor Justinian I’s compendium of existing laws from the sixth century (529–533).

In a major attempt to avoid conflicting or contradictory laws, Justinian reduced the body of legal writings back from 1,500 books to fifty with statutory force. In hindsight, this was one of the great moments in what might be called the history of the codification of European law.

24 It is possible that Welles explicitly wanted to pun on the issue of fascist showtrials. See Anne-Marie Scholz, "Josef K von 1963...": Orson Welles' 'Americanized' Version of The Trial and the changing functions of the Kafkaesque in Postwar West Germany, 4.1 EUR. J. AM. STUD. (2009), http://ejas.revues.org/7610.


26 On this, see JAMES BRUNDAGE, MEDIEVAL CANON LAW 120–53 (2013).


28 Legendre studied the issue from his earliest work onwards in PIERRE LEGENDRE, LA PENETRATION DU DROIT ROMAIN DANS LE DROIT CANONIQUE CLASSIQUE (1964).
Law. Law became codified in the *Digest*, or the *Digestorum, seu Pandectarum libri quinquaginta*, which along with the *Code*, the *Institutes*, and the *Novels*, formed the so-called *Corpus Juris Civilis*. The *pandectarum* indicated that these fifty books were “all encompassing.” It is evident that Justinian strived for the unification and centralization, one could also say the stability of the legal system in the Eastern Roman Empire. Yet, what is often ignored is that he did so in preparation to expand and restore the entire Roman Empire as a whole, including Northern Africa and Western Europe. This restoration had its consequences. In effect, Justinian’s conquering of the Western part of Europe turned out to prefigure the Frankish kingdom and future empire under Charlemagne, and inspired medieval efforts to centralize and unify. In light of my general argument about the connection between the law’s theatrical mode and visibility, it is telling that when Charlemagne was made sacrosanct in 1167, his bones were forever sealed and made invisible, thus mystically supporting or underpinning the visible manifestations of power and legal order.

Late Roman and medieval processes of centralization and moments of codification led to new “appearances” of law. Individual cases now fell under general rubrics, and—instead of these cases expressing a mediating judge’s particular decision—the judge now transformed into a staged character that expressed imperial and centralized power and served the stability of this order. As the classics scholar William Turpin contends: “Roman law was transformed by the acquisition of an empire: rules derived from a deep republican distrust of magisterial powers gave way to those of an authoritarian imperial government.” In this light, I argue that the obsession with the abstract theatricality of the legal system in Kafka’s novel is not coincidental. This obsession can be best understood in the context of the Austro-Hungarian Empire. It may be right that—as Walter Benjamin noted in 1934—“Kafka’s world is a world theater. For him, man is on the stage from the very beginning.” Yet, the very content and nature of what happens to the protagonist in Der Prozeß is not as universal as suggested. Kafka wrote the novel at a time when the Austro-Hungarian Empire—K & K: *Kaiserlich und Königlich*, both imperial and royal—was still fully functioning. Similar to previous European imperial systems and late nineteenth and early twentieth-century European empires, criminal law functioned primarily in *theatrical* terms. Its pivot was the

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29 There is abundant literature on Justinian’s codification. See, e.g., DAVID JOHNSTON, ROMAN LAW IN CONTEXT, 2012; PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY (2003); Caroline Humfress, *Law and Legal Practice in the Age of Justinian*, in THE CAMBRIDGE COMPANION TO THE AGE OF JUSTINIAN 161–84 (Michael Maas ed., 2005).

30 *DIGESTORUM, SEU PANDECTARUM LIBRI QUINQUAGINTA*, LUGDUNI APUD GUILLIELMUM ROULLIUM (1581). BIBLIOTECA COMUNALE “RENATO FUCINI” DI EMPOLI.


public display of a procedure that would commence in Act I, Scene 1 and proceed in good order towards a final conclusion.

One passage in Der Prozeß testifies to this. When K. returns to the theatrical space of the court—or better, the space behind the scenes that allows for access to that stage—he looks into the now empty courtroom stage with a table of books and says:

“Can I have a look at those books?” asked K., not because he was especially curious but so that he would not have come for nothing. “No,” said the woman as she re-closed the door, “that’s not allowed. Those books belong to the examining judge.” “I see,” said K., and nodded, “those books must be law books, and that’s how this court does things, not only to try people who are innocent but even to try them without letting them know what’s going on.” “I expect you’re right,” said the woman, who had not understood exactly what he meant. “I’d better go away again, then,” said K. “Should I give a message to the examining judge?” asked the woman. “Do you know him, then?” asked K. “Of course I know him,” said the woman, “my husband is the court usher.” It was only now that K. noticed that the room, which before had held nothing but a wash-tub, had been fitted out as a living room.33

The entire passage is illuminating not only for its illustration of the theatrical operation of law in an imperial context, but also for revealing the mysterious nature of the court’s behind the scenes. In terms of the imperial display of law, ordinary citizens only know the judge indirectly via a court usher. The judge’s operations are not based primarily on his dealing with the confrontation between the parties involved but instead on law books that determine how the court proceeds—how it “does things.” The intricacies of the law captured in these books escapes the uninformed layman, who—even when innocent—is forced to simply play a passive role in the procedures. Even when K. is standing behind the scenes, it does not provide him with inside knowledge because the space is no longer the behind the scenes of the court; its nature is fluid.

In Kafka’s text, the European theater of law displays quasi-imperial powers in the figure of the judge. Script, in this context, is not only the basis and result of this theater, it is also an icon for another kind of theatrical behind the scenes by embodying an invisible legal space that defines theatricality as much as does its public display. The invisibility and the display of imperial power is rendered manifest in the document, the book, and the archive, all of

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33 FRANZ KAFKA, THE TRIAL 60 (David Wyllie trans., 2003).
which emphasize stability, and serve the theatrical procedure. In the end, however, they
overrule it. As Stone Peters indicates, law is “committed to the sanctity of the verbal text.”

This may explain why a little later Josef K. considers his options as follows:

He was no longer able to get the thought of the trial out of his head. He had often wondered whether it might not be a good idea to work out a written defence and hand it in to the court. It would contain a short description of his life and explain why he had acted the way he had at each event that was in any way important, whether he now considered he had acted well or ill, and his reasons for each. There was no doubt of the advantages a written defence of this sort would have over relying on the lawyer, who was anyway not without his shortcomings.

Here, K. is shown trusting the power of paper and, by implication, procedure and codification. He is well aware that the behind the scenes may be of greater importance than his public appearance.

K.’s ideas coincide with a consideration of law defined by a fascination, or perhaps even an obsession, with law’s unknown origin and almost miraculous appearance. In his study of Derrida’s reflections on law and Kant, Jacques de Ville argues that “for law as such (pure morality) to have authority, according to Kant, it is required that it does not have a history. The law (as such) must present itself as ‘an absolutely emergent order, absolute and detached from any origin.”’

Put differently, law’s political, and, by consequence, intrinsically controversial origin needs to be hidden behind the scenes. As a result, law seems to enter the stage theatrically—in the imperial context, that is. Such an “emergent” form of theatricality is intrinsically related to language and especially to literature. As Derrida notes, literature is very well equipped to “play the law”, capable of “playing at being the law,” and as such—and this is a hallmark of theatricality—capable of “deceiving the law.”

Behind this argument is Derrida’s assertion that the foundational myths of law and the mystical foundation of its authority depend on the act of fingere—fictionalization in both the etymological and the common senses of the

34 Stone Peters, supra note 8, at 58.
35 KAFKA, supra note 33, at 134.
37 Derrida, supra note 36, at 212.
word. Etymologically speaking, the verb *fingere* initially meant *to shape or to form* and, only later, it came to denote *to pretend*. In its emergent appearance, literature is analogous to law and to theater here: Law has to emerge out of the domain of the invisible into the domain of the visible. Acts of constitution and foundation are precisely such appearances.

Like the curtain in the theater, the veil of fiction can be drawn away to show not the origin of law but rather the stage upon which legal characters are meant to appear. Such unveiling is radically different from the dramatic enactment of conflicts in a legal context. This Article now turns to the second theatrical mode of law’s public appearance and focuses on how the U.S. American system has acquired a public face by means of cultural representations where the dramatic is pivotal.

C. Dramatic Invisibility: The Test of Truth Behind-the-Scenes—the Anglo-American Case

The film *12 Angry Men* is remarkable for its persistent behind-the-scenes focus. Only at the very beginning of the film do we see the stage of the courtroom upon which everything relevant to the case has occurred. The film then progresses with the members of the jury entering the deliberation room where they will remain until they come to a conclusion and a verdict. From then on, the viewers will follow the conflicts and the dramatic deliberations of the jury members, including flashbacks in which we see only the face of the accused boy, who allegedly murdered someone with a knife. The film’s excision of the space of the courtroom is functional and telling, as the film provides a dramatic reenactment of a theatrical failure. The upshot is that the entire legal procedure must be repeated because what occurred in court may have been biased. The starting point for this reenactment is a single member of the jury who has doubts: Juror number eight (played by Henry Fonda). What was publicly tested in court is now tested again, outside of the public eye, though one could argue that the jury is the embodiment of that very eye. This public body now takes the floor, not in the form of a stage, but rather via a podium, in an open-ended action sequence where all actors have an equal say.

The dramatic reenactment at stake is a trial in the etymological sense of the word. As we have already seen, “trial” is derived from the Anglo-French *trier*, which means “to test,” “to experiment,” “to put to proof,” or “to try.” In this context, the translation of Kafka’s *Der Prozess or Der Prozeß as The Trial is a clear example of an incorrect translation, or rather, of an inescapable untranslatability. The untranslatability of culturally and linguistically disparate terms, like this one, were key to a project led by the philologist and philosopher Barbara Cassin, who published *Vocabulaire européen des philosophies: Dictionnaires des intraduisibles*, which was translated in English as *Dictionary of Untranslatables: A Philosophical Lexicon.* The principle behind this book was that there are words so specific to languages, and by consequence cultures, that they are untranslatable. As such, they

38 Dictionary of Untranslatables, supra note 25.
provoke relentless attempts to achieve some sort of translation. One of the volume’s translators, in turn, transferred the principle operating behind the dictionary to another domain. In Against World Literature: On the Politics of Untranslatability, Emily Apter argues that the study of texts from different cultures in university courses on world literature tends to take away the very thing that makes these texts specific. The translation of Der Prozeß as The Trial represents an unacknowledged proof of this contention. The two terms denote different modes of cultural representation and differing systems of law.

Paradoxically, an identical term may also point to cultural un-translatabilities. For example, in the European continental tradition, The Digest can only be used to refer to Justinian’s Digest. Yet, the Faculty of Law at the University of Oxford says this about the very same term:

The Digest is a compendium of case law from the 1500s onwards. Originally called the English and Empire Digest, it includes cases from England and Wales; Scotland, Ireland, Canada, Australia, New Zealand and other Commonwealth countries; and EU and European Court of Human Rights cases. The Digest provides a brief summary of cases, and their subsequent judicial history, arranged by subject. It is particularly useful for finding older cases, which are not included in the Current Law series.

As if to provide almost a mirror image of the continental Justinian Digest, this Anglo-Saxon version consists of fifty-two books—just two more than the Justinian Digest. To be sure, the reference to the European Union and the European Court of Human Rights makes clear that the distinction between the so-called common law tradition and the continental one should not be essentialized. As John Langbein stated three decades ago, “the familiar contrast between our adversarial procedure and the supposedly non-adversarial procedure of the Continental tradition has been grossly overdrawn.” Indeed, the traditions and systems have been gradually merging, in the case of the United Kingdom (U.K.), since the Middle Ages. Yet, there is no escaping the different meanings of the term “digest.” It concerns the familiar distinction between a codified system of law installed by an imperial power, and a system that has come into being based on individual cases in terms of jurisdiction and jurisprudence.


The clear commonalities between the two systems are due to the fact that the English system assumed its own quasi-imperial or royal coloring after the Norman conquest of England in 1066 when the French-speaking Norman elite came to control England’s mixed set of peoples and communities (Angles, Saxons, Vikings, Danes, Celts, Jutes, and others). The most basic attempt to do so was embodied, just twenty years after the invasion, in the Domesday Book, which described all parts of the countries and laid down the lines of allegiance to, ultimately, the (newly established) king. For that reason, Theodore Plucknett stated, “[t]his opportunity of systematising the land situation enabled the Conqueror to make England the most perfectly organised feudal state in Europe.” Moreover, in the years that followed, the royal question was how to bring communities into line that were ruled by customary law, mostly consisting in the form of oral transmission, or how to bring cohesion and consistency to the many communal courts or other types of tribunals that were related to shires or baronies, for example. Enter common law—common, that is, to the realm of the kingdom. This very commonality was guaranteed by royal judges who traveled the country and came to decisions in the context of specific courts, communities, and on the basis of consultation, or by using juries. Yet, this process was always overseen by the curia regis, the council-court of the king. Consequently, a system of law based on regional differences developed with underlying principles of reason and continuity, and at some distance was ratified by a supreme power. Still, it did not come into existence because of a top-down, codified, systematic, and closed set of books with statutory force.

Moreover, although the logic underpinning royal rule was clearly analogous to the centralizing power at work in Justinian’s empire, what colored the Anglo-Saxon and U.S. American system of law differently than the continental one was the distrust of royal or, by implication, government power—a distrust that is still active to this day, especially in the United States. In a rejection of despotism or uncontrolled imperial power, a line extends in European and Western history that connects the English Magna Carta Libertatum (1215) with the Hungarian Golden Bull or Edict (1222), and, centuries later, with the Dutch Act of Abjuration (1581), which, in turn, was studied by the Founding Fathers of the United States in preparing the Declaration of Independence (1776). The principle behind all four texts is the protection of the people against the abuse of imperial or royal power. In this context, the nineteenth-century American lawyer, anarchist, and staunch abolitionist Lysander Spoon (1808–1887) explicitly wished to recall what the aim and principle of judgment by jury meant, by repeating explicitly what the Magna Carta had stated:

No free man shall be captured, and or imprisoned, or dispossessed of his freehold, and or of his liberties, or of his

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free customs, or be outlawed, or exiled, or in any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful judgment of his peers, and or by the law of the land.43

Spoon’s recalling of this very passage needs to be understood both in the context of his efforts to end slavery as well as a principal defense of a people against any sovereign power. To that end, Spoon—like many others—offers an alternative to the theatrical display of legal power based on codified law books with statutory force. This alternative finds its anchor in “the lawful judgment of . . . peers.” In terms of legal procedure, this comes down to the use of a jury; to counter the brute execution of power, individuals’ rights must be protected by a trial, a test and judgment, by peers. I argue that such a test is not a form of theatrical display, but rather is distinctly dramatic by nature.

In her seminal study, The Test Drive, Avital Ronell considered that, “essentially relational and not static, testing admits of no divine principle of intelligibility, no first word of grace or truth, no final meaning, no privileged signified.”44 In the realm of the legal test, by means of a trial, this comes down to the refusal to presuppose a final meaning as contained in codified books. Peers decide a case based on the particular laws they adhere to, but not on the basis of a final imperial or royal word. In search of a truth that needs to be established, actors enter into the dramatic process of a test in the etymological sense of the word in order “to test,” “to experiment,” or “to put to proof.” This search for truth by means of a trial, or test, is formally embodied in the jury as the icon or synecdoche of “the people.” As the American Bar Association writes on its website, under the heading “Dialogue on the American Jury: We the people in action”:

The right to trial by a jury of one’s peers is a cornerstone of the individual freedoms guaranteed by the U.S. Constitution’s Bill of Rights. In a criminal case, trial by jury places twelve citizens between the power of the government and the rights of the accused. The government cannot take away someone’s right to life, liberty, or property until it has convinced those twelve

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43 LYSANDER SPOONER, AN ESSAY ON TRIAL BY JURY (1852), giving his version of Article 39 of the Magna Charta, that in the most recent translation reads: “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.” English Translation of Magna Carta, BRITISH LIBRARY (Mar. 2016), http://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

citizens of that person’s guilt beyond a reasonable doubt.\footnote{Dialogue on the American Jury: We the people in action, AMERICAN BAR ASSOCIATION (2016), http://www.americanbar.org/content/dam/aba/administrative/public_education/resources/dialoguepart1.authcheckdam.pdf.}

Formally, elements of staging are clearly involved here. Yet, the entire framework is dramatic due to the fact that the stage of the court can be overruled by a podium occupied by ordinary citizens: “peers.”

This is what 12 Angry Men portrays: The twelve members of the jury in their enclosed space provide us with a palette of socially diverse U.S. American citizens; although, as telling sign of the times in which the film was made, the jury members were all white men. Juror number eight, with whom the entire reenactment of the trial begins, can be seen as the embodiment of what Plato coined “nomocracy”; he is a reasonable, rational, measured, intelligent, and controlled man who stands up against the multitude. He is also the only one of the jurors not to sweat. The others’ sweating is symbolic of their passions, irrational fears and desires, and uncontrollability. By implication, they represent the dangers of a system that depends on the whims of individual people that make up a collective—what Plato coined “theatocracy.” In a sense, the jury is a mise en abyme for a theatrical, or popular, rule that runs the risk of being biased. This systemic problem of biased juries was the major reason why the jury system was abolished in India and Pakistan during the 1960s, while in the U.K., the jury system has been gradually dismantled and is used only in one to five percent of all cases.

In the context of this argument, the issue is that the theatrically-framed public test enacted on stage in court can be overruled by the dramatic behind-the-scenes action, when the jury retreats to deliberate on whether the accused should be found guilty. This—invisible to the audience—dramatic behind-the-scenes, which is nevertheless public due to the composition of the jury, can be either the source of bias and injustice, or seen as an aspect of one of law’s most basic requirements—the idea that potentially biased, unreasonable, or arbitrary results can be corrected by public control. Paradoxically, the public work of the jury embodies what Plato described as nomocracy, as an internal, in the sense of a dramatic, process between people that determines what kind of law should be made or upheld. For this very reason, Stone Peters argued that the opposition between theatocracy and nomocracy is a false one. Indeed, in terms of rhetoric, the opposition is false. Yet, in terms of jurisdiction and legitimacy, a central distinction between the two functions is the pivot between the theatrical and the dramatic. It concerns the publicly visible or invisible law-enforcing, law-making, law-upholding, and law-innovating actions of judges or juries. These actions do not happen through public consultation, but rather, through internal dramatic debates that are only later theatrically presented to the public.
In the Supreme Court of the United States, as well as in the Federal Constitutional Court of Germany, judges are allowed—and expected—to vent internal differences of opinion in relation to the public decision or verdict of the court. One such voice of dissent has recently fallen silent due to the unexpected death in 2016 of Justice Antonin Scalia, who served on the Supreme Court of the United States for thirty years. In its obituary, The Economist sketched the picture of a man who “never tried for consensus, not rating it anyway, and increasingly sat with the minority, though always the most colorful and quotable.”

Scalia’s frequent dissents represent an example of how the dramatic and, in essence, the public, yet invisible, clashes among judges in the closed deliberations of the Supreme Court were theatrically re-staged for a general audience.

Such theatrical, public disclosures of dramatic dissent are inconceivable for the Court of Justice of the European Union. In fact, the European Parliament conducted a 2012 study asking whether the Court of Justice of the European Union should allow dissenting opinions. To this end, the study considered existing practices in the member states. In Belgium, France, Italy, Luxembourg, Malta, the Netherlands, and Austria separate opinions of the judges on the Supreme Court are never accepted. Yet, in 2012, all of the other twenty member states had varying practices regarding dissenting opinions. This variety of procedures lead the study to conclude that this “calls into question the validity of some traditional arguments against dissenting opinion, such as those related to legal cultures and differences in understanding the role of judges.”

Yet, the argument that the simultaneous existence of dissenting opinions in different legal systems implies that they are not altogether that different—culturally speaking—and, therefore, the argument may not be very strong. Things that appear to be the same in different systems may have radically different meanings and connotations. In this context, it is telling that Raffaelli does not conclude that the Court of Justice of the European Union should include the practice of allowing for dissenting opinions because, as she contends, its authority and its precise relation to the systems of the member states is not sufficiently clear.

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48 This concerns the situation of 2012; Croatia became a member in 2013.

49 RAFFAELLI, supra note 47, at 29.

50 Id. at 39.
opinions is thus to remain behind closed doors. The borders of invisibility at stake here are intrinsically related to the court's authority, but in a double sense. As Justice Susanne Baer states in her contribution to this volume: “Indeed, this veil of the secrecy over deliberations protects me and the institution itself; it is highly functional.” Yet, this veil may serve the authority of the court in its theatrical appearance, staging itself as if it had only one voice, and dramatically, in implying the struggle of judges in getting to a decision.

In Europe, such struggle is not made public in terms of Öffentlichkeit, and the judges are not—and are not supposed to be—truly public figures. In contrast, in the U.S., the recently deceased Justice Scalia had a cultivated image: “Though he was not the only New Yorker on the bench, he was the only spoiled-rotten Italian kid brought up proud and scrapping in Queens and familiar with rude Sicilian gestures. ‘Come right back at you!’ was his motto, robed or not.” No comparable description of a judge in the Court of Justice of the European Union is thinkable. The reason may be that the U.S. American political and legal system is far more politicized than European ones, and here, the generic aspects of theater and drama may play a pivotal role in “coloring” of the different systems. Scalia is not described as an actor in his theatrical role as a justice, in which case the distinction between his being robed or not would make the difference. In fact, as the phrase “robed or not” suggests, a U.S. justice always plays a political role.

To this day, William Orville Douglas remains the longest sitting Justice of the Supreme Court of the United States, with thirty-six years of service (1939–1975), and he was certainly as controversial as Justice Scalia. Justice Douglas considered dissenting opinions to be crucial to America’s democracy. Many argue that the European Union is struggling to find its democratic colors—a struggle that concerns the parliamentary, the executive, and the judiciary branches. In this context, it may be understandable that the number of European citizens who can name even one judge on the Court of Justice of the European Union—even their own nationally appointed judge—is likely close to zero. This would not be a vexing problem if the Court had only a minimal function. Yet, it is one of the most powerful centralizing forces within the European Union, and it functions so theatrically rather than dramatically, as it follows the judiciary logic of imperial powers with which Europe has long been familiar.

51 See Baer chapter in this volume.
52 THE ECONOMIST, supra note 46.
54 To my knowledge, there is no research on this. There should be. As long as it is not there, this is my hunch, which is informed by the fact that for some time I asked friends, colleagues, and people I met on the street whether they could name the Dutch Justice on the European Court of Justice. They could not.
For those who tend to think of European nation states only in their most recent form, it is worth recalling that just one century ago, before the start of the First World War in 1914, Europe was dominated by imperial powers. Consider, for example, the Russian Empire under the czar that included the current state of Finland, the Baltic States, and parts of Poland; the Austro-Hungarian Empire that encompassed the current states of the Czech Republic, Slovakia, Austria, Hungary, Serbia, Croatia, Slovenia and the biggest part of Romania; the Ottoman Empire that had only recently ceded what are now the states of Albania, Macedonia, and Bulgaria; and the German Reich that included parts of what are now Poland, Russia, and Denmark. Certainly, the United Kingdom, only a kingdom in name, was effectively the biggest empire of all with immense colonial possessions. France was a republic, and yet still had its own colonial empire to rule. Even tiny Portugal and the Netherlands had imperial territories. The Netherlands controlled the densely populated territory of what is now the state of Indonesia. As late as 1922, Dutch constitutional law was altered so that it could declare by law that the Kingdom of the Netherlands included the territory of the Netherlands, Suriname, six Caribbean islands, and Indonesia. Though a democracy in more than just name, the Dutch legal system contended with the schizophrenia of defending a democratic European Rechtsstaat, on the one hand, while, on the other, maintaining an incredibly complex mixture of different systems of law under the umbrella of colonial rule. In terms of Öffentlichkeit, the Dutch legal system opened itself up dramatically to Dutch subjects in terms of public testability. At the same time, it theatrically demonstrated its imperial power to colonial subjects.

The fact that the political organization of Europe was, historically speaking, recently imperial is relevant to understanding the European Union now. In name, the European Union is democratic, yet the individual member states are incomparably better structured than the Union to offer guarantees of democracy. Moreover, the European system of law that, legally speaking, “rules” the continent, has no clear democratic political underpinnings. Accordingly, the Union has a tough time appearing theatrically. For example, many citizens in Europe think that the Court of Justice of the European Union (CJEU) is important, but very few actually know where the court is located. Additionally, citizens often and easily confuse the CJEU with the European Court of Human Rights in Strasbourg, France—which is not an EU court. This shows that the CJEU’s legitimacy is weak to say the least, as was confirmed by James L. Gibson and Gregory A. Caldeira. Their study, conducted for the European Commission, found that the CJEU was considered to be an important institute by about a quarter of the inhabitants of six member states. Yet, although the authors of the study

55 The original can be found at: https://www.denederlandsegrondwet.nl/9333000/1/j9vnhgf299q0sr/v7ilzdcshurk (last visited Mar. 1, 2017). The first article states: “Het Koninkrijk der Nederlanden omvat het grondgebied van Nederland, Nederlandsch-Indië, Suriname en Curaçao.”

56 On this see H.W. VAN DEN DOEL, HET RIJK VAN INSULINDE: OPKOMST EN ONDERGANG VAN EEN NEDERLANDSE KOLONIE (1996).

57 James L. Gibson & Gregory A. Caldeira, Changes in the Legitimacy of the European Court of Justice, 1 BRIT. J. POL. SCI. 63 (1998); see also Alicia Hinajeros, Social Legitimacy and the Court of Justice of the EU, 14 CAMBRIDGE Y.B. EUR.
found this impressive, they were more than pessimistic about the Court’s legitimacy. Noting the absence of the court’s theatrical appearance and testability, one is inclined to consider that invisibility has become more dominant than public visibility in the CJEU, and this implies a loss of the theatrical-proper.

In a different way, something comparable may be occurring in the United States, where plea-bargaining increasingly determines the outcome of most criminal cases. In fact, in 12 Angry Men, we are confronted with a rather outdated model of dramatic enactment. With plea-bargaining, there is no longer a public test nor a test performed in a legally protected space by peers. So, although the dramatic test is very much alive in terms of cultural representations in novels, films, and television series, these representations ignore actual legal practice. This discrepancy suggests that more research is required to understand what this means for the legitimacy of the system. Additionally, in both systems, the multiplication of different forms of media coverage has influenced the very ideas that many people have about systems of law.

Law has been topical in many forms of visual representation since the Early Modern period. Stone Peters argues that digital media has taken a quantitative change that, due to its omnipresence (with “a plenitude of moving images”) may have caused a qualitative change. According to her, in what she calls a digital theatrocracy, the danger is that, “in law, once the very epicenter of democracy, one can see the gradual infiltration of the vision machine: first the 19th-century diorama and panorama, then the photograph, then fingerprinting techniques, then the infinitely replicating and increasingly surreal images that make up law today.” This Article argues that the problem is not the visual nature of representations, but rather their quasi-infinite replications and the speed of those replications. Due to the omnipresence of repeated and multiplied digital images, the operations of law threaten to become the topic of spectacle, and spectacle runs counter to the very idea of law’s Öffentlichkeit. Spectacle is not about the ability to openly test something, but instead corresponds to the logic of the game, with winners and losers. In this sense, Stone Peters is correct that this “erodes our faith not only in law’s truth-finding capacity, but also in its stabilizing power.”

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FISHER, supra note 2.

Stone Peters, supra note 8, at 43.

Stone Peters, supra note 8, at 43.

Stone Peters, supra note 8, at 42.
There is no easy fix for this development. Moreover, some argue that there might be enormous advantages in using the explosion of visual media to deconstruct the invisibility of law and its perverse powers. Stone Peters, in her discussion with Peter Goodrich, considers what he has termed the “videosphere” as a powerful tool to disclose “the once-secret, invisible, or only partly visible practices at the heart of the law” and to transform law into a “transparent rite.” Yet, as this Article argues, and in agreement with Susanne Baer in this special issue, there are damaging, as well as pivotal and functional, aspects of those invisibility practices. Therefore, the question returns to what exactly should be rendered visible, or invisible, when law must appear open and to be made publicly testable. In his analysis, Goodrich emphasizes invisible actions as the potential source of law’s power, perversion, and bias. He thus makes a plea for total visibility. In contrast, while not making this entirely explicit, Stone Peters appears to be more concerned with legal processes acted out by experts and lay jurors, who, in a balancing act, embody the requirement of law to be reasonable and fair. Thus, to Stone Peters, total transparency may result in totalitarian terror. Both Goodrich and Stone Peters make legitimate points; in a sense, they both prove that, despite the radical developments in media, the basic capacities embodied in theater and drama are still essential to the fair—specifically, open and public—operation of law. The theatrical and public display of stability, as opposed to the arbitrary actions of totalitarian or sovereign powers, is as much key as the openness of the judicial system to public participation and assessment.

In legal terms, drama needs a protected space. Such a space is, on the one hand, public. On the other hand, in certain practices, it must remain invisible, such as when jurors deliberate away from the gaze of the sovereign power, the eyes and ears of a totalitarian force, or the masses who may be manipulated by the media. Such a protected dramatic space is increasingly threatened in the present circumstances. In legal terms as well, law must be seen to work theatrically. Yet, the combination of a growing tendency toward spectacle and the increased invisibility of legal actions place the requirement of theatrical openness and public testability under pressure. Publicity is growing in importance, therefore. Law’s Öffentlichkeit, in either theatrical or dramatic terms, is not truly served by pulling back all the curtains.

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In the Force Field of the Law: On Affect and Connectivity in the Casework of Forensic Architecture

By Christine Hentschel* & Susanne Krasmann**

Abstract

Law needs a force; without its force, it would be nothing. This article proposes a conceptualization of the force of law as affective by examining the political aesthetics of “Forensic Architecture,” a project based at Goldsmiths, University of London. The novelty of Forensic Architecture’s analytical approach arises, on the one hand, from its use of technologies of power that are otherwise employed by states and their military forces—thus reversing the direction of the surveillant gaze towards a disobedient practice of seeing and sensing. On the other hand, the notion of a “force field” operates as a particular critique of European border policy. The force of law appears to merge into, and at the same time emerge out of, a complex arrangement of technological devices, legal regulations, and human actions. This essay re-traces the political aesthetics of the “left-to-die-boat” case, where a boat filled with migrants was left without any assistance despite the legal regulation that obliges obliging seafarers to rescue anyone in distress in the Mediterranean Sea. Forensic Architecture’s case-work unsettles human-centered “norms of representation” typically used in critical writings on the European Union (EU) border regime; instead, the law is demonstrated to be enfolded within an affective force field that operates with “touch” and “connectivity” and that allows us to see and sense the law in a newly pluralistic manner.

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A. The Forces of and Within the Law

The force of law (Gesetzeskraft), Jacques Derrida reminds us, is deeply ambiguous.¹ It is bound to the idea that there is a force of the law that is tied to a legitimate power and that the law itself needs to be enforced or executed: There is no law without the use of force or even “the violence that one always deems unjust.”² Violence, indeed, is what law promises to exclude. But violence is also what the law involves, i.e. in the “originary” moments of law-making, in its constantly being in tension with justice, and in acts of enforcing the law that rely on violence as the legitimate use of force. Furthermore, there is the notion of legal force (Rechtskraft), which has a specific meaning. It refers to the taking effect of a legal act (Inkrafttreten). This procedure involves a moment of completion: When a judgment enters into legal force the process of legislation and the interpretation of laws come to an end. This transports the idea of law’s capacity for producing reliability: The legal act or judgment will stay as it is. It will be permanent. A judgment obtains legal force and consequently impels or restrains individual activities or institutional procedures.

Andreas Fischer-Lescano’s recent elaborations on legal force and the force of law play with the connotations of both of these terms.³ As he contends, the force of law tells us about law’s a-rational moments, about law’s drive and energy, and perhaps also about law’s susceptibility to social forces. Such a “force within the law,”⁴ Fischer-Lescano points out, demarcates the “unmarked space”⁵ of an assumed legal rationality or, using Stanley Fish’s words, of laws claim to have a “formal existence.”⁶ Indeed, according to Gilles Deleuze, a force is something pre-verbal; it concerns intensities and relations, as well as non-linear processes of division and distribution.⁷ Yet, the a-rational quality of law does not mean it is irrational, and the force of law is nothing outside of or intrinsically different from what the law is. In fact, the force is what sets the law in motion. Without its force, the law would be nothing.⁸

² Id. at 927.
⁴ FISCHER-LESCANO, RECHTSKRIFT, supra note 3, at 15.
⁵ Id. at 17 (emphasis added). Author’s translation.
⁷ See GILLES DELEUZE, FOUCAULT (1988).
In this regard, various questions arise: What does this force entail? How can we conceive of the forcefulness of the law? Is there a threshold at which non-legal powers—like social forces—address, mobilize, and interact with the law? To address these questions, we take inspiration from an approach that, at first glance, does not seem to have much relation to the law at all. The approach is that of Forensic Architecture, a research project based at Goldsmiths, University of London, led by architect Eyal Weizman. Forensic Architecture traces and exposes detrimental or illegitimate governmental or corporate practices, such as drone strikes, oppressive urban architecture, and environmental disasters. Yet, the project is also about the law, albeit in a very particular way. First, Forensic Architecture transgresses the established boundaries between the legal and the political spheres. The name “Forensic Architecture” is significant: It alludes to the classical notion of forensis—Latin for “pertaining to the forum”—which “designates the practice and skill of making an argument by using objects before a professional, political or legal gathering.” This forum consists of much more than the courtroom. Indeed, Forensic Architecture understands itself as a “counter-forensics” that endeavors to establish a public truth outside of the narrow juridical sphere. Second, the project takes a novel and innovative analytical approach to render the effects of harmful political practices visible to a broader public by drawing on the very technologies of power that are usually employed by states and their military, such as satellite images. The direction of the surveillant gaze is thus reversed. Third, Forensic Architecture is committed to “a materialist idea of truth.” In the process of assembling evidence, human witnesses rarely act as the most important voices. Rather, material sources are at play, such as the cracks and holes a bomb leaves on the surface of a building. At the center of the forensic project, these traces are made into evidence through the employment of a range of high-tech instruments and expert interpretation.

Yet Forensic Architecture is not only about establishing a public truth. The project also initiates a particular aesthetic practice that makes a politico-legal claim. Thus, it situates the law within a wider material and political force field. The force of law here begins to unfold far beyond the threshold of “serious” legal spheres consisting of the courtroom, statutes, or practices of adjudication and law making. The law deploys its own forces, but it also needs to be enforced in order to be recognized and connected to political concerns. It follows from our analysis of Forensic Architecture’s operations that this is a primarily affective endeavor. In other words, the force of law is an affective force. It operates, in Brian Massumi’s sense.

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13 MICHEL FORESOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 210 (2002). The concept of a “serious” legal sphere is based on Foucault’s understanding of discourse as a series of “serious” statements.
of the affective, through intensities, connectivity, susceptibility, and it is less concerned with what happens between people than that which occurs between human and non-human bodies. Affect reveals much about the materiality of communication, as it “traffics in abilities, intensities, and passages.”

This article examines just one of many forensic inquiries into state atrocities, genocides, and environmental crimes provided by Forensic Architecture’s website. The so-called “left-to-die-boat” case traces the fate of a boat with seventy-two migrants from Libya, which was left to drift in the Mediterranean for two weeks in 2011 despite distress calls and numerous encounters with military vessels. The case has also functioned as a legal and political intervention in a broader public sphere, and as such gives us a clear sense of how to imagine the law through the notion of force.

B. “Liquid Traces”: The Legal Production of “Collective Indifference”

The last decade has witnessed a growing body of literature documenting the violence of the European border regime, namely the conjunction of legal regulations, programs, technologies, and practices of intervention that govern the movements of migrants on the Mediterranean and between land and sea. Critical migration scholars and activists have denounced “Europe’s bleeding border” and its politics of “detention, deportation, and ‘letting drown.’” At the European Union’s maritime frontier, it is argued, the “spectacle of border ‘protection’” by Frontex—the European Union (EU) agency which was established in 2004 to secure its external borders—and others obscures how illegality is produced through policies of exclusion that force migrants into crossing through the Mediterranean, thereby risking their lives. Additionally, an increasingly “stretched” and externalized border regime

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has given rise to a wide range of “precarious transit zones” along Europe’s margins.20 Thus, “Fortress Europe” is no longer the appropriate metaphor to critique European border politics.21 Instead, a sophisticated regime of limitation, hierarchization, and the categorization of migrants within a system of “differential inclusion” has come into being.22 Border and migration politics have shifted their focus from merely restricting mobility to becoming increasingly sensitive to migrants’ strategies, thus shifting border management “from a ‘front-line’ to a series of points and surveillance nodes along changing itineraries.”23 We are witnessing a form of viapolitics, where “vehicles, routes and journeys” have become surfaces for the exercise of power within an extended regime of migration and border control.24

“Liquid traces” was a joint investigation of the “left-to-die-boat” case led by Forensic Architecture and a coalition of NGOs.25 The investigation addressed the growing unease amongst a wider European public towards the EU’s border politics and developed a very specific mode of critique. How is it possible, the researchers of Forensic Architecture ask, that within the highly surveyed and regulated space of the Mediterranean, a boat containing seventy-two migrants did not receive any assistance when it ran out of fuel? “Liquid traces” reestablishes these events in a seventy-page report, an eighteen-minute video, and a range of other visual materials on their website as well as a set of academic reflections in the volume Forensis.26 In combination, these forensic interventions provided the basis for several legal cases claiming “liability for non-assistance of people in distress at sea,”27 a report for the Council of Europe, as well as the basis for activist and academic debates.

A closer look at the video on Forensic Architecture’s website shows how the “left-to-die-boat” case differs from more dominant forms of representing the current migrant crisis, including critical ones. The video does not draw the viewer into the story through personal

20 See Sabine Hess, Gefangen in der Mobilität, 5 BEHEMOTH 8, 8 (2012); see also Maribel Casas-Cortes et al., Riding Routes and Itinerant Borders, 47 ANTIPODE 894, 906 (2015).

21 See Manuela Bojadžijev & Serhat Karakayalı, Autonomie der Migration, in TURBULENTE RÄNDER 203, 204 (Transit Migration Forschungsgruppe ed., 2007).

22 See SANDRO MEZZADRA & BRETT NEILSON, BORDER AS METHOD OR THE MULTIPLICATION OF LABOR 7 (2013).

23 Casas-Cortes et al., supra note 20, at 11.


25 The project is named Forensic Oceanography. Since it is an initiative within the framework of Forensic Architecture, we will use the latter term for the sake of simplicity.


27 Heller & Pezzani, at 673.
testimonies of exodus or images of dead or suffering bodies. Rather, it represents the facts in their simultaneity and connectedness and assembles them by following a careful logic, indeed, an aesthetic (see Figure 1): A satellite image depicts the Mediterranean Sea as a blue surface against a black background. The quiet sound of moving water can be heard, and everything seems to happen in slow motion. In a calm voice, the narrator formulates a series of questions: “What traces might death at and through the sea leave? How to reconstruct violations when the murder weapon is the water itself? What are the conditions that transform the sea into a deadly liquid?” The questions lead the way: Not only does the video reconstruct “what happened,” but it also shows how the evidence was discovered and brought to resonate publically. This includes how the forensic investigators assembled proof from a wide apparatus of sensory technologies such as optical and radar satellite images and migrants’ mobile phone signals. As the researchers explain in the book chapter on the project, “by repurposing this technological apparatus of sensing, [we] have tried to bring the sea to bear witness to how it has been made to kill.”

The sea represents many things here: It is a murder weapon, a deadly force, but it is also the surface on which traces of this killing could be found.

Figure 1. Liquid Traces—The “Left-to-Die Boat” Case (directed by FORENSIC OCEANOGRAPHY [Charles Heller and Lorenzo Pezzani], 2014)

A complex “field causality” transformed the sea into a deadly weapon. As we learn from the small screen on the side of the larger image, the revolutions in Tunisia and Libya, NATO interventions, and increased surveillance of the high seas are all part of this causality. At four

28 FORENSIC ARCHITECTURE, Cases: The Left-to-Die Boat, supra note 26, at (00:31–00:47).

29 Heller & Pezzani, supra note 26, at 658.
minutes into the video, the boat enters the scene, appearing visually as a dot on the satellite image and markedly not as an image of migrants on a ship: “In the early hours of the 27th of March, seventy-two people embarked on a ten-meter-long rubber boat. Before departing, the Libyan military handed them a GPS and a satellite phone.”

From here, a story of connectivity unravels: When the vessel came under distress, the migrants called an Eritrean priest at the Vatican who redirected their message to the Italian coast guard. Subsequently, the coast guard sent out signals informing other ships of the boat’s distress. As the narrator explains, when a helicopter flew close by, the pilot of the boat threw away the satellite phone for fear of being charged with smuggling, believing that help was on the way. When the helicopter returned, eight bottles of water and biscuits were thrown down to the migrants before they were ultimately abandoned. None of the nearby vessels diverted their routes to come to the boat’s aid. After days of drifting without food or water, people on the boat began to die. After half of the passengers were dead, the boat met a military ship that also refused to assist. Here, the narrator makes the video’s most explicit statement about liability: “Despite witnessing the passengers’ suffering, the military vessel left without providing them with any assistance. In so doing, it murdered them without touching their bodies.”

The boat was eventually stranded on the Libyan shore and, after fourteen days at sea, only nine people survived. Their testimonies and the digital traces form the basis of Forensic Architecture’s map of the boat’s journey and its demarcation of the many points at which help was denied to the passengers (see Figure 2). As the narrator notes, “Every point and every line drawn on this map seeks to inscribe responsibility in a sea of impunity.”

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31 Id. at (13:31–13:43).
32 Id. at (16:00–16:08).
Figure 2. Liquid Traces – The Left-to-Die Boat Case (directed by FORENSIC OCEANOGRAPHY [Charles Heller and Lorenzo Pezzani], 2014)

What happened? How does one explain the “humanitarian and . . . legal failure”\(^{33}\) to apply the law obliging “seafarers to rescue anyone in distress at sea if informed of their distress?”\(^{34}\) The high seas of the Mediterranean are not a legal vacuum. Rather, international waters are a “lawscape”\(^{35}\)—a space imprinted by legal normativity. Nevertheless, the legal framework does not automatically provide the protection it should. As the Rapporteur to the Commission on Migration, Refugees and Displaced Persons of the European Parliament, Tineke Strik, explains in her report on the incident,\(^{36}\) the United Nations Convention on the Law of the Sea (UNCLOS) from 1982 implies that states have two legal obligations: (1) “[A]ll states should take all necessary steps to ensure that shipmasters of ships flying their flags assist persons in distress, proceed to the rescue of persons and render assistance in collision situations”; and (2) that “[c]oastal states are required to ‘promote the establishment, operation and maintenance of an adequate and effective search and rescue service.’”\(^{37}\) These lawful obligations apply “without consideration of the nationality, status or

\(^{33}\) Heller et al., Liquid Traces: The Left-to-Die Boat Case, in FORENSICS, supra note 26, at 639, 644.

\(^{34}\) Id. at 651.

\(^{35}\) See Andreas Philippopoulos-Mihalopoulos, Atmospheres of Law, 7 EMOTION, SPACE & SOC. 35, 35 (2012).


\(^{37}\) Id. at 10 (quoting from Article 98 of the UNCLOS).
UNCLOS formalizes an expectation that neighboring states should cooperate and coordinate search and rescue activities, which failed in the case of the left-to-die boat. As the rapporteur implies, this was a failure on a systematic level. The migrant vessel was in Libya’s Search and Rescue (SAR) zone, yet Libya was neither willing nor capable of coordinating rescue operations—a circumstance for which the legal framework was not prepared. Thus, when SAR does not properly function, the institutional duties of neighboring countries are not clearly regulated. But UNCLOS’ purpose is precisely to prevent situations in which people in distress are made to navigate a no-man’s land. In other words, a neighboring state is never relieved of its responsibility to come to the rescue, even when the ship in question is outside its own sovereign territory.

Yet, international law does not penalize those who knowingly fail to come to the rescue of a vessel in distress. Moreover, an uncertainty prevails about where rescued people can disembark, which contributes to the hesitation of private or commercial vessels to offer help. In short, in the case of the left-to-die boat, “failures at every step of the way and by all key actors” occurred, from NATO to Libya, Spain, and Italy. But as Forensic Architecture’s case work demonstrates, what remains most troubling is that a helicopter and a naval vessel came close at two moments, interacted with the migrant boat, and then left and never returned. To this day the identities of the operators of the helicopter and the boat remain undisclosed.

Generally, the history of the SAR zones in the Mediterranean has been conflict-laden. This is due in part to the lack of clarity in the rules of necessary intervention. In this case, Tunisia and Libya had not defined the boundaries of their naval zones; other countries, like Italy and Malta, share overlapping SAR zones. As the Forensic Architecture investigators deduce, this situation leads to the formation of a space of “unbundled and elastic sovereignty,” which enables actors to “abide by obligations at sea selectively according to their interests, expanding and retracting their jurisdicational claims at will.” Given the various actors within this maritime border constellation, the “responsibility for the deaths and violations that are its structural product is shared, diffuse[d], and thus, difficult to address.”

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38 Id. at 11.
39 See id. at 14.
40 See id. at 15.
41 See id. at 20.
43 Heller & Pezzani, supra note 26, at 664.
44 Id. at 671.
“[w]hile the fragmentation of juridical regimes at sea so often allows for the evasion of responsibility, in this case it was mobilized strategically towards the multiplication of potentially liable actors and of forums where they could be judged and debated.”45 According to the findings of Forensic Architecture, the question of why those nearby ignored their duty to render assistance and failed to save the people on the boat becomes a question of how the law systematically provides conditions for this type of negligence to take place.46

The critical literature on the governance of the Mediterranean offers several clues on how overlapping, partly competing, legal regulations and norms might lead to a failure to render assistance. Tugba Basaran argues that the search and rescue regime in the Mediterranean operates through a legal system that operates as an engine of “collective indifference” towards people dying at high seas.47 Indifference, here, is not to be misunderstood as coldheartedness or a disregard arising from disrespect or disgust. Rather, it is the result of contradictory legal norms. While deaths at sea are often presented as the products of “forces of nature,” the result of a “lack of human engagement,” or as the outcome of the practices of ruthless smugglers,48 the duty to render assistance is, in fact, diluted by the restriction and legal sanctioning of individual and spontaneous rescue efforts. The Cap Anamur incident from 2004 provides a notable case in point: The humanitarian organization’s vessel, which sailed under a German flag, allowed thirty-seven people in distress on board in the area between Libya and Lampedusa. Yet, for several days the vessel was denied permission to dock, and when it finally did in Sicily, the head of the organization—who was on board—as well as the captain and first officer of the ship were detained for assisting irregular entry.49 In fact, in recent years, EU border policy has led to the increasing monopolization of search and rescue tasks that became indistinguishable from attempts to contain irregular migration. As Basaran argues, discouraging non-state actors from assisting vessels under distress fosters a sense of detachment from “public compassion” and establishes a normative order for European societies in which “letting drown” represents one brutal instantiation of a wider politics of securitizing (undesired) populations.50 Thus, the logic of indifference is embedded in a “differential treatment” of populations seeking to claim and exercise their “freedom of movement.”51

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45 Id. at 678.
46 Strik, supra note 36.
48 See id. at 206.
49 See Paolo Cuttica, From the Cap Anamur to Mare Nostrum, in THE COMMON EUROPEAN ASYLUM SYSTEM AND HUMAN RIGHTS 21, 21 (Claudio Matera & Amanda Taylor eds., 2014).
50 See Basaran, supra note 47.
smuggling and anti-trafficking legislation, Elspeth Guild and Sergio Carrera therefore assert, “often create[s] a presumption that a captain is committing the offence of smuggling or trafficking if he or she brings unauthorized people into harbors.”

In their analysis of the search and rescue regime in *mare liberum*, Tanja Aalberts and Thomas Gammeltoft-Hansen go even further. They argue that the systematic failure to rescue people on vessels in distress in the Mediterranean, is less the outcome of conflicting legal norms or an unclear, fragmented legal regime but more “the simultaneous expansion and politisation of international law.” Contrary to the benevolent conception of law or legal norms as regulating certain spaces and actions, Aalberts and Gammeltoft-Hansen focus on the constitutive effects of international law to create sovereign authority. In response to the standoff concerning the legal responsibilities of the coastal state, the flag state of the rescuing vessel, and the state of the next possible port of disembarkation, the 2004 amendments to the SAR regime provide further guidelines for coordination and cooperation. The regulation amounts to a “territorialisation” of the universal obligation of hospitality, which “turned into a particular obligation . . . for any single state at any point on the high seas” to render assistance to vessels under distress. In the context of the Frontex regime of coordinated maritime operations, this regulation opened up the space for active search and rescue operations in foreign SAR regions, where the respective responsibility to provide disembarkation places could be deferred. Attempts to strengthen the humanitarian commitment to saving lives in *mare liberum* through legislation resulted in an extended obligation of the states and a “respatialization” of the high seas. This led to “an increase of possibilities to disclaim sovereign responsibility.” With a plurality of legal regulations in place, various legal spaces exist and overlap, which results in a mindset that a different sovereignty can always be held responsible.

Interestingly, Forensic Architecture does not pursue the type of theoretical legal argument referenced here. “The ultimate destination” of the investigation was to provide the basis for

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52 Elspeth Guild & Sergio Carrera, EU Borders and Their Controls 2 (2013); see also Didier Bigo, Death in the Mediterranean Sea, in The Irregularization of Migration in Contemporary Europe, supra note 51, at 55; Raeymaekers, supra note 17, at 163–164.

53 See Aalberts & Gammeltoft-Hansen, supra note 42.

54 Id. at 441.

55 See id. at 457.


57 See Aalberts & Gammeltoft-Hansen, supra note 42, at 451.

58 Id. at 461.
a number of legal cases regarding “non-assistance of people in distress at sea.” While it proved impossible to bring NATO to court due to its immunity status, cases were filed against persons unknown in national courts in France, Spain, Italy, and Belgium. Additionally, Freedom of Information requests were submitted in Canada, the U.S., and the UK. None of these legal approaches successfully determined “legal responsibility” for the sixty-eight deaths on the left-to-die vessel. Yet, the investigation was also meant to extend beyond the courtroom. Some of the maps and images created within the project have been circulated in international press articles, and interactive maps that were redrawn based on the Forensic Architecture’s original disseminated on other websites. The investigators state that the broader aim of the investigation was to draw attention to the “systematic issue” of migrant deaths in the Mediterranean and the impunity that surrounds the perpetrators of these deaths. Visualizing events played an important role in Forensic Architecture’s efforts. It has provided a methodology that migrant right groups replicated to create participatory mapping projects “as a civilian right to look at the sea.” As the remainder of the article explains, Forensic Architecture’s achievement lies beyond the success or failure of the legal cases themselves. Rather, it is important to understand the aesthetics through which the project makes its case, that is, the (affective) rationalities of the force of law.

C. The Force of Law’s Affective Rationalities

How might we draw upon this case to better appreciate what the force of law is and how it works? According to Andreas Fischer-Lescano, this is a question of aesthetics and of how social emotion, drive, and energy morph into a force of law. As Fischer-Lescano holds, the law needs to develop a “culture of a feeling of justice” (Rechtsgefühlskultur) and a “sensorium” so as to sense, decipher, and detect the moment when legal force turns into legal violence. This may even give rise to a feeling of “disgust” when the law is employed with the effect that one may be indifferent and ignore human suffering.


61 Heller & Pezzani, supra note 26, at 654. See, for example, the initiative Watch the Med—an online mapping platform “to monitor the deaths and violations of migrants’ rights at the maritime borders of the EU” and their “alarm phone” that began to operate in October 2014. WATCH THE MED, http://watchthemed.net/. The “alarm phone” is a 24/7 hotline “for boatpeople in distress” and run by a network of activist and migrant groups, who offer advice and raise alarm “when people in immediate distress are not promptly rescued or even attacked and pushed-back by European border authorities.” Id.

62 See Fischer-Lescano, Radikale Rechtskritik, supra note 3, at 171.

63 FISCHER-LESCANO, RECHTSKRAFT, supra note 3, at 118.

64 See id. at 102.

65 See id. at 171; Olson, supra note 16.
To be sure, the “left-to-die-boat” case may leave many viewers horrified at the death of so many people who should—and could—have been rescued. But the affective operation stretches beyond anger, empathy, or a concern with the biographical story of the migrants, such as whether they were active in the Tunisian revolution that the EU celebrated so much and may have been pursuing an “uncanny idea of freedom, one that comprised freedom of movement.” While addressing its deadly subject, Forensic Architecture neither moralizes nor enters into the details of the individual lives lost. Furthermore, investigators conducted narrative interviews with the survivors, but these interviews were not meant to reconstruct their subjective experiences. Rather, the interviews were a part of the overall attempt to “recollect . . . precise elements that could support the reconstruction of the spatiotemporal coordinates of the event and the identification of the various vessels and aircrafts encountered by the migrants while at sea.”

This quiet and detailed reconstruction of the case leads to making a powerful forensic claim within the political sphere. The claim addresses the “elastic sovereignty” that is constituted by the maritime border regime, which allows for an irresponsible set of practices conditioned by the law. The audience is addressed as political subjects who are willing to connect the dots, with Forensic Architecture helping them to do so. The presentation of the project deploys its own rhythm in recounting the chain of events. The scene is thus multifaceted: The narrator’s account on the central screen is corroborated by video-insertions in the side bar. These video-insertions provide additional pieces of evidence and feature interviews with experts and professionals, legal documents, and images of the European border agency, Frontex, operating its patrol boats at night, among other things. The viewer must know not only of the boat’s whereabouts in the midst of “a high-wired sea,” but he or she must also be able to relate the main narrative to a number of other topics, such as what leads people to flee in the first place and why in this particular way.

Forensic Architecture carefully traces what Weizman has termed “field causality”—a mode of capturing “the thick fabric of lateral relations, associations and chains of actions between material things, large environments, individuals, and collective action.” In order to establish field causalities in the pursuit of publicizing forms of violence, one has to examine “force fields” that do not follow a simple logic of structure and causation; rather, these force fields can be understood as nonlinear, simultaneous, and dispersed “causal ecologies.” In the case of the left-to-die-boat, this ecology included the parameters of travel, the vessel’s fuel supply, sovereign divisions of the sea, the passengers’ call-to-help-messages, and the

66 Mezzadra, supra note 51, at 121, 127.
68 Ruben Andersson, Hardwiring the Frontier?, 47 SECURITY DIALOGUE 1 (2016).
69 Weizman, Introduction, supra note 11, at 27.
weather conditions. The gravitational point in the middle of this force field is the international law that requires ships to assist others in distress and coastal states to organize rescue operations in their SAR zones. This law is taken for granted as a reliable constant, but actually, it is a law lacking force. Forensic Architecture points out that the plural agency of maritime sovereigns causes the political failure to apply this law. The project’s critique does not dwell on specific EU regulations and practices: It “refuses to disclose clandestine migration.” Instead, the project’s “disobedient gaze” reverses the border control’s technological eye to render the violence of the border regime visible: “While these remote sensing technologies are usually used for surveillance, they are here repurposed as evidence of guilt.” Thus, the cause that Forensic Architecture sought to address is far broader and more fundamental than the single left-to-die-boat. It is paradigmatic of a failed EU border policy.

In the story told in the video, the force of law is what sets the enforcement of law in motion. Two operational modes are at work here: Touch and connectivity. The Mediterranean Sea is imagined as a tactile surface, that is, as a material space with winds and currents as well as electromagnetic waves that move between different sensory devices. It is a dense “sensorium,” which, after its technological apparatus has been repurposed, may become “a sort of digital archive” to be interrogated as a witness—a witness for the killings. On the one hand, the video’s narrator states that the vessel that came close and denied help “murdered [the passengers] without touching their bodies.” If touch is always reciprocal, in the sense that touching entails being touched, then the situation presented a dramatic lack of touch eventually holding the migrants’ vulnerability at bay. Forensic Architecture establishes precisely the fact of this distance, or non-touch, and denial. On the other hand, there is the sea which “bear[s] witness on how it [itself] has been made to kill” and is consequently turned into a “deadly liquid” or a “liquid trap.” Through tracing this relationship of touch and non-touch, Forensic Architecture assumes a distant gaze, one that

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70 See Heller & Pezzani, supra note 26, at 670.
71 id.; Heller et al., supra note 19, at 647.
72 FRORENSIC ARCHITECTURE, Cases: The Left-to-Die Boat, supra note 26, at (10:39-10:46).
73 See Heller & Pezzani, supra note 26, at 658.
74 See id. at 658, 661.
75 id.; Heller et al., supra note 19, at 647.
78 Heller & Pezzani, supra note 26, at 658, 671.
manages to connect seemingly disparate spatial practices and to "reinscribe responsibility within the space of the unbundled sovereignty at sea."\textsuperscript{79} Connectivity is the other key mode through which one can understand the events in their broader context and the links between the various pieces of evidence. Connectivity is an operational mode by which to establish relations that cannot be grasped at the level of mere representation, signification, and semiotics. It is a mode of reaching out and linking. Connection thereby occurs less “from node to node” or between people and things, but rather focuses on relationality and the “relational operations themselves.”\textsuperscript{80} Connectivity is what plays out in between these relations and emerges from them. Connectivity also involves the act of reaching out to the law; it is perhaps here that the law unfolds its own force\textsuperscript{81} in that it allows, and indeed incites, us to connect to and envision its legal, or legally binding, force.

As operational modes, touch and connectivity are affective. Forensic Architecture acts within and addresses an affective force field, whose modes—touch and connectivity—operate both as a way of seeing and knowing what happened and establishing the connections. These modes indicate that the EU border regime cherishes multiple sovereignties that render the international obligation to offer support a mere legal entity without force.

Thus, we follow Fischer-Lescano in imagining the force of law as that which exceeds the verbal and the subjective.\textsuperscript{82} Nonetheless, rather than by emotion, we understand the force of law to be shaped by affect. Through the prism of Forensic Architecture’s work on “liquid traces,” the force of law does not appear to involve social energy but instead concerns material evidence and touch; it is not about drive but rather connectivity and the sensible. If those who refrained from rescuing the refugees on the boat disregarded their suffering or were simply indifferent, then another source of indifference also has to be taken into account. The law itself remains indifferent as long as it is not addressed, enforced, or called out. Given that the force of law in the “left-to-die-boat” case relies on connectivity, the traceable, the touchable, and the sensible, we may conclude that the force of law forms and informs a particular type of affective rationality, rather than simply being a-rational.

\textsuperscript{79} Id. at 674.
\textsuperscript{80} Ute Tellmann et al., Operations of the Global, 13 DISTINKTION 209, 211 (2012); Urs Staeheli, Listing the Global: Dis/Connectivity Beyond Representation, 13 DISTINKTION 233 (2012).
\textsuperscript{81} See Yishai Blank & Issi Rosen-Zvi, The Spatial Turn in Legal Theory, 10 HAGAR STUDIES IN CULTURE, POLITY & IDENTITY 39 (2010).
\textsuperscript{82} See FISCHER-LESCANO, RECHTSKRAFT, supra note 3, at 81.
D. Conclusion: From the Political to the Legal and Back Again

Forensic Architecture, some have argued, is more of a political project than a legal one.\(^8\) It challenges our habits of perceiving violence and perhaps of understanding ourselves as political subjects. Yet, the project also invests its viewer with a sense of injustice and an awareness of the failure to do justice to people who fled their country and endured hardship. If this failure is also due to a failure to enforce an existing law, then Forensic Architecture enables us to understand how the force of law is driven, or blocked, by an assemblage of legal regulations, infrastructures, and actions that create their own force field. This force field surrounds the law and, in a way, is already “in touch” with the law. The presentation of the “left-to-die-boat” case enacts a specific form of political aesthetics by tracing this affective force field that operates through touch and connectivity. The audience is not addressed through appeals to emotions nor connected by a supposedly shared understanding of the meaning and value of human rights.\(^9\) No image of an exhausted, desperate refugee or of a dead child is meant to touch us; what is required is instead our political esprit and our ability to understand the assemblage of such deadly events.

Consumers of international media now seem to be able to recognize a refugee situation from afar. It typically includes scenes of groups of people on the move, in boats, stranded on islands, trying to get around fences, marching on highways, or arriving at train stations. In contrast, the left-to-die-boat that is depicted in the Forensic Architecture video represents a stagnant, static image of maritime sovereignty and of non-accountability. The movements that are visualized in the video appear comparatively insignificant given the overall field of connectivity: The dot representing the boat in question moves very little, and the camera angle remains constant. Perhaps the video’s most nuanced political statement about the “liquid traces” case lies in its interrogation of current migration within a force field of connection, or the lack of connection, of being encouraged, bound, or overlooked by the law.

The “left-to-die-boat” case occurs at the intersection of scientific epistemology and the “aesthetic regime” of the arts, which can be understood as a particular sphere of experience that unfolds an affective force and mode of identification in its own right.\(^5\) As Jacques Rancière holds, the political potential of art lies in its uselessness as well as its power to disrupt the established “distribution of the sensible.”\(^6\) The aesthetic regime allows us to see things differently, as the clear distinction between the fictive and reality is suspended—the

\(^8\) See Gordillo, supra note 12, at 383.


\(^6\) See generally JACQUES RANCIÈRE, LE PARTAGE DU SENSIBLE (2000).
real, as Rancière puts it, must first be fictionalized in order to be thinkable. Nonetheless, although the aesthetic regime is dissociated from social reality, it is not decipherable without it. Thus, the Forensic Architecture video attracts viewers’ attention through familiar yet unfamiliar representations of the Mediterranean as a liquid “lawscape” and the migrant passengers’ desperate attempts to reach European shores. The “left-to-die-boat” video highlights the signals that were sent out and received, and the technologies involved. Forensic Architecture’s political and ethical project is indeed inseparable from its aesthetics. The viewer’s ethical and technological gaze is forced to take in the entanglements caused by a revolution, a military intervention operating via cell phone, a lack of drinking water, and a variety of satellite signals for apprehending how the freedom of movement can and cannot be achieved in an ocean, which is, in the twenty-first century, highly technologized, zoned, and monitored—and which is, to be sure, not the same as being under control.

In creating an affective, and highly sophisticated, counter narrative of what went wrong in this case, and in many other instances that came before and after, Forensic Architecture addresses the law by creating a new forum. Viewers may not be moved emotionally, but they may be affected in how they see and comprehend things. Here lies the threshold of where the law comes into force: If the force of law is enacted at the very moment that one speaks through and to the law, “even though no proper legal decision has yet been taken,” then Forensic Architecture has made things speak in a legal sense through connecting what was disconnected and through expounding a story that goes beyond a simple narrative. Rather, the project makes the story palpable and comprehensible by rendering a chain of incidents visible and imaginable. It demonstrates that connectivity is needed to enforce the law, and that dis-connection and non-touch may be, and in this case came to be, forms of exercising violence.

In summary, Forensic Architecture works to unravel current human-centered “norms of representation” of migration that operate through images of a single person’s hardships as well as through a political discourse on masses, flows, quotas, and redistribution. Part of this prevailing norm is the moral stance that is taken, for example, in evoking empathy for the fate of a single refugee or, alternately, in feeding into the notion that there is a “migrancy problematic.” The video of the “left-to-die-boat” case, by contrast, does not rely on any emotional appeal—there are no actors that appear on screen. Rather, the screen shows only dots, lines of movement, and demarcations for the zones of responsibility. While represented in a seemingly “cold” or unemotional manner, the story becomes all the more

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87 See id. at 61.
89 José Luis Romanillos, Mortal Questions: Geographies on the Other Side of Life, 39 PROGRESS IN HUMAN GEOGRAPHY 560, 577 (2015).
affectively charged as the narrative unfolds and intensifies, rendering a sense of urgency more acute. Forensic Architecture’s political aesthetic opens up new forums that “exceed the kinds of ‘evidence’ and expertise admissible within state-sanctioned forums and which also expose[s] different publics to normally inaudible or invisible violences [sic].”

It then comes almost as a surprise that Forensic Architecture’s sophisticated work on the case led to a quest to find and sue the responsible actors. Whose helicopter was it, for example, whose operators did no more than toss a few packs of biscuits and bottles of water? What happened to Forensic Architecture’s plea for an increase of forums and forms of witnessing if, after the complex operation of tracing the field causality had been completed, the political-legal endeavor turned into a search for perpetrators? Did Forensic Architecture downgrade its project to tell the truth through an assemblage of objects, spatial locations, and signals to a mere means to present evidence? Did it deliver the law back to the courtroom in the end?

To pursue such an argument, let us briefly consider how Forensic Architecture deals with and thereby conceptualizes the law. We see a three-part maneuver here. First, Forensic Architecture makes a theory-based practical move by expanding the forum in which the argument is presented and thus also extending the legal sphere beyond the courtroom. Second, there is an implicit presumption that international law is present, useful, and in need of enforcement. Third, Forensic Architecture makes an explicit demand for the legal accountability of those who refused to help. The court cases themselves, one learns from Forensic Architecture’s website, did not succeed. Yet the question of “success” or “failure” cannot be reduced to courtroom achievements, if we are to seriously consider the idea of the force field. With its careful reconstruction of the “left-to-die-boat” case, Forensic Architecture offers a wider sense of the law through the pluralization of quasi-legal forums and forms of evidence. Why, then, was it necessary to suddenly return to the idea of the law as a stable pillar that can be relied on within the dark matter of the ocean?

To conceive of the law as part of an affective force field is to gain a sense of its dynamism and dispersion. Law takes turns before or when it is “enforced.” To state that the law needs to be enforced is to say that there is a law and a force of law that are separate from one another. By contrast, the notion of an affective force field, we argue, is not devoid of the law. The law is already enfolded within it, and so are we, the spectators who try to imagine and make sense of law’s force. This may entail seeing and sensing the law in a newly plural manner.

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91 Romanillos, supra note 89, at 577.