Philip M. Bender (ed.)

The Law between Objectivity and Power

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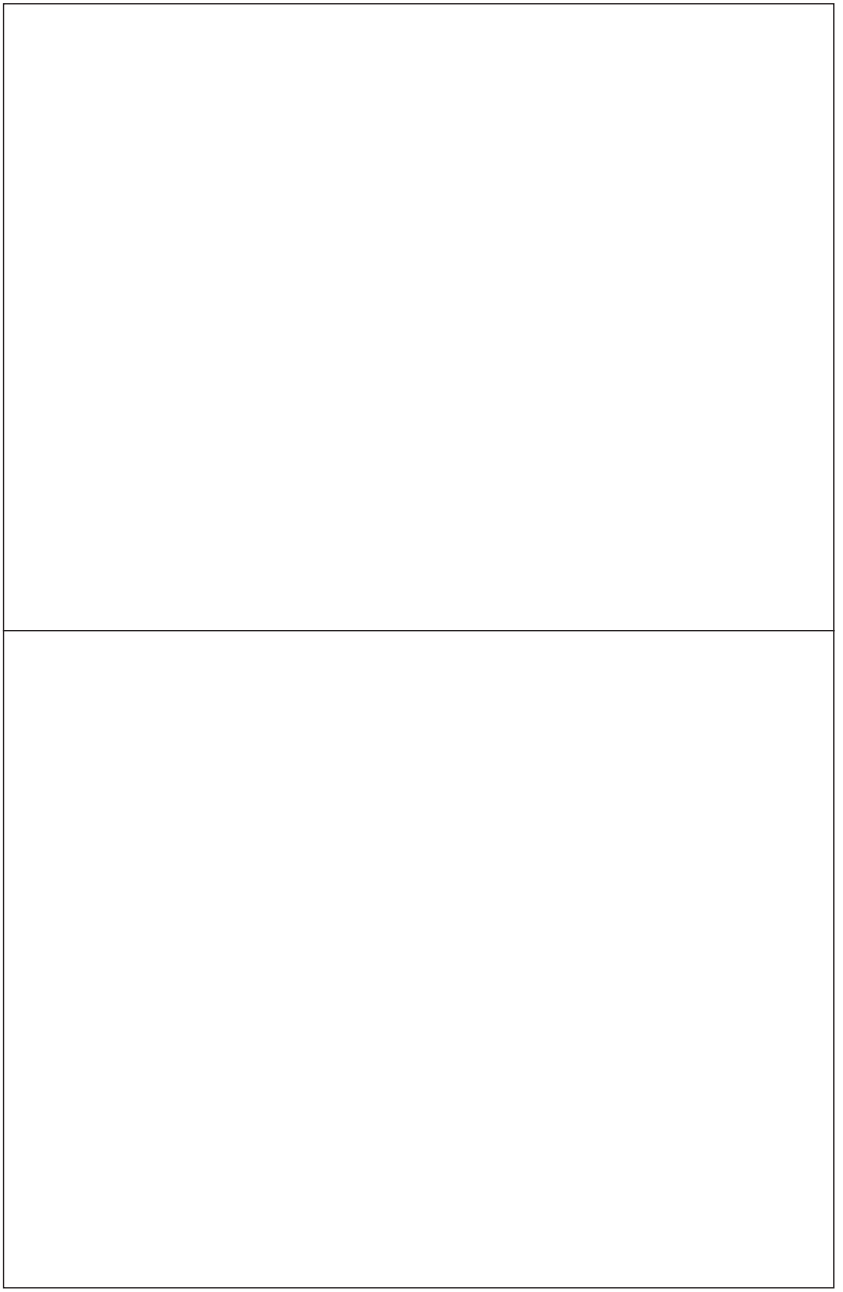

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Foreword

This book is the result of two complementary projects – one substantive, the other organizational. The *substantive project* is to explore law within the tension field of objectivity and power. It is a topic that has been following me from the very beginning of my studies.[1] The chair of Professor Hans Christoph Grigoleit, for whom I worked as an assistant for over a decade, provided an extremely inspiring environment to further pursue this interest. In a way, the diverging conceptions of what law is – an instrument of power or an objective reality limiting power – always reappeared in very different contexts. In their extreme version they seem to capture only part of the truth but not the whole of it. This book wants to reflect the broad range of the topic and the justification of both ways of looking at the law, depending on the perspective and the specific problem one is about to examine. The *organisational project* is linked to how this book was born: by bringing together young scholars from different areas of interest, disciplines, and countries, with whom I have interacted at different stages of my career. Even though the idea was to create a legal theory dialogue, I wanted to include doctrinal statements on the issue of objectivity as well. This approach reflects the necessity of considering the peculiarities of each legal subbranch. But there is more to it: theoretical, and especially epistemological questions have practical normative implications, which cannot be answered without the mechanisms that normally settle normative disputes, ie constitutional enactments, majority votes or other emanations of a given legal system. I develop this understanding, which I call *Constitutional Pragmatism*, in the introductory chapter in more detail.

The two projects leading to this book would not have been possible without the invaluable support of a variety of institutions and people. First and foremost, I owe my gratitude to the Max Planck Institute for

1 I want to mention the seminars with Lorenz Schulz on truth in legal reasoning (2010/2011) and with Hans Christoph Grigoleit and Jens Kersten on methodology, objectivity, and ideology (2012), both at the Ludwig Maximilian University of Munich (LMU), the scientific college (*Wissenschaftskolleg*) with Christian Hillgruber and Frank Schorkopf on power and law (2011/2012) organized by the German Academic Scholarship Foundation (*Studienstiftung*), and the class on legitimacy-based law with Tom Tyler at Yale Law School (2019).

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Tax Law and Public Finance in Munich for which I worked as a research associate during the past two years: the institute provided the generous funding for both the conference and this book. Especially its director, Professor Wolfgang Schön, unconditionally supported the idea from the very beginning. Not only did he contribute to the conference with his insightful and personal talk on the thinking of Werner Flume. He also helped to overcome each and every of the various organizational hurdles. In this regard, I also want to thank his secretary, Gabriele Auer, whose experience and dedication provided the backbone of this undertaking. I am also particularly grateful to Professor Hans Christoph Grigoleit and Professor Peter M. Huber for immediately accepting my invitation to the conference and for sharing their experienced views and insights with us. Finally, I want to thank all the peer reviewers involved that helped to get the book accepted and financed, as well as Florian Bode, who reported on the conference.[2]

I will end this foreword by briefly sketching out the plan of this collected volume. In the *first part*, which consists of my introductory chapter (§ 1), I present different ways of thinking about objectivity to structure the theoretical discourse and to provide some notional clarification. I also explain why the topic of objectivity and power is relevant and how we should approach it.

The *second part* contains two general contributions regarding legal interpretation. The first one, by Hans Christoph Grigoleit (§ 2), underlines the need of objective teleological interpretation of statutes as a response to the rather fictious claim of the will of the legislator. The second one, by Franz Bauer (§ 3), points out how the subjective (historical) interpretation of statutes, rightly understood, can avoid many of the pitfalls underlined by its critiques.

Then, the topic of objectivity and power is approached in specific areas of law. In that spirit, the *third part* focuses on constitutional law. It contains an outline of how objectivity is pursued in the reasoning of the German Federal Constitutional Court (*Bundesverfassungsgericht*) by Peter M. Huber (§ 4), who also builds on his experience as its Justice. Daniel Wolff (§ 5) turns to US constitutional law and analyses the (implicit) assumptions of the concept of law and the possibility of objectivity in legal

2 Florian Bode, 'Tagungsbericht: The Law between Objectivity and Power. Young Scholars Conference am Max-Planck-Institut für Steuerrecht und Öffentliche Finanzen in München am 12. und 13. Oktober 2020' (2021) 76 JZ 411–412.

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reasoning that underlie the debate on interpretive methodology between originalists and living constitutionalists.

The *fourth part* takes a closer look at private law. It starts with a contribution by Ben Köhler (§ 6) on remedial discretion – a particular form of institutionalized subjectivity and power. It is followed by the chapter of Victor Jouannaud (§ 7) on the scope of the essential matters doctrine (*Wesentlichkeitsdoktrin*) in private law adjudication. He argues for a limited applicability as long as the particular norms of private law aim at an (objective) balancing of interests. In contrast, for norms of private law that serve (subjective) regulatory goals, the constitutional doctrine applies. The part ends with a look at the international realm: following a comparative approach, Andreas Engel (§ 8) contrasts the power-based understanding of conflict of laws dominant in the United States with the European objective understanding of the system of private international law. However, he also points to the ongoing convergence of both approaches.

The *fifth part* turns to criminal law broadly speaking. Lucia Sommerer (§ 9) dwells on the risks of trying to create presumed objectivity in the field of predictive policing through the use of algorithms. Martín D. Haissiner (§ 10) analyses the presumption of innocence and its relation to (objective) truth as the goal of criminal proceedings.

The *sixth part* is dedicated to international arbitration, an area in which issues of legal theory are particularly present due to the lack of any sovereign to settle disputes authoritatively. Fabio Núñez del Prado (§ 11) starts this part by presenting his vision of arbitration, characterized by a strong belief in the market mechanism. Inspired by Hayekian thought, he entrusts spontaneous orders to create some kind of objectivity beyond the state. Even though Santiago Oñate (§ 12) also aims at an objective arbitral order beyond the nation state, the foundation of his approach does not consist in the market mechanism but rather in the value-judgments of the international community.

The contributions of the *seventh part* take an interdisciplinary approach. Whereas Peter Zickgraf (§ 13) analyses the potentials of the economic analysis of law to objectivize legal reasoning within the methodological positions of the German legal order, Emilia Jocelyn-Jolt (§ 14) explores the topic of this book from the angle of law and literature.

The *final part* is dedicated to what I call *structural objectivity* in my introduction: it is primarily not about the necessary power- or objectivity-based content of a legal decision but rather about the structures within which we think about law and the necessary consequences that come along with the decision for a particular path. In that vein, Jan-Erik Schirmer (§ 15) points out how metaphors pre-structure our legal thinking, and Alvin Padilla-Ba-

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bilonia (§ 16) unveils the duality of citizenship, which functions as both, a source of rights and an imperialist instrument of power. He thereby points to some kind of structural objectivity, because even though a government might be free in deciding whether or not to grant citizenship, it cannot escape the dual consequences that this decision entails.

Philip M. Bender
Munich, January 2022

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(Palestra Editores 2019), and co-edited *Justicia de Papel* (Palestra 2020). The international ranking Legal 500 has stated that Fabio 'has a very interesting future in the field of international arbitration', which is also his research focus.

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Part 1: Introduction

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Philip M. Bender[*]

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I. Introduction

People tend to see lawyers in very different ways. Some see them as legal mechanics that apply the law as it is – others as servants of the powerful that fill legal notions with whatever serves their interests. Accordingly, they either conceive the law as an objective reality, a concretization of justice, subject to *discovery* – or as a tool without content on its own, shaped by the *discretion* of those in power. These different perspectives on what the law is and how it operates within society not only characterize the day-to-day experience of lawyers. They equally divide legal thought as it exists between the poles of objectivity and power. This is true even though objectivity as an ideal of science is a relatively young concept, born

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in the middle of the 19th century.[1] Indeed, we can reconceptualize older (legal) theories and translate their concerns into modern language.

To grasp this (eternal) tension between what we might now call objectivity and power, it is helpful to clarify the notion of objectivity from the very outset. We will understand objectivity as an ideal – the ideal of acquiring 'knowledge that bears no trace of the knower'[2], the ideal of 'suppression of some aspect of the self'[3] in the processing and communication of legal information. It is the countering of the other pole, subjectivity, which can be explicated as the imposition of one's self.[4] Subjectivity therefore is closely related to the concept of social power (*Macht*), understood as the chance to carry through the own will within a social relationship.[5] In that sense, objectivity and power open up a tension field within each legal decision. Objectivity limits power, just as power threatens objectivity. This book wants to explore the phenomenon of law within this tension field. It explores the presence of different *active* selves – the selves of lawmakers, adjudicators, or contracting parties – in the decisions they take.[6] It thereby aims to reflect the different views one can have about law, objectivity, and power – depending on the theoretical position, the area of law, and the general predispositions. My introductory chapter aims to provide some no-

1 Lorraine Daston and Peter Galison, *Objectivity* (Zone Books 2010) 27.

2 ibid 17.

3 ibid 36.

4 ibid 36–37. This definition brings us close to how Kent Greenawalt, *Law and Objectivity* (Oxford University Press 1992) implicitly uses objectivity (especially in Parts I and III). It is broad enough to encompass aspects of metaphysical, epistemological, and semantic objectivity, without requiring a clear distinction. On these different perspectives, cf Brian Leiter, 'Law and Objectivity' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford University Press 2002) 970–976; Andrei Marmor, *Positive Law and Objective Values* (Clarendon Press 2001) 112–134; Brian Leiter (ed), *Objectivity in Law and Morals* (Cambridge University Press 2001). For further references on objectivity, truth, and law (also from the German discourse), see Carsten Bäcker, 'Einleitende Bemerkungen' in Carsten Bäcker and Stefan Baufeld (eds), *Objektivität und Flexibilität im Recht* (Franz Steiner 2005) 11.

5 cf Max Weber, *Wirtschaft und Gesellschaft: Grundriß der verstehenden Soziologie* (Johannes Winckelmann ed, 5th edn, Mohr Siebeck 1980) pt 1 ch I § 16 (only the elements of the definition considered relevant in this context are quoted). On that definition Isidor Wallimann, Nicholas C Tatsis and George V Zito, 'On Max Weber's Definition of Power' (1977) 13 Australian and New Zealand Journal of Sociology Canberra 231, 232.

6 This excludes another possible perspective: the extent to which *passive* selves (and their subjective traits) are taken into consideration by the law, cf Greenawalt (n 4) 91–160 (Part II – How the Law Treats People).

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tional clarifications and classifications. In that vein, it will suggest different ways of thinking about objectivity. It further outlines the importance of objectivity in legal thought and proposes an approach to the topic.

I will start with contrasting two ways of thinking about objectivity within the law (II.), which both deal with the possibilities and limits of suppressing the self – but on different levels of the legal process. Whereas the first way explores the issue on the level of lawmaking (*productional objectivity*), the second way scrutinizes the question on the level of the application of law (*applicational objectivity*).[7] Practically each institution of a legal system engages in both, norm production and application. Consider, for example, a parliament that not only creates new law through statutes but also applies constitutional norms. Likewise, judges apply the constitution, statutes, precedents, and contractual norms but also create law through new precedents. The same is true for individuals who apply the law but also create law through contractual stipulations. In other words, production and application of law is understood in functional, not in institutional terms.

Then, I will outline why it is important to examine the possibility of (productional and applicational) objectivity within the law and how we should deal with the theoretical disputes from the perspective of a lawyer (III.). In doing so, I will first suggest that the importance of talking about objectivity stems from its link to legitimacy: where objectivity is achievable, it provides for legitimacy because it allows a substantive justification beyond the self. Where objectivity is beyond our reach and power determines content, we have to strive for procedural forms of legitimacy and thereby tame the remaining realm of the self. In other words, whether we should aim at substantive or procedural legitimacy depends on the degree of objectivity we can achieve, and in that sense, legitimacy is a relative

7 The distinction of these different issues is often neglected in theory of law. Nonetheless, there are examples of similar distinctions, cf eg Richard A Posner, *The Problems of Jurisprudence* (Harvard University Press 1990) 11, who presents different permutations of natural law and positivism on one axis and formalism and realism on the other and thereby indirectly also distinguishes the productional (natural law vs positive law) and the applicational level (formalism vs realism). See also Marietta Auer, *Materialisierung, Flexibilisierung, Richterfreiheit: Generalklauseln im Spiegel der Antinomien des Privatrechtsdenkens* (Mohr Siebeck 2005) 214–217, whose 'applicational positivism' (*Anwendungspositivismus*) is close to theories upholding applicational objectivity but whose 'validity-positivism' (*Geltungspositivismus*) is not the same as productional objectivity. Instead, she refers to the classical positivism debate concerned with the definition of law, which is – as I will explain in a second – not the focus of this essay.

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notion (*relativity of legitimacy*). This, however, raises the question of how to determine the areas in which we can achieve objectivity. I will propose that we should approach this theoretical problem in Pragmatic terms: given that each epistemological question has normative implications, it is the epistemological position of the constitution that should educate our answer (*Constitutional Pragmatism*).

Finally, I will point to a third way of thinking about objectivity (IV.). This kind of objectivity refers to the impact that structural arrangements have on our understanding, thinking, and decisionmaking within the law (*structural objectivity*). They lead to objectivity because they impose limits on what power can *in fact* achieve. Indeed, they operate like paths among which we might be able to choose but which we cannot leave. Each of these paths is constituted by bundles of interconnected consequences, thought patterns, and predispositions. Structural objectivity is transversal to the previous two ways of thinking about objectivity in that its structural arrangements operate on the productional and applicational level alike. Even though they limit individual power on these levels factually (and therefore constitute their own form of objectivity), they also threaten to distort communication processes, which are essential for the previously described normative forms of productional and applicational objectivity. In that sense, structural objectivity is necessarily ambivalent.

II. Productional and Applicational Objectivity

This part of the introductory chapter is dedicated to the distinction between productional and applicational objectivity. Both of them explore the possibilities and limits of objectivity, they are both concerned with normatively suppressing the self – but they focus on different levels of the legal process. Productional objectivity focuses on a stage where no previously posited controlling norm exists and asks whether we can objectivize the making of law (1.). Applicational objectivity is different in that it focuses on a stage where there is a norm that can be interpreted. It is therefore concerned with whether we can objectivize the application of law (2.). Thus, the main difference between both levels concerns the presence or absence of positive law. This has important consequences for objectivity. Whereas the only possibility to (partly) suppress the self of the decisionmaker on the productional level is by reference to prepositive concepts, the applicational level allows us to take into account an additional source of objectivity. Indeed, the positive law contains statements of previous de-

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cisionmakers, which we can use to push back on the power of subsequent decisionmakers.

1. *Productional objectivity*

I will start the inquiry about productional objectivity by differentiating it from the debate around positivism to prevent misunderstandings and misleading associations one might have. Indeed, positivism will play only a subordinate role in what follows (a.). I will then present three modes of achieving (productional) objectivity and show how these modes can be found in principal currents of legal thought (b.). If objectivity is not achievable, we have to deal with subjectivity, which is why a presentation of three ways of doing so will follow (c.). Finally, I will turn to private lawmaking and sketch out how the theoretical divide between objectivist and subjectivist approaches is replicated in contract law (d.).

a. *The irrelevance of positivism*

Legal positivism – at least one version of it[8] – makes a definitional claim: law is to be defined without reference to morals.[9] It does not claim that norms of morality do not exist or that they are not intelligible – positivists might decide either way on that point. To put it simply, positivism just argues that these principles are not (necessarily) law and that law remains law even if it contradicts them.[10] In contrast, nonpositivists argue in favour of a connection between law and morals, so that at least extremely unjust

8 cf Auer, *Materialisierung* (n 7) 214–215, who calls this version validity-positivism (*Geltungspositivismus*), as opposed to applicational positivism (*Anwendungspositivismus*), to which we will turn later.

9 cf Hans Kelsen, *Reine Rechtslehre* (2nd edn, Verlag Franz Deuticke 1960) 68–69 (from the angle of normative positivism); HLA Hart, *The Concept of Law* (Leslie Green ed, 3rd edn, Oxford University Press 2012) 185–186; HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, 601, especially n 25, under (2) (from the angle of sociological positivism).

10 Therefore, presenting positivists as voluntarists, as it is often done (eg Jan Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1500–1933)*, vol 1 (3rd edn, CH Beck 2020) 295–297), is only convincing if one limits the examination to the *legal* realm.

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law ceases to be law.[11] This debate, especially from a German perspective, might have some relevance for dealing with the appalling injustices of Nazi Germany[12] or the cases involving marksmen on the Berlin Wall[13]. Beyond these extraordinary cases, however, the dispute between positivism and nonpositivism can be approached as a mere problem of terminology and is as such quite fruitless.[14] At least, it does not add anything to the question of whether a legal decision can be isolated from the decisionmaker and justified by reference to prepositive (legal or extralegal) concepts. In other words, it is beyond the focus of this introductory essay and of the whole book. We might come back to positivists and natural law theorists, but only insofar as they express statements on the possibilities and limits of objectivity. Having narrowed down the perspective of this essay, we can now examine legal thought under the aspect of objectivity and power.

b. Three modes of achieving objectivity

My outline will start with 'modes of thought'[15] that justify a legal decision not by reference to the self of the decisionmaker but by reference to some

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11 From an American perspective Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 Harvard Law Review 630, 644–648 (on 'the internal morality of law', notion on 645), 648–657 (on Nazi laws). From a German perspective Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' (1946) 1 SJZ 105, 107 (so-called 'formula of Radbruch'); Robert Alexy, *Begriff und Geltung des Rechts* (2nd edn, Verlag Karl Alber 2020) 44; Robert Alexy, 'The Dual Nature of Law' (2010) 23 Ratio Juris 167.

12 See BGHZ 3, 94, 107; BVerfGE 3, 58, 119; 6, 132, 198; 23, 98, 106.

13 See BGH NJW 1993, 141, 144; 1995, 2728, 2730–2731.

14 cf Posner, *The Problems of Jurisprudence* (n 7) 229 ('Regarding from a distance of thirty years the debate between H. L. A. Hart and Lon Fuller over the legality of Nazi laws, I am struck by how little was at stake.'). The argument that without claiming the legal nature of prepositive principles, we cannot criticize decisions based on principles (Ronald Dworkin, 'The Model of Rules' (1967) 35 Chicago Law Review 14, 29–31), can be countered by either suggesting that the law might incorporate them (this being the position of inclusive positivists like Hart, see generally Leslie Green, *Introduction to the Concept of Law* (2012) xxxix) or by pointing to the additional relevance of extralegal concepts for deciding the social issues with which the law is concerned (this being eg the pragmatic answer, cf Posner, *The Problems of Jurisprudence* (n 7) 468).

15 On that expression from an anthropological viewpoint cf Wolfgang Fikentscher, *Modes of thought: A study in the anthropology of law and religion* (2nd edn, Mohr Siebeck 2004) 17 ff. It corresponds to the notion of 'approach' as opposed to 'school' or 'movement', see Guido Calabresi, 'An Introduction to Legal Thought:

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substantive criterion beyond the self. Even though these modes share an inclination to objectivity, they differ profoundly in the ways they obtain the necessary normative insights to guide the lawmaker. I will call these modes *observational*, *deontological*, and *consequentialist*.

aa. Observational mode of thought

The first mode of thought is observational. It starts with the idea that by observing reality, we can discern (legal) norms.[16] It therefore is at odds with the modern separation between what is (*sein*) and what ought to be (*sollen*).[17] Classical natural law theories, inspired by the idea that nature can reveal its order and thereby provide guidance for behaviour[18], contain an observational element.[19] The historical school also applies an observational mode of thought in that it references not nature as such but the 'spirit of the people'

Four Approaches to Law and to the Allocation of Body Parts' (2003) 55 Stanford Law Review 2113, 2131–2132.

16 In that sense, it has similarity with what Greenawalt (n 4) 165 ff describes as 'cultural morality'.

17 Established in the Scottish Enlightenment, cf David Hume, *A treatise of human nature* (Lewis A Selby-Bigge ed, Clarendon Press 1896) 469–470 (book III pt I s I). Even stricter applied from the semantic vantage point of Analytical Philosophy, cf George E Moore, *Principia Ethica* (Cambridge University Press 1903) ch II para 24 (naturalistic fallacy).

18 Michel Villey, *La formation de la pensée juridique moderne* (Quadrige/PUF 2006) 86.

19 From Antiquity Aristoteles, *Politics*, vol 21 (Harris Rackham ed, Harvard University Press 1944) book VII pt I ('natural order of things'). From the Middle Ages St Thomas Aquinas, *Summa Theologiae* (Fathers of the English Dominican Province ed, 2nd edn, Burns Oates & Washbourne 1920) Prima Secundae, Question 91 (art 2) ('[…] and this participation of the eternal law in the rational creature is called the natural law.'), but in Question 94 (art 3) already pointing to the immutability of the principles of natural law and in that sense paving the way for deontological natural law theories. See also Francisco de Vitoria, *La Ley* (Luis Frayle Delgado ed, 2nd edn, Tecnos 2009) 29–34 (commentary on question 94). From the current doctrine John Finnis, 'Natural Law: The Classical Tradition' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford University Press 2002) 3; Villey (n 18) 90, 158, 618 ('méthode expérimentale', exaggerating the differences between the classics and the moderns).

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(*Volksgeist*) and the legal evolutions connected to it as the source of law.[20] The German line of thought called 'correct law' (*richtiges Recht*)[21] contains elements of this historical approach: it analyses the predominant cultural tradition of a certain legal system at a certain time to discern commonly shared norms. Dworkin's chain novel theory of law[22], insofar as it considers the 'standing political order' as a 'source of judicial rights'[23], likewise applies an observational mode and could be described as the American counterpart to German schools of 'correct law'.[24] Furthermore, the observational mode can appear in particularly anti-liberal theories, like in the national-socialist concrete thinking in orders[25], or in fundamentally liberal ones, like in

20 For a particularly clear account Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr und Zimmer 1814); Friedrich Carl von Savigny, 'Über den Zweck dieser Zeitschrift' (1815) 1 Zeitschrift für geschichtliche Rechtswissenschaft 1, 6–7. On the historical school, cf Schröder, *Recht als Wissenschaft* (n 10) 195–198. In a similar sense, the sociological schools described by the same author on 289–290 can be seen as aiming at observational objectivity.

21 Notably the later Karl Larenz, *Richtiges Recht: Grundzüge einer Rechtsethik* (CH Beck 1979) 23–32, especially on 31–32 on the cultural relativity of justice. See also Claus-Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz: Eine methodologische Studie über Voraussetzungen und Grenzen der richterlichen Rechtsfortbildung praeter legem* (2nd edn, Duncker & Humblot 1983) 57 (§ 49); Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz entwickelt am Beispiel des deutschen Privatrechts* (2nd edn, Duncker & Humblot 1983) 18; Walter Schmidt-Rimpler, 'Grundfragen einer Erneuerung des Vertragsrechts' (1941) 147 AcP 130, 155–156 (seeing the procedure of contract as a means to reach 'rightness').

22 Ronald Dworkin, 'Natural Law Revisited' (1982) 34 University of Florida Law Review 165, 166–168 (on the metaphor), 168–169 (applying it to the law), 183–187 (concretizing it by reference to the political order).

23 ibid 185.

24 However, it shall be noted that in other parts, he seems to develop the relevant prepositive norms from a 'right to concern and respect taken to be fundamental and axiomatic' (Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) 14, also 11), and is therefore closer to the modern natural law theories to which we will turn in a moment when dealing with the deontological mode of thought.

25 Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (3rd edn, Duncker & Humblot 2006) 11, 17. See also already Carl Schmitt, *Legalität und Legitimität* (8th edn, Duncker & Humblot 2012) 9. After 1945, see Carl Schmitt, *Die Tyrannei der Werte* (3rd edn, Duncker & Humblot 2011) 23. See also the early Karl Larenz, *Über Gegenstand und Methode des völkischen Rechtsdenkens* (Junker und Dünnhaupt 1938) 27 ff. For an analysis that underlines the nonvoluntaristic tendencies, see Jan Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1933–1990)*, vol 2 (3rd edn, CH Beck 2020) 5–7 (NS thinking generally), 42–44 (concrete thinking in orders).

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Hayek's spontaneous order (*cosmos*)[26] and its reception in the idea of a Private Law Society (*Privatrechtsgesellschaft*)[27]. In a way, it is also present in the German free-law-movement (*Freirechtsbewegung*), which describes its 'free law' sometimes in terms of 'correct law', ie culture-dependent natural law[28], sometimes in terms of spontaneity and unconscious organic law[29]. Beyond these theoretical accounts, we find the observational mode of thought in everyday legal doctrine, when we solve cases on the basis of customary law (*Gewohnheitsrecht*)[30], the 'nature of things' (*Natur der Sache*)[31], or the 'normativity of things' (*Sachgesetzlichkeit*)[32].

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26 Most prominently Friedrich A Hayek, *Law, Legislation and Liberty: A new statement of the liberal principle of justice and political economy* (3rd edn, Routledge 1998) 8 ff (evolution vs construction), 35 ff (cosmos vs taxis); Friedrich A Hayek, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (University of Chicago Press 1978) 3 ff (ch 1), especially 10. For an application of his theory to arbitration, see Fabio Núñez del Prado, 'Stateless Justice: The Evolutionary Character of International Arbitration' (§ 11).

27 Franz Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' (1966) 17 ORDO 75. Before him already Justus W Hedemann, *Das bürgerliche Recht und die neue Zeit: Rede gehalten bei Gelegenheit der akademischen Preisverteilung in Jena am 21. Juni 1919* (Verlag von Gustav Fischer 1919) 12. After him Ernst-Joachim Mestmäcker, 'Wirtschaftsordnung und Staatsverfassung' in Heinz Sauermann and Ernst-Joachim Mestmäcker (eds), *Wirtschaftsordnung und Staatsverfassung: Festschrift für Franz Böhm zum 80. Geburtstag* (Mohr (Paul Siebeck) 1975) 411; Ernst-Joachim Mestmäcker, *Wettbewerb in der Privatrechtsgesellschaft: Erweiterte Fassung der 1. Franz-Böhm-Vorlesung am 19. September 2017 in Freiburg* (Mohr Siebeck 2019) 22 ff; Claus-Wilhelm Canaris, 'Verfassungs- und europarechtliche Aspekte der Vertragsfreiheit in der Privatrechtsgesellschaft' in Peter Badura and Rupert Scholz (eds), *Festschrift für Peter Lerche zum 65. Geburtstag: Wege und Verfahren des Verfassungslebens* (CH Beck 1993) 874 ff; Franz Bydlinski, *Das Privatrecht im Rechtssystem einer 'Privatrechtsgesellschaft'* (Springer 1994) 63 ff.

28 Hermann Kantorovicz, using the pen name Gnaeus Flavius, *Der Kampf um die Rechtswissenschaft* (Carl Winter's Universitätsbuchhandlung 1906) 10–12 (with explicit reference to 'correct law').

29 ibid 15, 18.

30 On custormary law, cf Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (Springer 1995) 176–178.

31 For a definition particularly close to the concrete thinking in orders, see Canaris, *Lücken im Gesetz* (n 21) 118 (§ 107).

32 cf Hans Christoph Grigoleit, 'Leistungspflichten und Schutzpflichten' in Andreas Heldrich and others (eds), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, vol 1 (CH Beck 2007) 304; Hans Christoph Grigoleit and Lovro Tomasic, '§ 93 AktG' in Hans Christoph Grigoleit (ed), *Aktiengesetz: Kommentar* (2nd edn, CH Beck 2020) para 36.

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bb. Deontological mode of thought

The second mode of thought is deontological.[33] It respects the separation between is and ought and develops guidance by reference to normative principles.[34] These principles, however, have to come from somewhere. Either one considers them accessible for human reason (which is the approach of modern natural law theories[35]), one appeals to divine revelation (which characterizes theocratic accounts[36]), or one sets them axiologically without reference to God[37]. Yet another possibility is to apply the previously presented observational mode of thought to gain some basic principles and to start from there with the deontological reasoning. For instance, theories of 'correct law' and similar theoretical accounts refer

33 The deontological mode of thought is close to what Schröder, *Recht als Wissenschaft* (n 10) 292–295 describes as philosophical currents with an idealistic notion of law.

34 It has some similarities with what Greenawalt (n 4) 4, 6, 165 describes as 'political morality', even though important differences exist in detail (eg with regard to the qualification of classical natural law theories).

35 Even though qualified as modern, these modern natural law theories have origins in the Stoic tradition of Antiquity, see Marcus T Cicero, *De re publica* (Friedrich Osann ed, Librorum Fragmenta 1847) 283–284 (lib III cap 22 para 33). From the modern representatives, see Hugo Grotius, *The Right of War and Peace*, vol 1 (Richard Tuck ed, Liberty Fund 2005) 150 (ch I s X.1) ('Natural Right *is the Rule and Dictate of Right Reason* […]'), pointing on 155 (X.5) to its unalterable character and building especially on 156 (X.6) on Aquinas (n 19) Prima Secunade, Question 94 (art 4). See also Thomas Hobbes, *Elementa Philosophica de Cive* (Henricus Bruno 1647) 18 (ch II) ('Legem naturalem *non esse consensum hominem, sed* dictamen rationis'), even though his natural law has an extremely reduced content. For more recent accounts of this tradition, see (without interest in the precise content of their moral natural law) Radbruch (n 11), 107 (so-called 'formula of Radbruch'); Alexy, *Begriff und Geltung* (n 11) 44; Alexy, 'Dual Nature' (n 11).

36 eg Ruhollah Khomeini, *Islamic Government: Governance of the Jurist (Velayat-e Faqeeh)* (Hamid Algar tr, The Institute for Compilation and Publication of Imam Khomeini's Work 1970) 29. Divine law is often seen in a subjectivist (voluntaristic) tradition because it originates in the will of God. On that point Andrew Blom, 'Hugo Grotius (1583–1645)' in James Fieser and Bradley Dowden (eds), *Internet Encyclopedia of Philosophy* <http:/iep.utm.edu/grotius/> accessed 16 January 2022. However, from the viewpoint of human-posited law, it provides substantive guidelines beyond the self of the lawmaker and therefore allows to be grouped within modes of thought that aim at objectivity.

37 As noted, some passages of Dworkin suggest that he follows this approach, see eg Dworkin, *Taking Rights Seriously* (n 24) 14.

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to the predominant principles of a certain culture[38] or political system.[39] In doing that, they apply an observational mode of thought at an early stage and unfold a deontological theory based on them. The methodological counterpart of this mode of thought can be described as formalism (*Begriffsjurisprudenz*)[40] insofar as principles are taken as the starting point for conceptual deductions. In contrast, when these principles are operationalized through a flexible balancing-approach and taken in their teleological dimension, the deontological mode leads to the jurisprudence of values (*Wertungsjurisprudenz*)[41] or its American counterpart, the doctrine of reasoned elaboration[42].

cc. Consequentialist mode of thought

The third mode of thought is consequentialist since it focuses on the good and bad real-life consequences of each legal decision. Just as the deontological mode could not justify the origin of its principles, the consequentialist mode cannot provide the criterion of how to *evaluate* consequences. Eval-

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38 Larenz, *Richtiges Recht* (n 21) 23–32, especially on 31–32; Canaris, *Lücken im Gesetz* (n 21) 57 (§ 49); Canaris, *Systemdenken* (n 21) 18; Schmidt-Rimpler (n 21), 155–156.

39 Dworkin, 'Natural Law Revisited' (n 22) 185. Assuming normativity axiologically from a certain point on is also the purpose of Kelsen's 'basic norm' (*Grundnorm*), see Kelsen (n 9) 23 ('im juristischen Denken vorausgesetzt'), even though it is not used with regard to prepositive principles but only with regard to posited law.

40 On classical (German) formalism (*Begriffsjurisprudenz*), see generally Hans-Peter Haferkamp, 'Begriffsjurisprudenz' in Michael Anderheiden and others (eds), *Enzyklopädie der Rechtsphilosophie* (2011) especially under III. For a neo-formalist American account, see Ernest J Weinrib, *The Idea of Private Law* (2nd edn, Oxford University Press 2012); Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 Yale Law Journal 949. For a neo-formalist German account, see Florian Rödl, *Gerechtigkeit unter freien Gleichen: Eine normative Rekonstruktion von Delikt, Eigentum und Vertrag* (Nomos 2015).

41 Larenz and Canaris, *Methodenlehre* (n 30) 265. Especially clear also Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd edn, Springer 1991) 123–139; Schröder, *Recht als Wissenschaft* (n 25) 180–181.

42 cf Henry M Hart Jr and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N Eskridge Jr and Philip P Frickey eds, Foundation Press 1994) 145 ff; William N Eskridge Jr and Philip P Frickey, 'The Making of the Legal Process' (1994) 107 Harvard Law Review 2031, 2042–2043. For a critical presentation, see Roberto M Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (3rd edn, Verso 2015) 5 ff (on 13 pointing to the parallels to Germany).

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uation requires at least some values and deontological principles. It also provides no guidance in how to *know* real-life consequences. With respect to this, consequentialist thinking relies on (empirical) observation. But unlike the first two modes of thought, it neither grounds the legal solution on a more concrete normative principle nor on (normative) observation of reality as such. It rather evaluates real-life consequences according to a minimal and abstract normative criterion.[43] In the classical utilitarian tradition, this criterion is maximization of utility, understood as happiness.[44] Given the vagueness of utility or happiness, it is not particularly apt for suppressing the self, ie for objectivizing a legal decision.[45] The same is true for the cost-benefit-analysis of the law and economics movement if everything can potentially be a cost or a benefit.[46] Posner's criterion of wealth-maximization therefore tries to rationalize the cost-benefit-analysis by expressing costs and benefits in terms of wealth only.[47] Once wealth maximization is assumed as criterion for evaluating consequences, it is possible to settle cases on presumably empirical grounds, thereby eliminating

43 In the context of economic analysis of law, see Posner, *The Problems of Jurisprudence* (n 7) 24 ('And to the extent that the economic analyst seeks to shape law to conform to economic norms, economic analysis of law has a natural law flavor.'). For his adherence to consequentialism, see Posner, *The Problems of Jurisprudence* (n 7) 122; Richard A Posner, 'Legal Pragmatism Defended' (2004) 71 University of Chicago Law Review 683, 683 para 3. But even beyond the minimal natural law link of all consequentialism, Posner's thinking is not *only* consequentialist, see eg Posner, 'Legal Pragmatism Defended' (n 43) 684 para 4.

44 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (2nd edn, Clarendon Press 1879) 2 ('By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.'); John S Mill, *Utilitarianism* (Floating Press 2009) 14 ('The creed which accepts as the foundation of morals, Utility, or the Greates Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.').

45 Richard A Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8 The Journal of Legal Studies 103, 113–114.

46 cf Guido Calabresi and Philip Bobbitt, *Tragic Choices* (WW Norton & Company 1978); Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (Yale University Press 2016) 1 ff.

47 On wealth maximization as ethical concept, see Posner, 'Utilitarianism, Economics, and Legal Theory' (n 45) 124; Posner, *The Problems of Jurisprudence* (n 7) 24. On economic efficiency as source of objectivity, see also Greenawalt (n 4) 4, 165.

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the self.[48] However, the increase of objectivity attained by looking at real-life consequences through the one-dimensional lens of wealth comes itself with a cost: it captures only a part of the normative spectrum and therefore operates at the expense of some intuitive normative truth.[49] Likewise, gathering the necessary information for comparing real-life consequences in an objective manner has its limits.[50] In the German context of legal reasoning, one might consider the jurisprudence of interests (*Interessenjurisprudenz*) as closely related to the consequentialist mode of thought, in that it drew attention to conflicting interests within society[51] – even though beyond

48 That is why this strain of economic analysis is also particularly open for the application of Big-Data-based technologies within the law, for instance in order to personalize legal commands, see Omri Ben-Shahar and Ariel Porat, 'Personalizing Negligence Law' (2016) 91 New York University Law Review 627; Ariel Porat and Lior J Strahilevitz, 'Personalizing Default Rules and Disclosure with Big Data' (2014) 112 Michigan Law Review 1417). Critically Hans Christoph Grigoleit and Philip M Bender, 'The Law between Generality and Particularity: Chances and Limits of Personalized Law' in Christoph Busch and Alberto De Franceschi (eds), *Algorithmic Regulation and Personalized Law* (CH Beck, Hart Publishing, Nomos 2021) 121 ff; Philip M Bender, 'Limits of Personalization of Default Rules – Towards a Normative Theory' (2020) 16 European Review of Contract Law 366, 378 ff.

49 On the distinction between mechanical objectivity and truth-to-nature as scientific ideals, see Daston and Galison (n 1) 43 ('Mechanical objectivity was needed to protect images against subjective projections, but it threatened to undermine the primary aim of all scientific atlases, to provide the working objects of a discipline.').

50 For this critique close to the Austrian School, see Ernst-Joachim Mestmäcker, *A Legal Theory without Law: Posner v. Hayek on Economic Analysis of Law* (Mohr Siebeck 2007) 43 ('Posner subsumes the law under economics, Hayek incorporates abstract rules of just conduct into his theory of a free order.'); Gerald P O'Driscoll Jr 'Justice, Efficiency, and the Economic Analysis of Law: A Comment on Fried' (1980) 9 The Journal of Legal Studies 355, 359 ('Though to my knowledge no one else has previously noted it, Posner is actually grappling with the socialist calculation problem.').

51 See the fundamental contributions of Heck, especially Philipp Heck, 'Gesetzesauslegung und Interessenjurisprudenz' (1914) 112 AcP 1, 17 ('Die Gesetze sind die Resultanten der in jeder Rechtsgemeinschaft einander gegenübertretenden und um Anerkennung ringenden Interessen materieller, nationaler, religiöser und ethischer Richtung. In dieser Erkenntnis besteht der Kern der Interessenjurisprudenz.'); Philipp Heck, *Das Problem der Rechtsgewinnung* (2nd edn, Mohr 1932); Philipp Heck, 'Die Interessenjurisprudenz und ihre neuen Gegner' (1936) 142 AcP 129. See also already Rudolf von Jhering, *Der Kampf um's Recht* (Verlag der GJ Manz'schen Buchhandlung 1872). See generally Marietta Auer, 'Methodenkritik und Interessenjurisprudenz: Philipp Heck zum 150. Geburtstag' [2008] ZEuP 517; Herbert D Laube, 'Jurisprudence of Interest' (1949) 34 Cornell Law

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the positive statements of a given lawmaker, it largely lacked a criterion by which conflicts of interest should be decided.[52]

Let us now conclude on this outline of modes of thought aiming at objectivity. Observational, deontological, and consequentialist modes of thought do not represent different theories. As modes of thought, they play together within many given theories of law. These theories normally differ only in the importance they grant to observational, deontological, and consequentialist thinking. One might even recognize a certain common pattern, according to which all three modes of thought play together: first, by (normative) observation, some very general and basic principles are developed, and by (empirical) observation, hypothetical real-life solutions are determined. Second, in application of the deontological mode, principles are transformed into more concrete normative values, according to which we can evaluate each real-life hypothetical. Third, the final choice between possible solutions depends on a comparison of their consequences in terms of our previously discerned values. Thus, it corresponds to consequentialist thought. Some theories skip the (normative) observation by assuming the existence of a certain principle axiomatically or by reference to God. Others largely reduce the development of more concrete values and apply the consequentialist mode by reference to one basic principle, or they minimize the consequentialist step by formulating very concrete values. But they all apply different modes of thought and do so to achieve objectivity.

c. Three modes of dealing with subjectivity

By applying the previously presented three modes of thought, we might achieve some degree of objectivity. But in one way or another, some part of the self will persist. It might even be that one rejects these modes of

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Review 291. The later Heck claimed, under National Socialism, that his method is the same as Carl Schmitt's thinking in concrete orders, see Philipp Heck, *Rechtserneuerung und juristische Methodenlehre* (Mohr Siebeck 1936) 26–34, neglecting one core element of his own theory: the conflicts of interests and the value judgement needed to resolve them.

52 Which is why it made its main contribution to the objectivization of law as a theory of application and not as a theory of prepositive guidelines on the productional level, see eg Heck, 'Gesetzesauslegung' (n 51) 13 ('Der Richter hat nun den Maßstab für die Angemessenheit in erster Linie dem in Gesetzesform ausgesprochenen Werturteile der Rechtsgemeinschaft zu entnehmen.').

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thought altogether and assumes that the self fully dominates the lawmaking process. In any case, a theory of law also has to face the persistence of the self and its power. *Stat pro ratione voluntas*[53] or *auctoritas, non veritas facit legem*[54] capture this voluntaristic or subjectivist way of looking at law. Two successive developments of Modernity lead to the (partial) decline of objectivist modes of thought, each in particular ways. The first one was the demise of the medieval consensus in some basic religious issues, the *res publica christiana*[55], triggered by different events such as the confrontation with pagan indigenous people in the Americas[56] or religious wars in Europe[57]. The second development concerns the emergence of scientific positivism[58] and then especially logical empiricism, which rejects

53 The proverb is commonly associated with Decimus I Iuvenalis, *The sixteen satires* (Peter Green ed, Penguin Books 1998) Satire 6, 223 ('sit pro ratione voluntas'), where he cynically describes a scene in which a slave is capriciously sentenced to death.

54 This passage clearly appears in Hobbes' Leviathan in its Latin version, see Thomas Hobbes, *Leviathan: sive De Materia, Forma, & Potestate Civilitatis Ecclesiasticae et Civilis* (Apud Johannem Tomsoni 1676) 133 (book 2, ch 26) ('Doctinae quidem verae esse possunt; sed Authoritas, non Veritas facit Legem.'). But its content is already expressed in the original English version, see Thomas Hobbes, *Leviathan: or the Matter, Forme, & Power of a Common-Wealth Ecclesiastical and Civill* (first published 1651, Lerner Publishing Group 2018) 265 ('That which I have written in this Treatise, concerning the Morall Vertues, and of their necessity, for the procuring, and maintaining peace, though it bee evident Truth, is not therefore presently Law; but because in all Common-wealths in the world, it is part of the Civill Law: For though it be naturally reasonable; yet it is by the Soveraigne Power that it is Law […].').

55 On that notion, see Armin Adam, 'Res Publica Christiana? Die Bedeutung des Christentums für die Idee "Europa"' in Hartmut Behr and Mathias Hildebrandt (eds), *Politik und Religion in der Europäischen Union: Zwischen nationalen Traditionen und Europäisierung* (VS Verlag für Sozialwissenschaften 2006) 25–26; Carl Schmitt, *Der Nomos der Erde: im Völkerrecht des Jus Publicum Europaeum* (5th edn, Duncker & Humblot 2011) 27.

56 See generally Schmitt, *Nomos* (n 55) 69–83 (with a special focus on Francisco de Vitoria).

57 Particularly on the Thirty Years' War, see Diarmaid MacCulloch, *Reformation: Europe's house divided 1400–1700* (Penguin Books 2004). On religious wars as a reason for voluntaristic currents in legal theory, see also Schröder, *Recht als Wissenschaft* (n 10) 102–103.

58 Auguste Compte, *Discours sur l'esprit positif* (Carilian-Goeury et V Dalmont 1844) 12 ('De tels exercices préparaitoires ayant spontanément constaté l'inanité radicale des explications vagues et arbitraires propres à la philosophie initiale, soit théologique, soit métaphysique, l'esprit humain renonce désormais aux recherches absolues qui ne convenaient qu'à son enfance, et circonscrit ses efforts

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normative and metaphysical issues as nonsensical because they are beyond the scope of logics- and empirics-based science[59]. A theory of law can react in different ways to the presence of the self, of *voluntas*, of power – which again represent three different modes of thought, this time turning around subjectivity.

aa. Decisionist mode of thought

First, a theory of law can embrace the self and praise its charisma[60]. The decisionism of the early Carl Schmitt is representative of such an approach.[61] Likewise, the free-law-movement (*Freirechtsbewegung*), which celebrated the personality of the judge, also as lawmaker, tends to embrace the self.[62] A positive attitude to the self in the process of lawmaking can also follow from a reduction of the content of modern natural law to the

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dans le domaine, dès lors rapidement progressif, de la véritable observation, seule base possible de connaissances vraiment accessibles, sagement adaptées à nos besoins réels.').

59 See notably the Circle of Vienna, eg Rudolf Carnap, 'Überwindung der Metaphysik durch logische Analyse der Sprache' (1931) 2 Erkenntnis 219, 220 ('Wenn wir sagen, daß die sog. Sätze der Metaphysik *sinnlos* sind, so ist dies Wort im strengsten Sinn gemeint.'). See also already Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (CK Ogden tr, Routledge & Kegan Paul 1922) para 6.53 ('The right method of philosophy would be this: To say nothing except what can be said, *i.e.* the propositions of natural science, *i.e.* something that has nothing to do with philosophy: and then always, when someone else wished to say something metaphysical, to demonstrate to him that he had given no meaning to certain signs in his propositions.').

60 For the Weberian definition of charismatic rule, see Weber (n 5) pt 1 ch III § 2 para 3, § 10.

61 See notably the (early) Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (2nd edn, Duncker & Humblot 1934) 42 ('Die Entscheidung ist, normativ betrachtet, aus einem Nichts geboren'), on 44–46 explicitly building on Hobbes.

62 Flavius (n 28) 47 ('Nur wo statt unfruchtbaren Tüftelns ein schöpferischer Wille neue Gedanken zeugt, nur wo Persönlichkeit ist, – ist Gerechtigkeit.'), 49 ('So wird die Zeit auch kommen, in der der Jurist nicht mehr dem Gesetze mit Fiktionen und Interpretationen und Konstruktionen zu Leibe zu gehen braucht, um ihm eine Regelung zu erpressen, die sein zu individuellem Leben erwachter Wille selbständig wird finden dürfen.'), and in this voluntaristic spirit also 20, 26, 34 ('Sollen ist Wollen […]').

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principle of free will.[63] The presence of the self is then associated with positive attributes such as autonomy and sovereignty. Yet another way of justifying deference to a personal decision comes from a particular training and education the decisionmaker might have received, making her trained judgment superior to other judgments.[64] Finally, we find elements of this positive attitude towards the presence of the self as decisionmaker in a common critique of the algorithmization of law, which points to the intrinsic value of human decisionmaking and empathy, despite some loss of objectivity.[65] Besides theoretical accounts, some concrete institutions of positive law, such as the pardoning powers of presidents[66], can be interpreted as based on a decisionist mode of thought.

bb. Procedural mode of thought

Second, a theory of law can try to tame the persisting self by focusing on procedural rules that structure the decisionmaking process. Procedural approaches can maintain a strong link to substance in case they believe that a certain procedure, a certain coordination of different selves, produces advantageous outcomes. Discourse theories of law generally take this path.[67] Less optimistic procedural approaches will at least try to avoid

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63 For a clear expression of his voluntaristic-positivistic approach, see Thomas Hobbes, *On the Citizen* (first published 1642, Richard Tuck and Michael Silverthorne eds, Cambridge University Press 1998), especially 32–42 (ch II). See generally Finnis (n 19) 6; Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition* (Daniela Gobetti tr, University of Chicago Press 1993) 97.

64 On trained judgment in science, see Daston and Galison (n 1) 46 and in detail 309–357.

65 cf Virginia Eubanks, *Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor* (St Martin's Press 2017) 168; Grigoleit and Bender, 'Generality and Particularity' (n 48) 133 para 61 ('fellow-human empathy'). See also Rebecca Crootof, '"Cyborg Justice" and the Risk of Technological-Legal Lock-In' (2019) 119 Columbia Law Review 233, 238 (associating human decisionmaking with flexibility and 'common sense'). On algorithms and objectivity in detail Lucia Sommerer, 'Algorithmic Crime Control Between Risk, Objectivity, and Power' (§ 9).

66 See eg German Basic Law (*GG*), art 60(2); US Constitution, art II(2), first clause. Generally on pardoning powers and the rule of law, see Christian Mickisch, *Die Gnade im Rechtsstaat: Grundlinien einer rechtsdogmatischen, staatsrechtlichen und verfahrensrechtlichen Neukonzeption* (Lang 1996).

67 The most emblematic contribution in this line is Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*

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intentional abuses of lawmaking in a self-interested way by multiplying decisionmakers and dividing power among them. This is the path of Locke[68], Montesquieu[69], and the founding fathers of the American Republic[70], who put their ideas into practice.[71]

cc. Critical mode of thought

A practical theory of law designed to construct a legal system can therefore either seek to eliminate the self (by providing some criteria of objectivity), to embrace the self (by reference to the charisma, personality, education, or empathy of the decisionmaker), or to tame the self (by providing a certain procedure). But a theory of law can also choose not to be practical in that sense. Instead of showing how a legal system should operate, it can limit itself to criticism[72] or – in the extreme case – to demanding

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(Suhrkamp 1992), especially clear on 364 ('diskursive Rationalisierung') and 499. See also Hart Jr and Sacks (n 42) (legal process school); Lon L Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969) 96–97 (procedural natural law theory).

68 John Locke, *The Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* (Richard H Cox ed, Harlan Davidson Inc 1982) 89 (ch XII para 143) ('Therefore in well-ordered commonwealths, where the good of the whole is so considered, as it ought, the legislative power is put into the hands of divers persons who duly assembled, have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made […].') (focusing on the independence of the legislator).

69 Charles Louis de Secondat de Montesquieu, *De l'esprit des lois*, vol 1 (Garnier 1777) 312 (book XI ch VI) (developing the tripartite system, in which power is distributed among a legislator, an executive branch, and a judiciary).

70 eg James Madison alias Publius, 'Federalist No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments' *The Independent Journal* (Wednesday, 6 February 1788).

71 As mode of dealing with subjectivity, it is also present in many other theories, eg the free-law-movement, see Flavius (n 28) 41 ('Gegen Exzesse de[r] Subjektivität schützt genügend die ausgleichende Vielheit der Köpfe im Richterkollegium und der Instanzenzug.').

72 eg Duncan Kennedy, *A Critique of Adjudication: {fin de siècle}* (Harvard University Press 1997) 155. This, of course, describes only one aspect of the movement. Indeed, as movement, it aims at (positive) political action, see eg Unger (n 42) 199–208, but often remains vague in how concretely an alternative system should be conceived. See also Eugen Paschukanis, *Allgemeine Rechtslehre und Marxismus:*

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the abolition of law altogether[73]. It can also give up all normative aspirations and just describe how legal systems work in fact within a society of changing and conflicting ideologies.[74] In a way, this is also the approach of different forms of positivism.[75] Therefore, positivism is best understood not as embracing subjectivity but as redefining the research focus from prescription to description.

d. Parallels in private lawmaking

We have seen that theories of law oscillate between objectivity and power. So far, we had in mind lawmakers such as parliaments or judges that elaborate norms for individuals, ie we focused – as legal theory normally does – on heteronomous law emanating from the state. However, individuals are also lawmakers in that they engage in autonomous lawmaking to regulate their private affairs through contracts and wills. They produce norms just as parliaments and judges do.[76] Some scholars suggest that the concept of law strictly speaking should not apply to autonomous private norms but only to heteronomous ones.[77] This leads once again to a (quite fruitless) definitional problem – just as the positivism-debate did.[78] It will suffice to observe that individuals treat private norms at least *as if* they were law, so that – in order to emphasize this functional commonality –

Versuche einer Kritik der juristischen Grundbegriffe (3rd edn, Verlag Neue Kritik 1970).

73 eg Friedrich Engels, *Herrn Eugen Dührings Umwälzung der Wissenschaft ("Anti-Dühring")* (3rd edn, Dietz 1894) 262 ('Der Staat wird nicht "abgeschafft", *er stirbt ab*.').

74 For a recent example of this approach, see Auer, *Materialisierung* (n 7) 219.

75 For some positivists, each with a different focus, see John Austin, *The Province of Jurisprudence Determined* (John Murray 1832) (command theory of law, making the command the object of its description); Hart, *The Concept of Law* (n 9); Hart, 'Positivism' (n 9) (sociological positivism, opening the object of description beyond mere commands); Kelsen (n 9) (normative positivism, making hierarchically ordered legal norms the object of description).

76 eg Klaus Adomeit, *Gestaltungsrechte, Rechtsgeschäfte, Ansprüche: Zur Stellung der Privatautonomie im Rechtssystem* (Duncker & Humblot 1969) 18.

77 For a restriction to heteronomous law, see Werner Flume, *Allgemeiner Teil des bürgerlichen Rechts: Das Rechtsgeschäft*, vol 2 (3rd edn, Springer 1979) 5 (§ 1 4); Ferdinand Kirchhof, *Private Rechtsetzung* (Duncker & Humblot 1987) 84–86. This state-centrism is another feature often associated with positivism, an aspect we will not further pursue here.

78 On positivism, see supra (text to n 8–14).

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we will refer to both, heteronomous and autonomous norms, as law. Since the French Civil Code does the same, we find ourselves in good company.[79] Whether individuals as lawmakers exercise an original freedom[80], or whether the state granted this authority to them[81], is yet another question beyond our focus. It is enough that, from a functional perspective, individuals produce norms, regardless of the origin of their power to do so. Having said that, we can concentrate on the area of contract law as the most emblematic example of private lawmaking and sketch out how theories of contract law oscillate between the poles of objectivity and subjectivity as well. They primarily differ in how they answer two sets of questions with which a theory of contract law has to deal: how to determine when the will of the parties is relevant, and how to fill gaps where contractual stipulations are missing.

aa. Objectivist approaches to contract law

One possible approach to contract law grants objectivity broad room. According to that approach, not only the will of the parties but substantive principles structure the area of contract law. These principles resolve the two mentioned issues of contract law: they provide the scope and limit of the will of the parties, and they function as gap-fillers. Just like in the area of heteronomous lawmaking, they derive from one of the three modes of thought aimed at objectivity.

First, they might be obtained through an *observational* mode. Referencing (commercial) usage of trade to complete and interpret contract terms fits this category.[82]

Second, they can derive from principles of justice (or rightness) according to the *deontological* mode of thought. In this spirit, contracts are valid

79 French Civil Code (*Code Civil*), art 1103 ('Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits.').

80 Larenz, *Richtiges Recht* (n 21) 60, Gerhart Husserl, *Rechtskraft und Geltung: Genesis und Grenzen der Rechtsgeltung*, vol 1 (Springer 1925) 39 (on the so-called desert-case).

81 Assuming an authorization *ex ante*, see eg Adomeit (n 76) 19–20. Assuming a reception *ex post*, see eg Flume (n 77) 3 (§ 1 3a), 5 (§ 1 4); Kirchhof (n 77) 139; Jan Busche, *Privatautonomie und Kontrahierungszwang* (Mohr Siebeck 1998) 18–19.

82 eg German Commercial Code (*Handelsgesetzbuch*), s 346; US Uniform Commercial Code (UCC), s 1-303(c).

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only because and as long as they serve these higher principles.[83] Theories that try to find the just price (*pretium iustum*) such as the labour theory of value[84] or norms that sanction a mismatch between the parties' obligations based on a contradiction to the principle of equivalence[85] belong here. The same is true for default rules insofar as they are explained based on considerations of equivalence and justice.[86] An advantage of this principle-based approach is that private autonomy only appears as one value among others. It can perfectly be balanced with other more or less concrete principles that are relevant in a given case. For instance, in German law, if an agent acts on behalf of the principal without authorization and the principal is watching and does not intervene, then German law assumes a kind of authority by estoppel (so-called *Duldungsvollmacht*) so that the contracting party has a claim against the principal.[87] One way of explaining this doctrine is to invoke the principle that legitimate expectations ought to be protected – so that despite the lack of will of the principal, the claim of the contracting party is justified.[88]

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83 Most prominently in the German context Schmidt-Rimpler (n 21), 145, 147, 155–156 (arguing that contracts serve some sort of 'rightness').

84 cf Karl Marx and Friedrich Engels, *Werke: Theorien über den Mehrwert*, vol 26 (Karl Dietz ed, 6th edn, Karl Dietz Verlag 1972).

85 For initial mismatches, see the institute of *laesio enormis*, cf eg Matthias Rüping, *Der mündige Bürger: Leitbild der Privatrechtsordnung?* (Duncker & Humblot 2017) 41, which survives – as far as real property is concerned – in the French Civil Code (*Code Civil*), art 1674, but also has some similarities with usury, eg German Civil Code (*BGB*), s 138(2). For mismatches due to subsequent or unconsidered events, see the institute of *clausula rebus sic stantibus*, vivid in German Civil Code (*BGB*), s 313. See also the common law doctrine of frustration, based on an implied condition, *Taylor v Caldwell* (1863) 3 Best and Smith's Report 826.

86 This is indeed the position of courts, see eg BGH NJW 1964, 1123; *Hayward v Postma*, 31 Mich App 720, 724, 188 NW2d 31, 33 (1971). See also Charles J Goetz and Robert E Scott, 'The Limits of Expanded Choice: An Analysis of the Interaction Between Express and Implied Contract Terms' (1985) 73 California Law Review 261, 263 (especially n 5) ('For example, the courts' tendency to treat state-created rules as presumptively fair often leads to judicial disapproval of efforts to vary standard implied terms by agreement.'); Claus-Wilhelm Canaris, *Die Bedeutung der iustitia distributiva im deutschen Vertragsrecht* (Verlag der Bayerischen Akademie der Wissenschaften 1997) 54; Martijn W Hesselink, 'Non-Mandatory Rules in European Contract Law' (2005) 1 European Review of Contract Law 44, 58.

87 eg BGH NJW 2014, 3150, 3151 para 26.

88 For an example of this objectivist explanation, see Claus-Wilhelm Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (CH Beck 1971) 40–42.

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Beyond observational and deontological reasoning, we also find the third category in contract law, ie the *consequentialist* mode of thought, especially in the form of cost-benefit-analysis. The determination of the content of default rules according to who is the cheapest cost avoider[89] is a perfect example of that way of looking at contract law.

bb. Subjectivist approaches to contract law

In contrast to these objectivist approaches, one can take a subjectivist perspective and focus on the self of contracting parties. These subjectivist theories underline private autonomy as the foundation of all contract law: *stat pro ratione voluntas*.[90] Since autonomous lawmaking only concerns the lawmakers themselves, the presence of their self becomes an advantage. Subjectivist theories of contract law therefore embrace the self of the contracting parties, tamed only through the requirement of consent by the other side – which constitutes some form of procedural justice.[91] Subjectivist theories thus avoid normative discussions about justice by pointing to one single, abstract justification: private autonomy. The limits of freedom of contract therefore have to be based on a lack of consent – either on a *total lack* of consent, eg of a third party (negatively) concerned by the contractual stipulation, or at least on the demonstration that there is *no true* consent due to some deviation from rationality. Likewise, the task of filling gaps of incomplete contacts has to be explained by reference to the hypothetical will of the parties. We find here a certain affinity to the economic analysis of law that justifies mandatory law only in terms of

89 cf Charles J Goetz and Robert E Scott, 'The Mitigation Principle: Towards a General Theory of Contractual Obligation' (1983) 69 Virginia Law Review 967, 971. See generally Bender, 'Default Rules' (n 48) 379 (critically presenting this economic approach towards default rules).

90 Flume (n 77) 45 (§ 1 4) ('Für den Bereich der Privatautonomie gilt der Satz: stat pro ratione voluntas.'). See also Eberhard Schmidt-Aßmann, 'Öffentliches Recht und Privatrecht: Ihre Funktionen als wechselseitige Auffangordnungen – Einleitende Problemskizze –' in Wolfgang Hoffmann-Riem and Eberhard Schmidt-Aßmann (eds), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* (Nomos 1996) 16.

91 On the procedural character of *iustitia commutativa*, predominant in contact law, see Canaris, *iustitia distributiva* (n 86) 50.

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externalities (lack of consent) or paternalism (lack of true consent)[92] and that designs default rules – at least in most cases – according to what the parties would have wanted[93].

From this perspective, we can now revisit the previously mentioned institutions and explain them through the will of the parties. The relevance of trade usage, for instance, might not be seen as relevant due to some observational mode of thought but simply as an indicator of what contracting parties would have wanted. Likewise, the cost-benefit-analysis and the question of who is the cheapest cost avoider need not be associated with a consequentialist mode of thought, but they can again be seen as indicator of what rational parties would have wanted.[94] By the same token, instead of analysing distortions in the equivalence of obligations (such as extortionate prices) as a problem of justice, they can as well be understood as indicative of a lack of free will.[95] Finally, the claim against the principal in the case of the German *Duldungsvollmacht* might be justified by interpreting the fact that the principal is watching and tolerating the behaviour of the agent as a tacit authorization, ie by the principle of private autonomy.[96]

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92 On the economic viewpoint on mandatory law, see Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 Yale Law Journal 87, 88.

93 On this theory of complete contract eg Alan Schwartz, 'Proposals for Products Liability Reform: A Theoretical Synthesis' (1988) 97 Yale Law Journal 353, 361; Porat and Strahilevitz (n 48), 1425 f; Hans Christoph Grigoleit, 'Mandatory Law: Fundamental Regulatory Principles' in Jürgen Basedow and others (eds), *The Max Planck Encyclopedia of European Private Law* (Oxford University Press 2012) 1127; Martin Schmidt-Kessel, 'Europäisches Vertragsrecht' in Karl Riesenhuber (ed), *Europäische Methodenlehre: Handbuch für Ausbildung und Praxis* (3rd edn, De Gruyter 2015) 385 (Rn. 26); Steven Shavell, 'Damage Measures for Breach of Contract' (1980) 11 Bell Journal of Economics 466, 466 f; Hans-Bernd Schäfer and Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (6th edn, Springer 2020) 426.

94 On the alignment of both, the subjectivist what-the-parties-would-have-wanted-approach, and the objectivist who-is-the-cheapest-cost-avoider-approach, under the assumption that parties are *homines oeconomici*, see Bender, 'Default Rules' (n 48) 379.

95 German Civil Code (*BGB*), s 138(2), for example, requires certain external circumstances excluding a free choice. Also, the unconscionability-doctrine contains a procedural element. Finally, a central aspect of the institution of *clausula rebus sic stantibus* and its modern forms is the hypothetical inquiry in what parties would have contracted for had they considered the unforeseen event, see Dieter Medicus and Jens Petersen, *Grundwissen zum Bürgerlichen Recht: Ein Basisbuch zu den Anspruchsgrundlagen* (27th edn, Vahlen 2019) para 165.

96 For this subjectivist interpretation Flume (n 77) 828 (§ 49 2 a, c).

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The reference to the self certainly has some appeal in the area of autonomous lawmaking, but making private autonomy the 'theory of everything'[97] in the world of contract law has its limits. The main problem is that autonomy is a highly normative concept. The reference to the will of the parties cannot explain the rules of formation of a contract, ie the rules that describe under which conditions one party is bound vis-à-vis the other. It is also unable to explain when exactly consent is needed: both the question of when the effects on a third party are considered a relevant externality and when there is a lack of true consent with the consequence of a need for paternalism require a value judgment.[98] Given this normativity of legal will, the gap-filling is also a normative undertaking.[99] Therefore, we need some objective mode of thought. Referencing the self and its *voluntas* alone risks dissimulating rather than explaining underlying values, ie becoming 'pseudo-subjective'[100]. Such a private law theory would be based on fictions and empty legal constructions[101].

With that in mind, it is worthwhile to revisit the previous examples once more. Let us start with the German *Duldungsvollmacht*, which – in the end – is part of the rules of contract formation. Here, the principal did not actually want to give authority, the agent normally knows this fact, and the other contracting party assumes that the principal authorized the agent in the past and therefore necessarily does not understand the passiveness of the principal as a present grant of authority either.[102] Finding the solution

97 Thus the denomination to describe the efforts in physics to explain the world in one formula, see eg Steven Weinberg, *Dreams of a Final Theory* (Vintage Books 1994) ix.

98 The normative embeddedness of contracts and corrective justice is also the reason why corrective and distributive justice cannot be separated, see Jules Coleman and Arthur Ripstein, 'Mischief and Misfortune: Annual McGill Lecture in Jurisprudence and Public Policy' (1995/1996) 41 McGill Law Journal 91, 93. See also Canaris, *iustitia distributiva* (n 86) 60–63 (less far-reaching but still recognizing distributive implications).

99 On the normativity of default rules, see Bender, 'Default Rules' (n 48) 385–386.

100 Hans Christoph Grigoleit, 'Subjectivism, Objectivism, and Intuitionism in Legal Reasoning: Avoiding the Pseudos' (§ 2) (Statement 1). See also Alexander Krafka and Bernhard Seeger, 'Vertragsgestaltung im Immobilienrecht' in Jörn Heinemann (ed), *Kölner Formularhandbuch Grundstücksrecht* (3rd ed, Heymanns 2020) 4 para 12.

101 On this aspect eg Hans Christoph Grigoleit and Philip M Bender, 'Der Diskurs über die Kategorien des Schadensersatzes im Leistungsstörungsrecht – Teleologische Dogmatisierung auf dem Prüfstand' (2019) 6 ZfPW 1, 27 ('konstruktionspositivistische Eigendynamik').

102 Canaris, *Vertrauenshaftung* (n 88) 40–42.

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to this case in the will of the principal is quite farfetched and disguises the actually decisive value: the protection of legitimate expectations. We can now turn to the hardship cases in which paternalism is at place. On what grounds are we able to decide that there is a lack of true will? Isn't it that we have a normative concept of free will, according to which we define when it is lacking? If this is the case, instead of saying that hardship leads to a lack of will, it would be more accurate to say that we want parties to abstain from feeling bound in certain cases of hardship due to some normative principle. We can finally re-examine default rules. If we fill gaps by reference to trade usage, is it really that we do so because parties want us to? Or isn't it rather the case that we want parties to complete contracts with trade usage because we like trade usage – be it because we pursue an observational mode of thought or because we consider it efficient according to our consequentialist approach? This issue can also be formulated without reference to trade usage: do we design default rules according to the criterion of efficiency because parties want efficient default rules or because we want parties to want efficient default rules? Don't efficiency-minded lawmakers actually define free will according to some economic rationality of *homines oeconomci*,[103] ie according to their own normative criterion? Only in that way, it can escape the default rule paradox[104], which arises when preferences (as defined under some different logic) do not correspond to economic rationality. In this case, avoiding the costs of an opt-out might paradoxically require mimicking irrational preferences (if taken seriously), even though the default rule regime based on these irrational preferences would be inefficient, ie not correspond to who is the cheapest cost avoider. Therefore, we do not even have to turn to classical minoritarian default rules that deviate from the will of efficiency-minded individuals – and aim at forcing individuals either to opt-out and thereby to disclose information (penalty or pushing default rules), or to stick with the default and thereby produce some positive externalities

103 eg Schäfer and Ott (n 93) 58–59; Fritz Söllner, Alexander Stulpe and Gary S Schaal, 'Politische und ökonomische Theorie- und Ideengeschichte' in Karsten Mause, Christian Müller and Klaus Schubert (eds), *Politik und Wirtschaft* (Springer 2016) 32; Martin Brusis and Joachim Zweynert, 'Wirtschafts- und Gesellschaftsordnungen' in Karsten Mause, Christian Müller and Klaus Schubert (eds), *Politik und Wirtschaft* (Springer 2016) 4. For a critical presentation of *Rational Choice Theory*, see also Herbert A Simon, 'A Behavioral Model of Rational Choice' (1955) 69 The Quarterly Journal of Economics 99, 100 ff.

104 Bender, 'Default Rules' (n 48) 379.

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(pulling default rules).[105] Ordinary majoritarian, will-aligning default rules already demonstrate the need for normativity. All of this is not to say that the subjective approach is wrong in pointing to the value of the self with its autonomy and its power. But it only covers *one* aspect. Subjectivism and objectivism should not be understood as overarching theories of contract law but as modes of thought that highlight different aspects. In this way, one can point to the decisive values – without the need of discrediting some manifestations of the self as lacking true will.

cc. The objectivist dimension of private autonomy in heteronomous lawmaking

I will now conclude the part on productional objectivity with some remarks on the relationship between autonomous (private) and heteronomous (public) lawmaking. At first glance, there is some coherence in assuming that adherents to the *voluntas*-principle in contract law would also favour subjectivist accounts of heteronomous lawmaking. This is certainly true concerning their scepticism vis-à-vis substantive objectivity. But the contractual *voluntas*-principle can collide with its legislative counterpart. In other words, it is not possible to fully embrace the subjectivity of both the contracting parties and the legislator. Indeed, according to its normative foundations, party autonomy (subjectivity) functions as a minimal assumption of natural law[106] with far-reaching objectivist consequences on the legislative level. This objectivist legislative implication of a subjectivist tradition of contract law is at the origin of the formalist assumption (or myth) that private law is apolitical.[107] Subjectivity in contract

105 Specifically on penalty default rules, see Ayres and Gertner, 'Filling Gaps' (n 92) 95. On minoritarian default rules in general, see Ian Ayres and Robert Gertner, 'Majoritarian vs. Minoritarian Default Rules' (1999) 51 Stanford Law Review 1591; Cass R Sunstein, 'Deciding by Default' (2013) 162 University of Pennsylvania Law Review 1, 4; Porat and Strahilevitz (n 48), 1442. On the terminology of pushing and pulling default rules, see Bender, 'Default Rules' (n 48) 381.

106 For the natural law foundation of subjectivist approaches, see already supra (n 35).

107 From a neoformalist perspective, eg Weinrib, *The Idea of Private Law* (n 36); Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (n 36) 998 (pointing to freedom and self as foundations of the system of corrective justice). Critically on the apolitical character of *iustitia commutativa* eg Coleman and Ripstein (n 98) 93.

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law can be used to immunize private law against legislative intervention.[108] The fact that embracing the self of one actor leads to objectivity from the viewpoint of another is no specificity of the relationship between contracting parties and the legislator. We find this feature as well when we shift the focus from productional to applicational objectivity because the adjudicator somehow has to deal with the self of the lawmaker.

2. *Applicational objectivity*

So far, we focused on the self of the lawmaker and the possibility to eliminate or tame it (*productional objectivity*). We examined prepositive constraints that guide the making of law. Let us now shift to objectivity in the application of law (*applicational objectivity*). Once the lawmaker has made a statement, can the adjudicator detect this determinate statement or is each interpretation of it a recreation of the norm?[109] Even though different actors have to deal with different previous manifestations of the self – in that sense parliament applies the constitution when enacting statutes and administrative agencies apply statutes and executive orders – the most emblematic perspective is that of a judge that decides cases on the basis of statutes and precedents. In a theory of law, the predominant (objectivist or subjectivist) mode of thought on the productional level does not need to be the predominant mode of thought on the applicational level as well.[110] One might perfectly be sceptical about objectivity on a productional level but nonetheless believe that the self of the judge in the process of the application of the law plays only a subordinate role. This is because legislative statements constitute higher rules that bind the judge, just as the prepositive commands of reason or God did on the productional level.[111] The existence of these higher rules allows the deduction of additional normative solutions through deontological thinking. In

108 See most famously *Lochner v New York*, 198 US 45 (1905).

109 Issues of applicational objectivity are therefore also discussed in terms of determinacy, eg Greenawalt (n 4) 11, or in terms of interpretation, eg Nicos Stavropoulos, *Objectivity in Law* (Clarendon Press 1996) 1.

110 See also Daniel Wolff, 'Conceptual and Jurisprudential Foundations of the Debate on Interpretive Methodology in Constitutional Law: An Argument for More Analytical Rigor' (§ 5).

111 On deontological modes of thought, see supra (text to 33–42).

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other words, legislative statements produced at an earlier stage of the legal process constitute an additional source of objectivity.[112]

Even though norm production and application are to be evaluated independently, it is helpful to combine the insights on both levels to a broader theory of adjudication.[113] Indeed, we have to distinguish application and adjudication. By *adjudication*, I understand the process of deciding cases. One significant part of this process is the interpretation and *application* of existing law. However, if one recognizes the existence of gaps in the law, an adjudicator will decide cases not only by reference to previously enacted law but also by creating new law. Therefore, a theory of adjudication combines norm production *and* application, so that objectivity in adjudication depends on the stance one takes on productional *and* applicational objectivity. Accordingly, I will present applicational objectivity not in isolation but together with possible theoretical positions on the productional level, so that we see the full picture of possible conceptualizations of adjudication. However, before we turn to these permutations of objectivity and subjectivity on the productional and applicational level (b.), it is necessary to clarify the specific use of objectivity and subjectivity in the particular context of interpreting and applying norms (a.). Finally, we will again draw some parallels to contract law (c.).

a. Subjectivity and objectivity in interpretation

Two notional clarifications are in order before we can present the different permutations of objectivity and subjectivity on the one hand and the productional and applicational level on the other.

The first clarification concerns theories of interpretation that are sometimes called 'Subjectivist' and 'Objectivist' and to which I will refer with upper-case letters to point to their specific meaning. Whereas Subjectivists focus on the legislative statement when applying a statute, Objectivists (also) take into account the predominant values that motivated the norm production.[114] These theories therefore derive their name from their po-

112 cf George C Christie, 'Objectivity in the Law' (1969) 78 Yale Law Journal 1311, 1334, emphasizing statutes and precedents as additional source of objectivity in legal reasoning.

113 For an integral view, cf Greenawalt (n 4) 12. See also Christie (n 112) (objectivity in adjudication).

114 On this notional clarification, see also Hans Christoph Grigoleit, 'Dogmatik – Methodik – Teleologik' in Marietta Auer and others (eds), *Privatrechtsdogmatik*

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sition vis-à-vis another self – the self of the legislator. It is important to note, however, that *both* theories try to obtain objectivity on the applicational level. They are therefore not subjectivist with regard to the self of the adjudicator. Rather, they are both objectivist in that they seek and deem possible (at least in part) the suppression of the judicial self in the process of applying the law. Differences between Subjectivists and Objectivists originate in their positions on the productional level. In other words, the (applicational) Subjectivists are subjectivists on the productional level, whereas the (applicational) Objectivists are objectivists on the productional level – but both are objectivists on the applicational level.

The second clarification concerns the will of the self. As soon as more than one individual is involved, there is no such thing as a pre-existing intent of 'the' legislator or 'the' contracting parties.[115] Therefore, also Subjectivist approaches have to objectivize until they reach the entity level (eg the parliament or the group of contracting individuals). This objectivization is common ground in the interpretation of contract law, in that the subjective intent of one party is irrelevant if not known to the other[116], and it is contrasted with interpretations of wills where the testator is the only person involved. But this minimal objectivization is also required in statutory interpretation. Indeed, Public Choice theories have a long time ago started to analyse the relationships between deputies (and voters more generally) as contractual.[117] In statutory interpretation, one might even consider the people, ie the public, as a further recipient of

im 21. Jahrhundert: Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag (De Gruyter 2017) 254.

115 On these problems in detail Franz Bauer, 'Historical Arguments, Dynamic Interpretation, and Objectivity: Reconciling Three Conflicting Concepts in Legal Reasoning' (§ 3).

116 On the tension-field of subjectivity and objectivity in the area of the interpretation of legal acts, see German Civil Code (*BGB*), s 133 (directing the adjudicator towards subjectivity), and s 157 (directing her towards objectivity). For the degree of objectivization necessary to resolve the conflict between both paragraphs, see the seminal contribution of Karl Larenz, *Die Methode der Auslegung des Rechtsgeschäfts: Zugleich ein Beitrag zur Theorie der Willenserklärung* (Dr Werner Scholl 1930) 70–106.

117 Anthony Downs, *An Economic Theory of Democracy* (Harper & Row Publishers 1957). For lawmaking as dealing, see also Posner, *The Problems of Jurisprudence* (n 7) 276–278.

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communication.[118] From there, one might[119] draw the conclusion that it is the 'original meaning' of the statutory text that is of relevance – a point to which I will turn in a second. Equipped with these notional clarifications, let us now further examine the possible permutations of objectivity and subjectivity, considering the difference between the productional and the applicational level.

b. Permutations of objectivity and subjectivity in adjudication

According to the insight that the mode of thought dominant on the productional level influences the mode of interpretation, I will approach objectivity and subjectivity on the applicational level in relation to the position one might take on the productional level. In other words, I will examine different permutations of objectivity and subjectivity in *adjudication*.

aa. Productional subjectivity and applicational objectivity ('Subjectivists')

Let us start with the permutation that I have already mentioned in the introduction to this section. In this permutation, we assume a subjectivist (voluntaristic) attitude on the productional level and an objectivist (non-voluntaristic) attitude on the applicational level ('Subjectivists').[120] Accord-

118 eg Bernd Schünemann, *Gesammelte Werke Band I: Rechtsfindung im Rechtsstaat und Dogmatik als ihr Fundament* (De Gruyter 2020) 53, and also 58 (rejecting the relevance of secret intentions of parliamentarians). Given these insights, it is surprising that he manifests, on the same page, reluctance in drawing parallels to the interpretation of contracts.

119 This, however, is not a necessary conclusion. Schünemann, for instance, at ibid 58, still focuses on the legislative intent.

120 This combination is sometimes referred to as 'association of legal positivism with legal formalism', see Posner, *The Problems of Jurisprudence* (n 7) 10–11 (positivism on the lawmaking level and formalism on the adjudicative level). See also Schmitt, *Drei Arten* (n 25) 24–33, who describes Positivism as a combination of decisionism and formalistic normativism. See also Greenawalt (n 4) 6–7, who refers to this permutation as the 'simple positivist conception'. Since 'positivism' is often used to describe the problem of how to define law (which is beyond the scope of this essay), and 'formalism' is often associated with a specific 19th century theory and its revivals, which has implications on the lawmaking level as well, I prefer to describe this first permutation as a combination of productional subjectivity and applicational objectivity.

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ing to this view, whereas the lawmaker is free in shaping the content of the law, the judge *can* and *should* follow the legislative commands. However, theories disagree about how best to follow legislative commands. Should one try to understand and follow the intent or purpose of the legislator (subjectivist-teleological interpretation[121], intentionalism[122], or – as applied to the constitution – original intent[123]) or should one focus on the text alone, ie the meaning of the concepts used at the time they were enacted (textualism or – as applied to the constitution – original meaning[124])? Whether to take a purposive or textualist approach could also depend on what the legislator actually wanted to regulate: the ends (then purpose) or also the means to pursue the ends (then meaning)?[125]

In addition, theories are divided on how to deal with gaps. The idea that gaps do not exist, that the judge is only the mouth of the law (*bouche*

121 Thus the common denomination in German legal discourse, see eg Schünemann (n 118) 52; Bernd Rüthers, 'Methodenfragen als Verfassungsfragen?' (2009) 40 Rechtstheorie 253, 283. See also Auer, 'Interessenjurisprudenz' (n 51) 528.

122 eg Michael Zander, *The Law-Making Process* (7th edn, Hart Publishing 2015) 189–191. See also Heck, 'Gesetzesauslegung' (n 51) 8 ('historisch-teleologische Auslegung').

123 This early form of originalism uses the notion of original intent and focuses on judicial restraint, see eg Richard S Kay, 'Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses' (1988) 82 Northwestern University Law Review 226, 244 (note 77), and 284–292; Robert H Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Indiana Law Journal 1, 17. However, whereas the former actually seems to follow an intentionalist approach, the latter (at least in other work) rather seems to understand 'original intent' as something expressed in the public meaning of words (see reference in n 124). Also Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 University of Cincinnati Law Review 849, 852–853 uses the notion of original intent in the sense of original meaning.

124 This is the now dominant version of originalism, see eg the later Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (Touchstone 1990) 143–160, especially 144, and briefly also 12; Scalia, 'Originalism' (n 123) 853; Steven G Calabresi and Saikrishna B Prakash, 'The President's Power to Execute the Laws' (1994) 104 Yale Law Journal 541, 552; Amy C Barrett, 'Originalism and Stare Decisis' (2017) 92 Notre Dame Law Review 1921, 1924. For an in-depth discussion of this 'new originalism', see Wolff (n 110) (§ 5). For a general textualist account of interpreting legal texts, see Oliver W Holmes, 'Theory of Legal Interpretation' (1898–1899) 12 Harvard Law Review 417, 417–418.

125 Bauer (n 115) (§ 3).

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de la loi)[126] or applying the law like a machine (*Subsumtionsautomat*)[127], might have been plausible to some 19th century formalists[128], but it is now widely rejected so that an interpretative theory has to account for the gap problem. One possible solution consists in saying that the democratically elected parliament should fill the gaps in order to prevent (arbitrary) judicial activism.[129] This approach might have some appeal in some areas of law – for instance, in criminal law, where the lack of punishment favours the individual[130], or even in constitutional law, where the lack of a constitutional fundamental right favours the democratically elected parliament.[131] But in private law settings, the lack of a right favours one individual at the detriment of another without good reason.[132] Here, the price to pay for the benefit of restricting judges is high. It could be described as a denial of justice as default position in cases of statutory gaps. Another way

126 Montesquieu (n 69) 327 (book XI ch VI) ('Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur.'), also 320 ('Des trois puissances dont nous avons parlé, celle de juger est en quelque façon nulle.').

127 See generally Regina Ogorek, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert* (Klostermann 1986) 306–314.

128 On the applicational level, especially the French *école de l'exgégèse* (see generally Jean-Louis Halpérin, 'École de l'Exégèse' [2005] Encyclopedia Universalis 227 <http://www.universalis.fr/encylopedie/ecole-de-l-exegese/> accessed 3 February 2021) is of interest, since it developed its formalism on the basis of the French Civil Code at a time when elsewhere formalism developed without broader codifications, ie on the productional level.

129 This is the main focus of early originalism, eg Bork, 'Neutral Principles' (n 123) 2–3, 10–12, 18, but it is still an important part of modern originalism, see eg Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1997) 23; Barrett (n 124), 1925. Sceptical on whether originalism actually achieves this goal, Werner Heun, 'Original Intent und Wille des historischen Verfassungsgebers: Zur Problematik einer Maxime im amerikanischen und deutschen Verfassungsrecht' (1991) 116 AöR 185, 207–208 (focusing rather on procedure, competency, and public opinion).

130 Therefore, the basic rule *nulla poena sine lege*, enshrined in German Basic Law (*GG*), art 103(2), as well as German Penal Code (*StGB*), s 1, prohibits the judicial development of the law at the detriment of the potential criminal.

131 Bork, 'Neutral Principles' (n 123) 10–12. On the statutes-requirement in detail Victor Jouannaud, 'The Essential-Matters Doctrine (*Wesentlichkeitsdoktrin*) in Private law: A Constitutional Limit to Judicial Development of the Law?' (§ 7).

132 In that sense, Private Law is reconciliation of interests (*Interessenausgleich*), see Alexander Hellgardt, *Regulierung und Privatrecht: Staatliche Verhaltensteuerung mittels Privatrecht und ihre Bedeutung für Rechtswissenschaft, Gesetzgebung und Rechtsanwendung* (Mohr Siebeck 2016) 55.

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of dealing with the gap problem is to look at how the legislator has solved similar conflicts of interests (*Interesssenjurisprudenz*)[133] or at which policy goals and values the legislator has enacted (*Wertungsjurisprudenz*)[134] and to use these normative insights to close the gaps in the spirit of the legislator. This position has certain parallels with the method of reasoned elaboration of the legal process school.[135] A third way of dealing with the gap problem is to say that the judge switches from the applicational to the productional level, which means – since we look at theories that assume subjectivity on this level – to a subjectivist mode of taking decisions.[136]

bb. Productional objectivity and applicational objectivity ('Objectivists')

We can now turn to a second permutation, one that combines a strong belief in objectivity (nonvoluntarism) on both the productional and the applicational level ('Objectivists'). Here, the legislator is engaged in some sort of discovery (*Erkenntnis*), not only in decision (*Entscheidung*).[137] This has three important implications for the process of adjudication. First, judges will interpret statutes as an effort of concretization and therefore understand them in the light of the objective purpose they want to pursue

133 The idea of guiding the judge by reference to how the legislator solved conflicts of interests, also when filling gaps (so that judicial discretion is the exception), is particularly present in Heck's earlier work, see eg Philipp Heck, *Interessenjurisprudenz: Gastvorlesung an der Universität Frankfurt a. M. gehalten am 15. Dezember 1932* (Mohr (Paul Siebeck) 1933) 20; Heck, 'Gesetzesauslegung' (n 51) 21, already on 16–17 introducing the concept of obedience, on 17 explaining statutes as a resolution of interests. On the (empirical) guidance of judges in the conception of Heck, see generally Auer, 'Interessenjurisprudenz' (n 51) 533; Bender, 'Default Rules' (n 48) 376. On Heck's shifted focus under National Socialism, see already supra (n 51) and especially Heck, *Rechtserneuerung* (n 51) 26–34.

134 Larenz and Canaris, *Methodenlehre* (n 30) 265; especially clear also Bydlinski, *Juristische Methodenlehre* (n 41) 123–139.

135 cf Richard H Fallon Jr 'Reflections on the Hart and Wechsler Paradigm' (1994) 47 Vanderbilt Law Review 953, 966.

136 The positivist account of Hart, assuming judicial discretion in hard cases, can be understood in this way, see eg Hart, The Concept of Law (n 9) 307 (notes to the third edition, written in response to Dworkin).

137 Hans Christoph Grigoleit, 'Anforderungen des Privatrechts an die Rechtstheorie' in Matthias Jestaedt and Oliver Lepsius (eds), *Rechtswissenschaftstheorie* (Mohr Siebeck 2008). See also Greenawalt (n 4), passim.

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(objectivist-teleological interpretation).[138] Second, judges can also fill any gaps by reference to prepositive insights gained by observational, deontological, or consequentialist thought. They become lawmakers – but unlike in the first permutation, this time without proceeding in a (purely) subjectivist manner.[139] Third, it means that the legislator can make incorrect or incoherent statements because lawmakers can be measured against the backdrop of productional objectivity. For the judge, there are two concurring and potentially binding orders: one positive, set by the legislator, and one prepositive, accessible through observational, deontological, or consequentialist modes of thought. It is this order that the legislator tries to concretize. Faced with these two concurring orders, judges must have a rule of how to decide potential conflicts. They can be deferential to the efforts of concretizations of the legislator and use the higher, prepositive order only to fill gaps. Even if the legislator failed in its undertaking of discovery, the judge would accept the legislative decision and abstain from correcting the statute or overruling the precedent. Given the assumption that the legislator actually wants to conform to the higher truth[140], this deference is not self-evident. Indeed, why should the judge apply a law which is incorrect measured against the assumed productional objectivity? The other way of dealing with conflicts between both orders therefore is to let the higher, prepositive truth prevail, claiming the power for judges to correct a statute. Applied to the constitution, this position opens the door for a continuous update according to dominant popular views[141] so that the constitution becomes a 'living instrument'[142]. In a way, there is a more or less free competition between statutory and adjudicative efforts

138 eg Grigoleit, 'Teleologik' (n 114) 245.

139 From a deontological (rights-based) perspective Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057. From a consequentialist (pragmatic) perspective Posner, *The Problems of Jurisprudence* (n 7) 23.

140 A reasoning well known for positivized higher truths such as constitutional law and especially European Union law (for the latter see BGH NJW 2009, 427, 429 para 25).

141 On popular constitutionalism, see Larry D Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press 2004) 3 ff.

142 eg Bruce Ackerman, 'The Living Constitution' (2007) 120 Harvard Law Review 1737, 1742. See also the chain novel conception of Dworkin, 'Natural Law Revisited' (n 22) 166–168 (on the metaphor), 168–169 (applying it to the law), or the Canadian equivalent: the living tree doctrine (eg *Edwards v Canada* (AG), 18 October 1929, [1930] AC 124, 1929 UKPC 86).

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of concretization.[143] Of course, an Objectivist theory of interpretation does not need to fully embrace this consequence. Most German objectivist-teleological thinkers will grant legislative statements some weight or, put in other words, some margin of error, so that the argumentative burden for correcting a statute (or overruling a precedent) is high.[144] The need for legal certainty and the protection of legitimate expectations are some reasons for this (at least partial) deference in an objectivist logic[145], and some subjectivist elements of thought will always persist, which give the democratically elected legislation special weight[146]. Indeed, cases in which we have such strong beliefs in objectivity that we feel confident to declare the legislative statement incorrect are rather rare. Judges feel that the road of deriving solutions from higher law is perilous and can lead to arbitrariness.

cc. Productional subjectivity and applicational subjectivity ('full nihilists')

The third permutation unites subjectivism (voluntarism) of both the productional and the applicational level. In this spirit, one assumes that there are no substantive prepositive principles that guide the legislator and that there is no possibility for the judge to apply the statements of the legislator

143 cf Günter Hirsch, 'Auf dem Weg zum Richterstaat? Vom Verhältnis des Richters zum Gesetzgeber in unserer Zeit' (2007) 62 JZ 853, 855 (pointing to that a statute can be more intelligent than its author and an objectivized will of the statute). See also Grigoleit, 'Teleologik' (n 114) 249–256 (pointing to the normative relativity of each statutory enactment and the judicial competency to correct legislative statements but criticizing on 256 the idea of an 'objectivized will' as paradoxical). In short already Hans Christoph Grigoleit, 'Das historische Argument in der geltendrechtlichen Privatrechtsdogmatik' (2008) 30 ZNR 259, 266. Even further Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press 1982) 2 (seeing statutes as part of the common law and therefore coming close to free competition, with further references in fn 5). Likewise very free Richard A Posner, 'Pragmatic Adjudication' (1996) 18 Cardozo Law Review 1, 5 (regarding 'authorities' such as statutes, precedents, and constitutions only as source of information and as limited constraints).

144 eg Grigoleit, 'Teleologik' (n 114) 256 (presumptive validity), 258 (particularly strict argumentative burden). Similarly already Grigoleit, 'Das historische Argument' (n 143) 266. See also, even though with a different argumentation, Hirsch (n 143), 855 ('some weight').

145 Critically Grigoleit, 'Teleologik' (n 114) 248.

146 ibid 256.

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– either due to the vagueness of language[147] or because communication about normative issues is considered nonsensical[148]. Interpreting the law means recreating it. The self of the judge is as present as the self of the legislator. Authors with this spirit are sceptical of legal methodology and any sort of objectivity in adjudication.[149] Just like on the level of lawmaking, they criticize, but they cannot offer a positive account of how adjudication should actually work – insofar they could be labelled 'full nihilists', without reference to any broader Nihilistic movement.[150] According to that view, law is conceived as an inevitable expression of power, accepted by those who have the same interests or who are coerced to do so. It certainly is a merit of nihilistic currents to unveil certain legal power dynamics and to critically point to the persistence of the judicial self. However, by assuming ideology everywhere, nihilism is as simplistic as imagining the judge as the formalist mouth of the law.[151] It generalizes the 'hard cases' and is attractive as theory because distinguishing hard cases from

147 cf Timothy Endicott, 'Law and Language' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (Oxford University Press 2002) 955.

148 In that sense the above-mentioned Circle of Vienna, eg Carnap (n 59), 220. For the (related) discussion of semantic challenges and a suggestion of how to overcome them, see Stavropoulos (n 109).

149 This *element* of thought can be found in different *theories* (which often also contain other elements of thought and other ways of thinking about objectivity): for sceptical German authors, each with a different focus, see eg Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgrundlagen richterlicher Entscheidungspraxis* (Athenäum Fischer Taschenbuch Verlag 1972); Theodor Viehweg, *Topik und Jurisprudenz: Ein Beitrag zur rechtswissenschaftlichen Grundlagenforschung* (CH Beck 1974). For a critical outline, see generally Bydlinski, *Juristische Methodenlehre* (n 41) 140–175. In the US context, this is a position we often find in more political contributions of the Critical Legal Studies movement, eg Kennedy, *A Critique of Adjudication* (n 72) 155 ('The judge is an ideological performer willy-nilly'), or 173 ('The judge with an ideological preference has to deal with the structure of authorities as part of the medium in which he works to frame the question of law, of rule choice, and then to produce an argument that will generate the experience of internal and external constraint on the side he favors.'). See generally Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press 1987). See also (beyond the Critical Legal Studies movement) John Hasnas, 'The Myth of the Rule of Law' [1995] Wisconsin Law Review 199.

150 Posner, *The Problems of Jurisprudence* (n 7) 459 uses this label.

151 Similarly ibid ('Moral and legal nihilism is as untenable as moral realism or legal formalism.'). On the classical formalist concept, see already supra (n 126–128).

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common legal issues is itself a hard case.[152] But it thereby does not provide a complete picture of law – it makes one mode of thought a 'theory of everything'[153] and thereby misses the point that communication between selves is actually possible. It disregards that the existence of dawn does not make us doubt the existence of day and night.[154] In doing so, it hastily generalizes about the nature of law from view reported cases, which are far from being representative for the totality of legal disputes. Let us suppose, for instance, that someone purchased a used bicycle and that – even though she paid – the seller sold it to a third party who offered a higher price. Let us further suppose that the law in such circumstances grants expectation damages.[155] Then, if these facts are undisputed, it is hard to imagine that practitioners would find a judgment granting expectation damages arbitrary. In the unlikely event that parties do not settle in such a clear case, the judgment would probably not be published anywhere. Given the inadequacy of nihilistic total scepticism, the real ideological battleground on the applicational level runs along the lines of Subjectivist and Objectivist interpretation – both being applicational objectivists.

dd. Productional objectivity and applicational subjectivity ('partial nihilists')

There is a fourth possible permutation: the combination of productional objectivity (nonvoluntarism) and applicational subjectivity (voluntarism). Indeed, a theory of *adjudication* can be objectivist, ie belief in the suppression of the judicial self, even though it is subjectivist on the applicational level – it just conceives adjudication as objectivized lawmaking. Some aspects in the thinking of Posner point in that direction in that he believes in the possibility of rationalizing decisions (especially through the consequentialist mode of thought on the productional level) but disregards legal interpretation and the strictly legal point of view.[156] At the same

152 On hard cases, from different perspectives, see Hart, The Concept of Law (n 9) 130; Dworkin, 'Hard Cases' (n 139).

153 eg Weinberg (n 97) ix.

154 eg Claus-Wilhelm Canaris, *Grundrechte und Privatrecht: Eine Zwischenbilanz* (De Gruyter 1999) 46.

155 eg German Civil Code (*BGB*), ss 280–283; US Uniform Commercial Code (UCC), ss 2-711–713.

156 Posner, *The Problems of Jurisprudence* (n 7) 459–461, especially 459 ('[…] there is no such thing as "legal reasoning."'), 460 ('[…] there is no longer a useful

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time, however, he also seems to give some weight to authorities[157] so that he might as well fall in the second permutation ('Objectivists'). Just like Posner assumes a (liberal) productional objectivity and disregards interpretation, other methodologically sceptical contributions might be interpreted as actually assuming some kind of (socialist) productional objectivity, which is why they could also be grouped in this permutation.[158] This is no coincidence since the thought of partial nihilists borrows from both Objectivism and nihilism. On the one hand, the combination of productional objectivity and applicational subjectivity leads to a position close to the position that assumes objectivity on both levels but favours free competition between them. Indeed, in both cases, the productional level dominates adjudication: thinking that you can disregard a statute because it does not align with productional objectivity or thinking that a statute has no proper meaning so that you directly refer to productional objectivity will produce quite similar outcomes. On the other hand, the position of partial nihilists also often merges with nihilistic critiques of adjudication, and it is often not clear whether a critique is fully nihilistic or based on some assumption of productional objectivity. Therefore, partial nihilism differs from the position of Objectivists in that it is not an interpretative theory, and it differs from full nihilism in that it believes in adjudicative objectivism. Even though Posner, for instance, is an *adjudicative* objectivist (and therefore rejects full nihilism[159]), he is (at least sometimes) an *applicational* or partial nihilist. It is a position at first glance counterintuitive since it assumes objectivity in the area of norm production in which most people would not, and it rejects objectivity in the area of interpretation in which most people are quite confident with regard to objectivity. But it is perfectly possible to think about adjudication in that way.

In conclusion, one can say that on the applicational level, objectivity-oriented modes of thought dominate. The only question is where to look at to gain this objectivity: to the subjectivity of the legislator or some sort

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sense in which law is interpretive.'). See also (in a similar liberal-pragmatic adjudicative spirit) John Hasnas, 'Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument' (1995) 45 Duke Law Journal 84.

157 Posner, 'Pragmatic Adjudication' (n 143) 5.

158 Unger (n 42) 143–178 (criticizing contract law from an altruistic value-basis), 199–208 (proposing social positive action for the whole legal system, even though vague).

159 Posner, *The Problems of Jurisprudence* (n 7) 459 ('Moral and legal nihilism is as untenable as moral realism or legal formalism.').

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of further objectivity. Only full and partial nihilists are true subjectivists on the applicational level. But even partial nihilists belief in some sort of adjudicative objectivity, leaving only the full nihilists as adjudicative subjectivists. Having presented all possible permutations, we can summarize our insights in the following table, which presents different modes of thought according to the presence of the self (objectivity vs subjectivity) and the level within the legal process (norm production vs norm application):

	Productional Objectivity	Productional Subjectivity
Applicational Objectivity	*'Objectivists'*	*'Subjectivists'*
Applicational Subjectivity	*partial nihilists*	*full nihilists*

c. Parallels in private lawmaking

With the previously drawn distinctions in mind, we are again able to point to some parallels in the interpretation of heteronomous and autonomous law and reproduce the permutations of the previous lines in the area of contract law. Indeed, adjudication does not only require a theory of statutory interpretation but also a theory of contract interpretation. Therefore, in theories of contract law, we also find a combination of productional subjectivity and applicational objectivity ('Subjectivists'), a combination of productional objectivity and applicational objectivity ('Objectivists'), a combination of productional subjectivity and applicational subjectivity ('full nihilists'), and a combination of productional objectivity and applicational subjectivity ('partial nihilists'). We understand these permutations again as possible *elements* of different theories, not as exclusive theories on their own.

Let us start with the first permutation, ie with those that obtain applicational objectivity by reference to another self ('Subjectivists'). We have seen that they often worry about judicial activism and the threat to democracy. This activism can also be conceived as a threat to the autonomous lawmaking of the contracting parties. Strict rules of interpretation and a (textual) focus on the law itself are means to counter the danger of rewriting the contract for the parties. In that logic, a literal interpretation of

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the contract, excluding, for instance, evidence outside its 'four corners'[160], might seem convincing – even though other Subjetivists might be fearful to miss the real intentions of the parties. Thus, even the debate between intentionalists and meaning-adherents is somehow reproduced on the contractual level. Furthermore, Subjectivists (though intentionalists not necessarily[161]) will probably be hostile to reinterpreting the contract when circumstances have changed in the application of some sort of *clausula rebus sic stantibus*.[162] They will argue that we do not possess any objective criteria to reshape the contract as the law of the parties and that we should not do so because the contract is in itself worthy of respect. Just as they refer to the democratic legislative process to update statutes, they can point to the possibility (and necessity) of renegotiating a contract. The example therefore shows how the presence of subjectivity on the productional level and the respect for this subjectivity on the applicational level go hand in hand in contract law as well.

Adherents to the second permutation, ie the combination of productional and applicational objectivism ('Objectivists'), will probably look at these institutions from a different perspective. Objectivists will probably be on the side of those that would like to receive broader circumstantial evidence. The contract is just a concretization of a higher truth – why not bring it as close to it as possible? Principles such as good faith, of which *clausula rebus sic stantibus* is just one application, will provide for some flexibility and allow updating the parties' stipulations in accordance with their true and present intent.[163]

Adherents of the third permutation ('full nihilists') would yet again have a different look on these institutions. They might see contract law as a pure power relation without content on its own and from this perspective, they can only point to the ongoing power struggle.

Mostly, however, this power relation is analysed in its dependence on a dominant (capitalist) ideology. Adherents to the Critical Legal Studies movement, for instance, characterize the contractual link between parties as 'unsentimental money-making'[164] and thereby go beyond the characterization of the contract as a power relation: they also criticize how the deter-

160 *State v Wells*, 253 La 925, 221 So2d 50 (1969); KY Supreme Court, *Hartell v Hartell*, 2007-CA-000498-MR.

161 On dynamic statutory interpretation by means of subjectivist-historical arguments, see Bauer (n 115) (§ 3).

162 See German Civil Code (*BGB*), s 313 (codifying this principle).

163 eg *Krell v Henry*, [1903] 2 KB 740 ('coronation case').

164 Unger (n 42) 171.

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minative power is exercised. In other words, they fall in the category of the fourth permutation ('partial nihilists') since they believe in some sort of productional objectivity, based on substantive values such as altruism or solidarity. From that viewpoint, they will probably embrace an institution such as *clausula rebus sic stantibus* as fairness-based counter-principle that challenges the will-based dominant (liberal) doctrine.[165]

III. Why and How to Think about Objectivity

After having distinguished productional and applicational objectivity, we can now turn to the question of why and how to think about them. I will first answer the 'why' by explaining the importance of productional and applicational objectivity as one source of legitimacy. In that perception, legitimacy is a *relative* concept, which is based on procedure and substance alike (1.). I will then address the 'how' of achieving objectivity and suggest a way to define the scope of objectivity within the law despite all epistemological disputes. I propose that the mode of thought that we should apply depends on the position the legal system itself, and especially the constitution, takes. I call this method *Constitutional Pragmatism* (2.).

1. Relativity of legitimacy

Since we explain the importance of objectivity in relation to the notion of legitimacy, we will yet again start this part with some notional clarifications. This is all the more important because much of the confusion in debates about legitimacy stems from notional misunderstandings. We will show how the decline in the belief in objectivity redefined the meaning of legitimacy, just as it also triggered a debate – the positivism-debate – about the definition of law (a.). We will then shift our focus from the meaning to the criterion of legitimacy. In that context, we will see that legitimacy can either come from substantive or procedural criteria and that the decline of objectivity triggered a shift from substance to procedure (b.). However, just as previous theories neglected the necessity of procedure, current approaches neglect the necessity of substance. Legitimacy depends on objectivity in various ways, and objectivity depends on different modes

165 eg ibid 155, in general on 143–178 analysing dominant contract law theories from a Critical Legal Studies perspective.

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of thought. Where these modes of thought are inadequate, the source will stem from procedure. Based on these observations, we will present legitimacy as a relative concept (c.).

a. The meaning of legitimacy and its connection to objectivity

It is important to distinguish two meanings of legitimacy. On the first account of legitimacy, a decision (or social order) is legitimate when it is acceptable or (at least to some extent) justified in terms of justice and fairness. This definition of legitimacy is normative (*normative legitimacy*). By contrast, on the second account of legitimacy, a decision (or social order) is legitimate when the addressees of the decision (or the individuals constituting the social order – 'the people') accept it. This definition of legitimacy is descriptive or empirical (*empirical legitimacy*).[166] Normative legitimacy answers the question what people *should* accept (acceptability), whereas empirical legitimacy answers the question what people *in fact* accept (acceptance). In other words, normative legitimacy refers to what *is* right, empirical legitimacy refers to *beliefs* in what is right. In that sense, one could say, the choice of meaning changes the research perspective from moral philosophy to social sciences.[167] Yet again, questions about the definition of a concept (legitimacy, law, etc) are best understood as questions of research agendas.[168]

Of course, the relationship to the self – the take on objectivity – influences how legitimacy is defined. Strong beliefs in objectivity make it much more likely to adopt a normative meaning of legitimacy (or a meaning of law that includes prepositive concepts) because a normative discourse is not seen as nonsensical or at least unscientific.[169] We already pointed to two successive developments which lead to a decline of objectivity – the disintegration of the *res publica christiana* and scientific positivism.[170] These

166 cf Peter Fabienne, 'Political Legitimacy' (2017) <https://plato.stanford.edu/archives/sum2017/entries/legitimacy/> accessed 1 October 2020 (under 1.). On that distinction, see also Jürgen Habermas, 'Legitimationsprobleme im modernen Staat' (1976) 7 Politische Vierteljahresschrift Sonderhefte 39, 58; David Beetham, *The Legitimation of Power* (2nd edn, Palgrave Macmillan 2013) 13–14.

167 Beetham (n 166) 13–14. See also Habermas, 'Legitimationsprobleme' (n 166) 58.

168 In that way, we also interpreted the positivist struggle over the meaning of 'law'. See supra (text to n 8–14).

169 See Carnap (n 59), 220; Wittgenstein (n 59) para 6.53.

170 On that see already supra (n 49–52).

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developments influenced the research agenda of Modernity: Max Weber paved the way to an empirical, value-free approach to social sciences in general and legitimacy in particular in that he focused on people's 'belief in legitimacy' (*Legitimitätsglauben*).[171] But he still used the notion of legitimacy with a normative meaning. Otherwise, if the notion of legitimacy had already been defined in terms of beliefs, the additional use of 'belief' would indeed not make any sense and lead to a duplication ('belief in belief').[172] Only in a second step, the definition adapted to the new research focus. In contemporary contributions with an empirical research focus, legitimacy is often directly defined in empirical terms, as acceptance or beliefs in moral correctness.[173] This does not mean that all normative use of legitimacy has disappeared[174], but at least in social sciences, the focus and predominant meaning have shifted towards empiricism.

b. The criterion of legitimacy and its connection to objectivity

Let us now turn to the criterion (source[175], reason) of legitimacy. The criterion of legitimacy answers the question why a decision (or social order) is legitimate. Given the two different meanings of legitimacy, we are actually facing two different questions: why is the decision (or social order) justified (normative legitimacy), and why is it accepted (empirical legitimacy)? In both cases, the criterion of legitimacy can either be substantive, ie based on the correct output according to a set of values (*substantive*

171 Weber (n 5) 122 pt 1 ch III § 1.

172 The fact that the combination of 'belief' and 'legitimacy' in 'belief in legitimacy' (*Legitimitätsglauben*) actually presupposes a normative meaning of legitimacy is mostly ignored. See, for instance, Beetham (n 166) 8.

173 eg Mattei Dogan, 'Conceptions of Legitimacy' in Mary Hawkesworth and Maurice Kogan (eds), *Encyclopedia of Government and Politics*, vol 1 (2nd edn, Routledge 2004) 110; Seymour M Lipset, *Political Man: The Social Basis of Politics* (Doubleday & Company 1959) 77; John H Herz, 'Legitimacy: Can We Retrieve It?' (1978) 10 Comparative Politics 317, 318; Bruce Gilley, *The Right to Rule: How States Win and Lose Legitimacy* (Columbia University Press 2009).

174 For a normative use, see eg John Rawls, *A Theory of Justice* (2nd edn, Belknap 1999) 31, 319, 323 (even though his work is not centred on legitimacy but rather on notions such as justice and fairness). See also Calabresi, *Common Law* (n 143) 91; Habermas, *Faktizität und Geltung* (n 67) 350 ff; Beetham (n 166) 11, 15–16.

175 On that terminology, see Fabienne (n 166) (under 3., but limited to normative legitimacy and with different sub-classifications).

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legitimacy), or procedural, ie based on some input (*procedural legitimacy*).[176] Given this, we understand statements about legitimacy as pairs of a certain meaning and a certain criterion, and we risk misunderstanding if we do not clarify the precise meaning first.[177] For instance, the affirmation 'this system is legitimate because it complies with Christian values' understands legitimacy in substantive terms, but it is unclear whether the speaker uses 'legitimate' in a normative way ('this system is just because…') or in an empirical way ('this system is accepted by the people because…'). On both levels of meaning, the distinction between substantive and procedural criterion makes sense.

Again, it is easy to see the connection between objectivity and the criterion of legitimacy. If we hold strong beliefs in some sort of objectivity, we will evaluate a system against the backdrop of these beliefs. We will require acceptance because we can invoke some sort of objectivity. The self of the decisionmaker disappears because there is a common reference-point (objectivity) for the decisionmaker and the addressee (inside perspective) or the decisionmaker and an external observer who evaluates the decision (outside perspective). Acceptance and procedure in general might be relevant but only insofar as they serve substantive goals.[178] Let us now consider again what happens if our beliefs in objectivity decline,

176 On substantive and procedural legitimacy particularly clear Thomas Christiano, 'The Authority of Democracy' (2004) 12 Journal of Political Philosophy 266, 266 (in the context of democratic legitimacy). On the (parallel) distinction between output- and input-legitimacy Fritz W Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) 6, 7 ff (input-legitimacy), 10 ff (output-legitimacy); Fritz W Scharpf, 'Deconstitutionalization and Majority-Rule: A Democratic Vision for Europe' (2016) 1–2 <https://d-nb.info/1124901450/34> accessed 21 December 2020. Based on Abraham Lincoln's Gettysburg Address (1863), Scharpf describes both elements as part of democracy. However, whether output-legitimacy in terms of the promotion of the 'common welfare' or the 'protection of life, liberty, and property' is required by democracy, is a definitional question. The inclusive definition should not mask potential conflicts between majority vote and individual rights, should not lead to the conclusion that output-legitimacy is sufficient for democracy, and should not lead to the assumption that non-democratic systems do not pursue output-legitimacy.

177 Fabienne (n 166) (under 1.).

178 For instance, according to German Rules on Administrative Procedure (*VwVfG*), s 46, errors in the administrative procedure tend to be irrelevant if they cannot be consequential for the result, see Christian Quabeck, *Dienende Funktion des Verwaltungsverfahrens und Prozeduralisierung* (Mohr Siebeck 2010) 18 ff. In the adjudicative context, German Rules of Criminal Procedure (*StPO*), s 337, can be interpreted as embracing a vision of the serving function of procedure.

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if we live in a pluralistic society in which we disagree on many normative issues. Then, the common reference point of decisionmaker and addressee, of decisionmaker and observer disappears. The self persists. In that case, if more than compliance out of fear, more than power-based decisionmaking is wanted, in short: if a criterion of legitimacy has to be found, the self has to be tamed or embraced. In today's societies, taming the self seems to be more appealing than embracing it (even though, as the pardoning power has illustrated, corners of embracing it persist). Therefore, procedure is of utmost importance. It loses its serving function[179] and becomes the predominant criterion of legitimacy in normative and empirical research alike: normative contributions point to the importance of fair procedure to justify decisions[180], and empirical contributions show that for the acceptance of people, procedure is more important than substance[181]. This is not to say that all substantive criteria disappeared.[182] But it indicates a shift in focus from substantive to procedural modes of thought.

The attractiveness of procedure gives us the impression that we can avoid taking substantive normative positions and – in a way – empiricize the normative battlefield. This is particularly visible in the approach of Beetham, sometimes presented as a third way: the Beetham-approach explicitly defines legitimacy in normative terms but gives predominant weight to the possibility of justifying a regime in terms of the specific beliefs and values held by the

179 This is again reflected in German administrative law, where so-called absolute procedural rights are established under the influence of EU law, so that procedure does not only have a serving function any more, see Angela Schwerdtfeger, *Der deutsche Verwaltugsrechtsschutz unter dem Einfluss der Aarhus-Konvention: Zugleich ein Beitrag zur Fortentwicklung der subjektiven öffentlichen Rechte unter besonderer Berücksichtigung des Gemeinschaftsrechts* (Mohr Siebeck 2010) 232 ff. We can, once again, draw a parallel to German Rules of Criminal Procedure (*StPO*), s 338.

180 eg Niklas Luhmann, *Legitimation durch Verfahren* (9th edn, Suhrkamp 2013); Habermas, *Faktizität und Geltung* (n 67) 350 ff, especially 364 ('diskursive Rationalisierung').

181 From an empirical account, see Tom R Tyler, *Why People Obey the Law* (Yale University Press 1990). See also Tom R Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006) 57 Annual Review of Psychology 375; Tom R Tyler and Jonathan Jackson, 'Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement' (2013) 20 Psychology, Public Policy and Law 78.

182 eg Rawls (n 174) 45 ('substantive moral conceptions'), even though he gains his principles of substantial fairness by applying a procedural-contractarian thought experiment.

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people concerned.[183] It takes a supposedly internal perspective[184], but it does not take this internal perspective seriously because it transforms it into a criterion of external evaluation.[185] This is true for both ways in which 'beliefs' as normative criterion of legitimacy can be understood. We can first understand the reference to beliefs as a criterion of substantive legitimacy, based on observational objectivity: we believe that for a specific people, the predominant values are actually the right values.[186] We embrace these values for a given space at a given time in history. But we still do not adopt a completely coherent internal perspective since we limit system-specific religious claims of universal aspiration to a concrete region and time. We are actually bound to do so when we compare different systems from an overarching perspective based on the proposed criterion. Second, we can understand 'beliefs' as a criterion of procedural legitimacy, which defers to the self of a people: we believe that a specific people should be able to choose their values, no matter whether they are right. We take their inside perspective just as a means of being deferential to other selves, but in comparing and evaluating different systems, we actually look at them from the outside.[187] It is this latter, more distanced perspective that seems to inspire the Beetham-approach. The specificity consists in transforming the empirical meaning of legitimacy (beliefs in justification or acceptance) into its normative criterion

183 Beetham (n 166) 11 ('A given power relationship is not legitimate because people believe in its legitimacy, but because it can be *justified in terms of* their beliefs.'), 15–16 (announcing his three criteria: *legality*, *justifiability* in terms of beliefs, on which we focus here, and evidence of *consent*, which is another procedural element). See also Habermas, 'Legitimationsprobleme' (n 166) 58–59, who takes the internal perspective more seriously (on that point in a moment).

184 On the internal perspective with regard to law eg Dworkin, 'Hard Cases' (n 139) 1090 ('internal logic of the law'). See also Douglas E Litowitz, 'Internal versus External Perspectives on Law: Toward Mediation' (1998) 26 Florida State University Law Review 127, 127–128; Michael Mandel, 'Dworkin, Hart, and the Problem of Theoretical Perspectives' (1979) 14 Law & Society Review 57, 59–60. In a particularly narrow sense Ulfrid Neumann, *Wahrheit im Recht: Zu Problematik und Legitimität einer fragwürdigen Denkform* (2004 Nomos) 57–58. In the context of legitimacy (and with specific understanding) Herz (n 173), 318–319; Christiano (n 176), 269.

185 Beetham (n 166) 15, on that point deviating from Habermas, 'Legitimationsprobleme' (n 166) 59. The latter emphasizes the problem that one acts historically unjust by approaching different systems with a general and abstract concept of legitimacy ('Wenn man Maßstäbe diskursiver Rechtfertigung an traditionale Gesellschaften heranträgt, verhält man sich historisch "ungerecht".').

186 This is the correct-law-approach described above, see supra (n 21).

187 Critically Habermas, 'Legitimationsprobleme' (n 166) 59.

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of procedural justice.[188] Seen in either way, it is not a 'third way' of talking about legitimacy but one that can be captured by the previously outlined categories and modes of thought. It is important, though, to pay attention to the different functions that 'acceptance' can fulfil in relation to legitimacy: first, acceptance is the meaning of empirical legitimacy ('this system is accepted by the people'). Second, it can be the *general* procedural criterion of normative legitimacy ('this system is justified because it is accepted by the people').[189] Third, acceptance can refer to a responsive (democratic) mode of decisionmaking that enables changes according to changing acceptance. In that case, it is used as a *specific* procedural criterion of legitimacy. This responsiveness-acceptance can in turn occur in empirical affirmations ('this system is accepted by the people because it is responsive to their acceptance'), and in normative settings ('this system is justified because it is responsive to the acceptance of the people').

Even though it is important to distinguish 'meaning' from 'criterion' and examine separately the shifts from normativity to empiricism and from substance to procedure, it is at the same time worthwhile to point to some connections. Indeed, both shifts reinforce each other: defining the concept of legitimacy in terms of acceptance might create some unconscious bias in favour of acceptance as a normative criterion, and the lack of substantive legitimacy redefines the research agenda in empirical terms. Behind both developments, we see the (theoretical) decline of objectivity-oriented modes of thought.

c. A field-specific approach

The previous outline has shown that our take on legitimacy depends on our take on objectivity. In other words, legitimacy is a relative notion, which we best understand not in absolute terms but in relation to objectivity (*relativity of legitimacy I*): a strong belief in objectivity implies a substantive criterion of legitimacy, whereas subjectivity requires procedural legitimacy.[190] It is the decline of objectivity which leads to the flourishing of procedural approaches towards legitimacy. However, we have to re-examine this procedure-centrism. Indeed, even though objectivity has de-

188 Therefore critically Fabienne (n 166) (under 1.).

189 Beetham (n 166) 11, 13–14, 16; Habermas, 'Legitimationsprobleme' (n 166) 58–59.

190 Similarly Neumann (n 184) 41–42 (who sees truth and authority as alternative sources of legitimacy).

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clined over time, it has not disappeared. Especially beyond the theoretical meta-discourse, objectivity is still present, and objectivity-oriented modes of thought provide arguments for substantive legitimacy. Procedure and substance legitimize decisions and systems together, depending on where objectivity is still alive.[191] In an area in which (productional or applicational) objectivity is dominant, substantive legitimacy is more important. In contrast, in an area in which we perceive legal commands as discretionary, procedural legitimacy has special significance. Both criteria of legitimacy are interconnected like communicating vessels: the stronger the first, the weaker the second, and vice versa. Therefore, a purely procedural approach to legitimacy is inadequate and incomplete. Thus, legitimacy is a relative concept also insofar as it requires both procedure *and* substance, depending on the specific field in question (*relativity of legitimacy II*).[192] It is precisely this claim that we will develop in what follows. To do so, I will first concentrate on empirical legitimacy and then turn to normative legitimacy.

aa. Field-specificity and empirical legitimacy

Empirical research has shown that people care about substance but that they actually care more about procedure.[193] Focusing on procedure alone does not, even on the basis of the research conducted so far, allow us to fully explain people's acceptance of a decision in particular or of a system as a whole. People still care about substance to some extent. Understanding legitimacy as a relative, field-specific concept allows us to add more nuances to this research. Indeed, it is likely that people do not always

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191 Against monistic explanations of democratic legitimacy also Christiano (n 176), passim, especially 266–269, who convincingly points to the need for both substantive and procedural legitimacy in the context of democracy but does not (explicitly) link both criteria to objectivity and the fields in which they are dominant. In order to describe this connection, I prefer the term 'relativity' or 'relative' over 'dualism' or 'dualistic' (269). Both substance and procedure do not randomly confer legitimacy but in relation to the account of objectivity in a specific field.

192 Just on an aside: legitimacy is also a relative notion in that it comes in degrees, see eg Dogan (n 173) 114. See also Herz (n 173), 320 (in the context of empirical legitimacy, even though the degree-view is also appropriate for normative legitimacy). We could call this *relativity of legitimacy III*.

193 From an empirical account, see Tyler, *Why People Obey the Law* (n 181). See also Tyler, 'Psychological Perspectives' (n 181); Tyler and Jackson (n 181).

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care more about procedure. Rather, the importance of substance and procedure for legitimacy depends on their beliefs in objectivity, which in turn depend on the area of law. Three examples will illustrate this point.

The first one shows how strong beliefs in productional objectivity influence the acceptance of a legal decision. Let us suppose the legislator decides to mitigate the economic consequences of the Corona-pandemic by means of private law, eg by temporarily granting a right to refuse performance, by suspending the right to terminate a long term lease for a certain time, or by extending the time for payment.[194] If someone is a neoformalist and conceives private law as a concretization of corrective justice and private autonomy[195] (contractual subjectivism leading to legislative objectivism, predominantly based on a deontological mode of thought[196]), she will probably reject these measures as illegitimate because they deviate from the 'correct' solution. In the same way, someone who believes in the possibility of objectivity based on observation, ie who is particularly deferential to the spontaneous order of the market[197], will perceive these measures as an illegitimate governmental intervention. Finally, someone who pursues a consequentialist mode of thought[198] might conclude that these measures are actually economically reasonable to avoid the high costs of bankruptcies and therefore legitimate. For all of the three, the fact that these measures were enacted through the procedure of democratic rulemaking will consequently play a subordinate role. In contrast, if someone underlines that private law always has distributive implications, ie that rulemaking in this area requires an open-ended balancing of values[199],

194 See the German contract law measures to mitigate the first wave of Corona in spring 2020, contained in the German Introductory Law to the Civil Code (*EGBGB*), art 240 ss 1–3. Out of the excessive literature on Private Law and Corona, see eg Caspar Behme, 'Miniatur: Krisenbewältigung durch Zivilrecht – Rechtsökonomisch sinnvolle Anpassungen des Leistungsstörungsrechts infolge der Corona-Pandemie' (2020) 6 ZfPW 257.

195 Weinrib, *The Idea of Private Law* (n 36); Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (n 36); Rödl (n 40).

196 See supra (text to n 106–108).

197 See supra (n 26).

198 See supra (text to n 43–52).

199 eg Coleman and Ripstein (n 98). See also Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press 1970) 198 f; Calabresi and Bobbitt (n 46) 135; Calabresi, *The Future of Law and Economics* (n 46) 1 ff, 131 ff, 157 ff. Specifically in the context of Corona also Sebastian Guidi and Nahuel Maisley, 'Who Should Pay for COVID-19? The Inescapable Normativity of International Law' (2021) 96 New York University Law Review 375 (for public international law but drawing parallels to private law).

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and that the previously existing rules actually freeze a more or less contingent compromise in favour of some (capitalist) ideology[200], one is more prone to find legitimacy in the democratic procedure that produced the Corona-measures. These different approaches are not only representative of academic legal thought. They unconsciously also explain why citizens accept one policy and reject another. What I illustrated concerning the discussion of Corona-measures is true in many other fields, one of them being the legitimacy of arbitral orders and *lex mercatoria*: if conceived as a spontaneous order (observational objectivity), the lack of democratic legitimacy is less urgent than if arbitral rules are themselves conceived as discretionary.[201]

The second example illustrates how strong beliefs in applicational objectivity influence the legitimacy of the US Supreme Court. For a while now, people talk about its legitimacy crisis[202], which is mainly formulated in terms of the so-called countermajoritarian difficulty[203]. However, this countermajoritarian difficulty only affects the legitimacy of the Supreme Court if people believe that the self of the judges plays an important role in the decisionmaking process, ie if they perceive their decisionmaking as subjective and political. Then, procedure is the only way to tame the different selves, and of course, in terms of democracy, the legitimacy of nine appointed lifetime Justices has to pale compared to the regularly

200 Unger (n 42) 143–178.

201 For an observational account, see Fabio Núñez del Prado Ch, 'The Fatal Leviathan: A Hayekian Perspective of Lex Mercatoria in Civil Law Countries' (2019) 31 Pace International Law Review 423; Núñez del Prado (n 26) (§ 11); Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (Académie de droit international de La Haye, Martinus Nijhoff Publishers 2008) 60 ff. For a rather deontological account, see Santiago Oñate, 'International Arbitration as a Project of World Order: Reimagining the Legal Foundations of International Arbitration' (§ 12).

202 Samuel Moyn, 'The Court Is Not Your Friend' (2020) <http://www.dissentmagazine.org/article/the-court-is-not-your-friend> accessed 1 October 2020. For a more nuanced analysis Richard H Fallon Jr *Law and Legitimacy in the Supreme Court* (Harvard University Press 2018) (relativizing the presumed crisis of legitimacy of the US Supreme Court).

203 On that recently Moyn (n 202). See generally Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill Company 1962); Stanley C Brubaker, 'The Countermajoritarian Difficulty: Tradition Versus Original Meaning' in Kenneth D Ward and Cecilia R Castillo (eds), *The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory* (State University of New York Press 2005).

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elected bodies of parliaments.[204] In contrast, if one assumes that the self of the judges can largely be suppressed, it is not the procedure of democratic voting that confers legitimacy but the objective reference point of the law. Then, the Supreme Court is the trustee of another self: the people that spoke in the process of 'higher lawmaking'[205], the *pouvoir constituant*[206]. It guarantees the 'government of laws and not of men'[207]. In short, for people who believe that the application of law can be objectivized, the countermajoritarian difficulty and the lack of democratic legitimacy are beside the point.[208] They might still differ in their perception of productional objectivity, which in turn influences their methodological position on the applicational level. Concretely, they might argue in favour of a strict orientation on previous enactments of law ('Subjectivists') or favour an interpretative style that takes into account prepositive principles and values ('Objectivists').[209] But they will be united in primarily focusing on substantive legitimacy on the level of the application of law (applicational objectivity).

So far, we referred to the legitimacy of the US Supreme Court as such. Let us give a third example that examines the legitimacy of a particular decision. This will allow combining issues of productional and applicational objectivity and thereby help to summarize the argument. In *Roe v Wade*[210],

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204 On judicial restraint and monistic procedural accounts of legitimacy Christiano (n 176), 266–267.

205 Bruce Ackerman, *We The People: Foundations*, vol 1 (Harvard University Press 1991) 6.

206 cf Emmanuel J Sieyès, *Qu'est-ce que le Tiers état?* (Éditions du Boucher 2002) 53 ch V (*pouvoir constituant*); Roger Bonnard, *Les actes constitutionnels de 1940* (R Pichon et R Durand-Auzias 1942) 7 (*pouvoir originaire*), 17 (*pouvoir institué*). See generally Arnaud Pillouer, 'Pouvoir constituant originaire et pouvoir constituant dérivé: à propos de l'émergence d'une distinction conceptuelle' (2005/2006) 25/26 Revue d'histoire des Facultés de droit et de la science juridique 123; Carl Schmitt, *Verfassungslehre* (11th edn, Duncker & Humblot 2017) 75 ff, 102 f.

207 See Constitution of Massachusetts, art XXX (pt I).

208 For a similar substantive legitimation of the power of courts in general, see Calabresi, *Common Law* (n 143) 94–98. On 96–97, he also points to the people actually wanting broad judicial power based on substantive legitimacy. By this move, he embraces a procedural element on a very abstract level and in a way anticipates (and generalizes) Ackerman's dualist legitimation of constitutional adjudication (see supra n 205).

209 See supra (text to n 114, 120–146).

210 *Roe v Wade*, 410 US 113 (1973). Later relativized, see *Planned Parenthood v Casey*, 505 US 833 (1992).

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the US Supreme Court recognized a 'right of privacy'[211], which is 'broad enough to encompass a woman's decision whether or not to terminate her pregnancy'[212]. If people hold strong beliefs in terms of productional objectivity, substantive arguments will determine the legitimacy of the decision. For instance, if one firmly beliefs, due to religious convictions, that abortion is wrong, *Roe v Wade* must seem illegitimate. However, if one believes that there is a (natural law) right to abortion, then *Roe v Wade* must seem legitimate. In both cases, it is not the (democratic) procedure that determines legitimacy but the substantive argument. Indeed, even a statute banning or allowing abortion would seem legitimate or illegitimate, no matter its preeminent democratic legitimacy. In contrast, if one does not believe in productional objectivity, in prepositive principles, then the only question is whether the procedure of higher lawmaking decided the issue (whether the right to abortion can be found in the Constitution) or whether the day-to-day procedure of democratic lawmaking should apply. It is still substantive arguments of constitutional interpretation that decide the issue of legitimacy. Only if beliefs in applicational objectivity come in their turn to an end, the lack of democratic procedural legitimacy retrieves importance.

In conclusion, empirical legitimacy is based on substance and procedure alike, depending on how strong beliefs in objectivity are. It is true, empirical research has shown, so far, a dominance of procedural elements. But people not having particularly strong beliefs in objectivity in the area examined might explain this. Tyler, for instance, focused on policing.[213] This might well be an area which does not involve strong beliefs on the productional level and in which broad discretion is granted to the police on the applicational level. In this setting, respecting a fair procedure is of utmost importance.

bb. Field-specificity and normative legitimacy

So far, we discussed the relativity of empirical legitimacy. We will now turn to normative legitimacy and demonstrate why it is best conceived as a relative concept as well. Normative legitimacy requires substance, not only

211 *Roe v Wade*, 410 US 113 (1973) 152.
212 ibid 153.
213 cf Tyler, *Why People Obey the Law* (n 181).

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if we take the external perspective on a (legal) system but also if we take the internal view. I will briefly explain both in what follows.

If we evaluate the legitimacy of a legal system from the *external* perspective, presumably without our own substantive considerations, we face a dilemma. We can either give particular weight to the (democratic) procedures at place. But then, we equate democracy and legitimacy and ignore a broader procedural criterion: the right of a people to determine its own form of government.[214] Or we can make people's beliefs the normative (procedural) criterion of legitimacy.[215] But then, we lose any possibility of criticizing the legitimacy of barbaric systems as long as they are supported by the people.[216] In addition, in focusing on presumably value-neutral criteria of procedure, we dissimulate its value-implications.[217] A full account of normative legitimacy thus has to be based on substantive and procedural criteria alike.

Let us now turn to the *internal* perspective[218]. If we want to criticize the legitimacy of a decision or an institution from the inside, we have to take into account substantive criteria of legitimacy as well. Indeed, as the discussion of the previously introduced three examples – Corona-aid by means of private law, the legitimacy of the US Supreme Court in general, and *Roe v Wade* in particular – has shown, many arguments in favour or against legitimacy are substantive in nature.[219] We discussed these examples in the context of empirical legitimacy so that it was all about beliefs in objectivity. But once we take the internal perspective, these beliefs become objective truths and grounds for substantive arguments.

It is important to see the difference to the Beetham-approach that takes the internal perspective only as a means of external evaluation[220] and there-

214 On the right of self-determination, see also UN Charta, ch 1 art 1(2). The approach of Beetham (n 166) 11, 16 is – in the end – also based on this normative assumption.

215 See ibid 11, 16.

216 cf Christiano (n 176), 287–290. It is in this context of extremely unjust systems that we also have to see the so-called 'formula of Radbruch', see Radbruch (n 11), 107.

217 cf eg Robert S Summers, 'Evaluating and Improving Legal Processes: A Plea for Process Values' (1974-1975) 60 Cornell Law Review 1, 3–4 ('process values'). See also Michael Bayles, 'Principles for Legal Procedure' (1986) 5 Law and Philosophy 33, 50–57.

218 On the internal perspective, see supra (n 184).

219 Christiano (n 176), 269.

220 Beetham (n 166) 11, 13–16, and supra (text to n 183–188).

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by does not take it seriously.[221] Instead of saying that a system is legitimate because it lives up to the values in which people believe (broad procedural criterion), the truly internal perspective argues on the basis of these values directly (substantive criteria). Of course, by doing so, by taking the internal perspective seriously, we can evaluate a system only in terms of its own internal values. We lose the possibility to switch perspectives, and we actually have to choose one perspective.[222] This might be a problem for the social scientist or the moral philosopher. But it is not a problem for the lawyer since the choice of internal perspective is determined by the legal system in which she operates. This brings us to Constitutional Pragmatism.

2. *Constitutional Pragmatism*

So far, we have seen that there are different modes of thought which – taken seriously – allow us to obtain objectivity and to deal with subjectivity. We have also seen that legitimacy depends on objectivity since it is the possibility of objectivity which decides over substantive or procedural means of legitimation. However, up to now, we did not provide any answer to how we determine which mode of thought, which criterion of legitimacy, is adequate for which field. What I call *Constitutional Pragmatism* suggests itself as one method to do so. It is apt for the lawyer that operates within a specific legal system. In the following, I will briefly sketch out its Pragmatic (a.) and its constitutional (b.) leg.

a. The Pragmatic leg of Constitutional Pragmatism

The approach that I suggest is, in important aspects, Pragmatic in the sense of classical philosophical Pragmatism, to which I refer (again) with an upper-case letter – even though, of course, not all positions of this quite heterogeneous movement are part of Constitutional Pragmatism.

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221 cf also the critique of Habermas, 'Legitimationsprobleme' (n 166) 58–59 (in detail text to n 187).

222 This is precisely why Beetham (n 166) 15 criticizes Habermas, 'Legitimations-probleme' (n 166) 58–59.

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aa. Three core aspects of philosophical Pragmatism

For the purpose of this essay, it is enough to concentrate on three core aspects of philosophical Pragmatism.[223] The first aspect refers to the goal of every inquiry, which is described as the 'settlement of opinion'[224], the transition from doubt to belief. It is less ambitious than approaches that seek 'truth' and more ambitious than nihilists who reject all possibility of knowledge.[225] In that sense, it aims for a workable compromise between truth-seekers and sceptics, for something as 'inter-subjectivity'[226], something plausible enough to silence doubt. I will call this aspect *belief-centrism*. The second aspect refers to the preliminary character of beliefs. They are subject to modification if new doubt arises.[227] The main source of modification is the falsification of a theory[228], which is why I call this second aspect *fallibilism*.[229] Even though Pragmatic philosophers showed a strong inclination towards scientific methods of falsification[230], the theory is, at least in principle, open enough for other methods of falsification

223 On the following three aspects see generally Jack Knight and James Johnson, *The Priority of Democracy: Political Consequences of Pragmatism* (Princeton University Press 2011) 26–27 (in part with different terminology).

224 Charles S Peirce, 'The Fixation of Belief: Illustrations of the Logic of Science' (1877) 12 Popular Science Monthly 1, 6 ('Hence, the sole object of inquiry is the settlement of opinion.'); Charles S Peirce, 'How to Make Our Ideas Clear: Illustrations of the Logic of Science' (1878) 12 Popular Science Monthly 286, 300 ('The opinion which is fated to be ultimately agreed to by all who investigate, is what we mean by the truth, and the object represented in this opinion is the real.'). See also William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (Floating Press 2010) 44 (Lecture II) ('ideas [...] become true just in so far as they help us to get into satisfactory relation with other parts of our experience [...]').

225 Knight and Johnson (n 223) 27, who underline the rejection of complete doubt and therefore call this aspect 'anti-skepticism'. However, this denomination reflects only one of the two consequences of the pragmatic middle-ground between the strong truth-seekers and the nihilists.

226 On intersubjectivity from a phenomenological perspective, see Edmund Husserl, *Husserliana: Gesammelte Werke*, vol 13–15 (Iso Kern ed, Nijhoff 1973). For the use of this notion in the context of legal theory, see eg Grigoleit, 'Teleologik' (n 114) 267.

227 Peirce, 'The Fixation of Belief' (n 224) 11.

228 eg James (n 224) 138.

229 Knight and Johnson (n 223) 26–27.

230 eg Peirce, 'The Fixation of Belief' (n 224) 11–15 (on the so-called scientific method); James (n 224) 6 (on him being a radical empiricist and on this position being independent from pragmatism). See also the seminal work of Karl Popper,

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such as those we use in law[231] – methods that revive doubt. The third aspect refers to the connection between beliefs and actions.[232] Theoretical positions, which provide for beliefs, are to be judged according to their effects, to the practical differences they make in our lives.[233] Pragmatism approaches epistemological problems in an instrumental way[234], which is why I will call this third aspect *instrumentalism*.[235] All three aspects fulfil different functions: belief-centrism allows us to settle disputes – to assume some static position on which we can act. Fallibilism allows us to rethink beliefs – to fall back into a dynamic environment of doubt and thereby reach progress.[236] Instrumentalism suggests how we should form beliefs and revive doubt – when to transition from one state to the other.

bb. The different perspective of pragmatic adjudication

It is important to see that these premises of philosophical Pragmatism define how we treat epistemological problems. They do not guide – at least

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The Logic of Scientific Discovery (Routledge Classics 2005) 17–20, 64–73 (on empirical fallibility and falsification).

231 Claus-Wilhelm Canaris, 'Funktion, Struktur und Falsifikation juristischer Theorien' (1993) 48 JZ 377, 386.

232 Peirce, 'The Fixation of Belief' (n 224) 5.

233 Peirce, 'How to Make Our Ideas Clear' (n 224) 293 ('Consider the practical effects of your conception. Then, your conception of those effects is the whole of your conception of the object.'), 301 ('only practical distinctions have a meaning'); John Dewey, *Logic: The Theory of Inquiry* (Henry Holt and Company, Inc 1938) iv ('But in the proper interpretation of "pragmatic," namely the function of consequences as necessary tests of the validity of propositions, provided these consequences are operationally instituted and are such as to resolve the specific problem evoking the operations, the text that follows is thoroughly pragmatic.'); James (n 224) 36 (Lecture II) ('If no practical difference whatever can be traced, then the alternatives mean practically the same thing, and all dispute is idle. Whenever a dispute is serious, we ought to be able to show some practical difference that must follow from one side or the other's being right.'), 137–138 (Lecture VI) ('What, in short, is the truth's cash-value in experiential terms?').

234 Especially clear James (n 224) 41 (Lecture II) ('Theories thus become instruments, not answers to enigmas, in which we can rest.'), 44–45 (on his instrumental view on truth).

235 See also Knight and Johnson (n 223) 27, who refer to that aspect as 'consequentialism'. In order to avoid confusion with the consequentialist mode of thought, oriented towards substantive objectivity, I will denominate this aspect 'instrumentalism'.

236 Similarly on doubt and belief Peirce, 'The Fixation of Belief' (n 224) 6.

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as such – our concrete decisionmaking, ie they do not imply some sort of pragmatic adjudication. In that sense, Posner is right in that there is no *necessary* connection between a philosophically Pragmatic position and an adjudicative theory.[237] But there certainly is some *affinity* to a certain applied theory of decisionmaking. In that sense, some Pragmatists rightly illustrate the affinity of Pragmatism, especially the fallibilism-aspect, to democracy[238] (but they overconfidently take affinity as necessity). Also, the pragmatic adjudicative theory of Posner[239], on which I will briefly concentrate, can be seen as an illustration of affinity between philosophical Pragmatism and a pragmatic style of solving problems: Posner rejects both formalism and nihilism[240] and introduces his reasonableness-criterion as epistemological middle ground, building on the Pragmatic belief-centrism. But he goes beyond this epistemological statement by deducing from there that judges should actually decide (at least hard) cases based on considerations of reasonableness[241], thereby explicitly choosing one of Peirce's four modes of thought – the apriori-mode of which the latter did not have the highest opinions.[242] In addition, Posner embraces the fallibilism

237 Posner, 'Pragmatic Adjudication' (n 143) 3 ('For it would be entirely consistent with pragmatism the philosophy *not* to want judges to be pragmatists […].'). See also Richard A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press 2003) 55; Rorty Richard, *Philosophy and Social Hope* (Cambridge University Press 1999) 23.

238 eg Knight and Johnson (n 223) 28 (on the political implications of pragmatism), 29 (criticizing the 'Posner-Rorty consensus') 33 (on the radically democratic implications of pragmatism), building on John Dewey, *The Public and Its Problems* (Swallow Press 1927) 169. On the political strain of pragmatism, see generally Richard J Bernstein, 'The Resurgence of Pragmatism' (1992) 59 Social Research 813, 815. See also Hilary Putnan, 'A Reconsideration of Deweyan Democracy' (1990) 63 Southern California Law Review 1671, 1671 (on 'the epistemological justification of democracy', building on Dewey).

239 Posner, *The Problems of Jurisprudence* (n 7) 454–469; Posner, *Law, Pragmatism, and Democracy* (n 237); Posner, 'Pragmatic Adjudication' (n 143); Posner, 'Legal Pragmatism Defended' (n 43).

240 Posner, *The Problems of Jurisprudence* (n 7) 459.

241 On the reasonableness-criterion, see ibid 130–133; Posner, 'Legal Pragmatism Defended' (n 43) 683. However, he complements this rather vague reasonableness-criterion by scientific, empirical tools, see Posner, 'Legal Pragmatism Defended' (n 43) 684. Insofar, he joins Peirce's scientific mode of forming beliefs, see Peirce, 'The Fixation of Belief' (n 224) 11–15.

242 Peirce, 'The Fixation of Belief' (n 224) 10–11 ('It makes of inquiry something similar to the development of taste […].'). For a criticism of Posner's reasonableness-criterion on the basis of its vagueness, see Richard A Epstein, 'The Perils of Posnerian Pragmatism' (2004) 71 Chicago Law Review 639, 640.

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of philosophical Pragmatism.[243] But he goes beyond this epistemological affirmation by generalizing the doubt towards authority and granting the judge broad leeway in not following statutes.[244] Finally, Posner endorses the Pragmatic instrumentalism. But yet again, he goes beyond the epistemological attitude towards theories in considering the consequentialist mode of thought the adequate way of decisionmaking.[245] Pointing to these affinities between philosophical Pragmatism and Posner's applied pragmatism is at place to distinguish them clearly. They are affinities, not necessary implications. Constitutional Pragmatism builds on philosophical Pragmatism, but it does not embrace Posner's applied pragmatism as a theory of decisionmaking – at least not as a whole. The applied theory of how to take legal decisions has to come from somewhere else. This else is the Constitution.

b. The constitutional leg of Constitutional Pragmatism

Philosophical Pragmatism alone does not provide a theory of adjudication. We know that we should be happy with beliefs, that we are ready to fall back into doubt, and that we consider the effects of our beliefs. But we still do not know what to believe. I suggest that we should turn to the constitution of the system of which we take the internal perspective seriously. We should act according to the epistemological statements contained in the constitution and thereby settle epistemological disputes authoritatively. In that sense, Constitutional Pragmatism is not a pragmatic theory of constitutional adjudication but a constitutional theory of Pragmatism.

aa. Pragmatism and the constitution intertwined

Let us examine more in detail how the three premises of philosophical Pragmatism are intertwined with the constitution of a given legal system. Pragmatism provides the philosophical methodology which allows and

243 On the importance of doubt eg Posner, *The Problems of Jurisprudence* (n 7) 20.

244 eg Posner, 'Pragmatic Adjudication' (n 143) 5 (seeing 'authorities' such as statutes, precedents, and constitutions merely as a source of information and limited constraints).

245 On Posner and consequentialism, see supra (n 43, 47).

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incentivizes us to turn to the authority of the constitution as arbitrator in epistemological disputes.

The *belief-centrism* of Pragmatism enables us to invoke the constitution. If we were to look for something as truth, we would have to disregard the constitution. But since we are just looking for something that settles doubt, we are perfectly able to invoke its authority.[246] Authority, however, cannot silence real doubt. The only thing that authority can do is to make us act as if we had no doubt.[247] The persistence of real doubt can modify the epistemological compromise contained in the constitution. The *fallibilism* of Pragmatism therefore aligns with and explains the possibility to revise the constitution as soon as a significant part of the people doubts its solutions. Their new beliefs will then dominate. One could also say that the constitutional framework institutionalizes the interchange of belief (belief-centrism) and doubt (fallibilism).

Whereas belief-centrism and fallibilism *enable* us to turn to the constitution, *instrumentalism* even *requires* us to do so. The focus on the effects of a theory draws the attention to the normative implications of an epistemological position.[248] Indeed, each epistemological question has normative implications, also presumably neutral agnostic positions. For instance, the affirmation 'I don't know whether abortion is right or wrong, therefore I think that each one should decide on her own' leads to a substantive right to abortion.[249] Another example: the rejection of productional and applicational objectivity leads to procedural tools of creating legitimacy, especially a strong democratic principle at the detriment of judicial review and the protection of fundamental rights, whereas a strong belief in objectivity limits the scope of democratic decisionmaking.[250] Once we recognize

246 On the authoritative method of settling doubt, see Peirce, 'The Fixation of Belief' (n 224) 8–9. In the context of truth, see also Neumann (n 184) 41–42.

247 One could also say that we use the epistemological statements of the constitution as 'regulative ideas' in the sense of Kant. On that approach, see Neumann (n 184) 37–41. See also Claus-Wilhelm Canaris, 'Richtigkeit und Eigenwertung in der richterlichen Rechtsfindung' (1993) 50 Grazer Universitätsreden 23, 41.

248 Similarly in the context of truth Neumann (n 184) 58.

249 On that, using the abortion example, Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe it' (1996) 25 Philosophy & Public Affairs 87, 96–101. See also Ronald Dworkin, *Justice for Hedgehogs* (Belknap 2013).

250 On this tension, see Ackerman, *We the People* (n 205) 11; Moyn (n 202). See also supra (n 176). The German constitutional discourse underlines more the fact that fundamental rights are an integral part of the democratic principle, see eg Bodo Pieroth, 'Das Demokratieprinzip des Grundgesetzes' [2010] JuS 473, 478. This is certainly true, but this conceptualization risks to disguise the inherent

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these normative implications of epistemological positions, epistemological disputes become just another kind of normative dispute. If seen in that way, it is quite natural – and from the internal perspective of a lawyer even mandatory – to turn to the instrument that normally settles normative disputes: the constitution. Methodological issues become constitutional issues.[251]

In conclusion, one can say that the constitution requires the belief-centrism and fallibilism of Pragmatism, just as the instrumentalism of Pragmatism requires the constitution.[252] In other words, Pragmatism makes it both possible and necessary to turn to the constitution. Let us now examine more closely the epistemological guidance that a constitution can provide.

bb. Epistemological statements of the constitution

In what follows, we will see that constitutions generally adopt a field-specific approach in answering epistemological issues in which subjectivity and objectivity are both necessary elements on different levels, with subjectivity increasing the higher the level of lawmaking. Constitutions adopt different modes of thought, not one overarching theory, and are each a 'bundle of compromises'[253] in epistemological terms as well. The duality of subjectivity and objectivity is particularly visible in the constitution of Iran, which combines democratic (procedural) and theological

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tension between popular sovereignty and fundamental rights. One would have to use different notions to refer to this conflict, eg majority vote (as integral part of democracy) and fundamental rights (as likewise integral part of democracy).

251 Like here Rüthers (n 121), 272 ('Methodenfragen sind Verfassungsfragen.'); Karl Engisch, *Einführung in das juristische Denken* (Thomas Würtenberger and Dirk Otto eds, 12th edn, W Kohlhammer 2018) 140–143; Felix Somló, *Juristische Grundlehre* (Felix Meiner 1917) 377–378, 384–391; Joachim Hruschka, *Das Verstehen von Rechtstexten: Zur hermeneutischen Transposivität des positiven Rechts* (CH Beck 1972) 90; Neumann (n 184) 63. Critically Schünemann (n 118) 75–78 (but he himself refers to the constitutional framework all the time to argue in favour of his methodology, see eg 52).

252 This does not mean that philosophical pragmatism requires a *democratic* constitution – even though there might be some *affinity*, see supra (text to n 238).

253 Max Farrand, *The Framing of the Constitution of the United States* (Yale University Press 1913) 201. See also John F Manning, 'Separation of Powers as Ordinary Interpretation' (2011) 124 Harvard Law Review 1939 (elaborating a field-specific approach for understanding the separation of powers doctrine, rejecting any overarching functionalist or formalist interpretation).

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(substantive) elements of legitimacy.[254] But it is also present in the liberal constitutions of Germany and the United States, on which I will focus in what follows.

(1) Epistemological statements on the productional level

Let us start with the making of statutory law (*productional objectivity*). Both the German Basic Law (*GG*) and the US Constitution grant broad room to the democratic principle, enshrined most prominently in article 20(1) and (2) of the German Basic Law (*GG*), and in article I(1) of the US Constitution. Democracy provides procedural legitimacy – it institutionalizes the subjectivity of the people and rejects complete substantive determination. Even though subjectivity dominates on the level of parliamentary norm production, we also find significant elements of objectivity on that level, which trigger the logic of substantive legitimacy. Substantive provisions of the constitution are higher law so that the making of ordinary law is never only production but also always application of higher law, controlled by a constitutional court.[255] Most importantly, fundamental rights, contained in the respective bills of rights, and embedded in a system of rule of law, limit the scope of democratic subjectivity.[256] We can understand them

254 On the duality of Iranian government, see generally Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Belknap 2019) 324 ff. See also Randjbar-Daemi Siavush, *The Quest For Authority in Iran: A History of the Presidency From Revolution to Rouhani* (I.B. Tauris 2018); Neil Shevlin, 'Velayat-e Faquih in the Constitution of Iran: The Implementation of Theocracy' (1998) 1 Journal of Constitutional Law 358; Khomeini (n 36) 29.

255 Especially clear *Marbury v Madison*, 5 US 137 (1803) (in the American context); Khomeini (n 36) 29 (in the Iranian context). See further Philip M Bender, 'Solange III? La décision de la Cour constitutionnelle fédérale allemande du 15 décembre 2015 située dans le contexte de son contrôle d'identité' [2016] Revue des affaires européennes/Law & European Affairs 93, 97. More in detail on these issues Peter M Huber, 'The Law between Objectivity and Power from the Perspective of Constitutional Adjudication' (§ 4). For a conceptualization, see the dual constitutionalism of Ackerman, *We the People* (n 205) 6–7, which underlines the popular origin of both ordinary and higher law and is valid well beyond the American context. In limiting his approach to revolutionary constitutions, see Ackerman, *Revolutionary Constitutions* (n 254) 362 or Ackerman, *We the People* (n 205) 15, he overestimates the differences between Germany and the US.

256 On the tension between fundamental rights and democracy, see supra (n 176, 250).

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as positivizations of modes of thought aimed at objectivity. They are substantive principles, manifestations of certain values. In that sense, they implement a *deontological* mode of thought in the spirit of modern natural law theories.[257]

But fundamental rights go well beyond these initial value-enactments since freedom and equality have a transformative function. Let us first dwell on protections of freedom.[258] They force the legislator to defer to private organization, notably through contracts, and they thereby embrace the idea of *observational* objectivity.[259] Indeed, freedom-rights shield significant parts of society against governmental regulation and thereby guarantee its spontaneous development.[260] Here, we find again the correlation between private autonomy and productional objectivity.[261] Let us now turn to the transformative function of equality rights[262]: they measure the legislator against the backdrop of its own present and past value-enactments.[263] The legislator can pursue its subjectivity, but it has to do so in a coherent way that does not hurt legitimate expectations.[264] The

257 On the deontological mode of thought, see supra (text to n 33–42 and specifically on modern natural law theories n 35).

258 For the most general protection of freedom in the German context, see Basic Law (*GG*), art 2(1). In the US Constitution, we might see a certain equivalent in the due process clause of the 5th Amendment (applicable to the federal government) and the 14th Amendment (applicable to the states).

259 On the observational mode of thought, see supra (text to n 16–32).

260 In the Lochner era, see *Lochner v New York*, 198 US 45 (1905), the shielding effect was mainly centred on freedom of contract and a substantive understanding of the due process clause. Now, the focus shifted to the First Amendment protections, which play a similar role in shielding tech companies such as Google or Meta (Facebook) from regulation. On that, see Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books 2019) 108–109 (with further references in fn 42).

261 See supra (text to n 106–108).

262 For the most general protection of equality in the German context, see Basic Law (*GG*), art 3(1). In the US Constitution, we find an equivalent in the equal protection clause of the 14th Amendment, applicable to the states. *Bolling v Sharpe*, 347 US 497 (1954) incorporated its protections in the due process clause of the 5th Amendment, applicable to the federal government.

263 On equality as a guarantee of (minimal) rationality, see Grigoleit, 'Teleologik' (n 114) 240–241. This aspect also takes a central place in the approach to objectivity of Christie (n 112) 1334–1335.

264 The rule of law requirement to protect legitimate expectations and the principle of equality therefore go hand in hand. The doctrine of *stare decisis* formalizes these considerations. On *stare decisis* in general, see eg Christopher J Peters, 'Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis' (1996)

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deontologial mode of thought thereby receives a much broader scope of application, which goes beyond the initial constitutional value-enactments.

Finally, we also find the *consequentialist* mode of thought as part of the constitutional framework.[265] When the legislator limits fundamental rights, German constitutional law requires her to respect the rule-of-law-based principle of proportionality.[266] Its requirements of suitability, necessity, and adequacy lead to a sort of cost-benefit-analysis (which, however, is not limited to wealth).[267] The same is true for the balancing-tests of constitutional doctrines in the United States.[268]

(2) Epistemological statements on the applicational level

We will now examine epistemological statements of the constitution concerning the application of statutory law (*applicational objectivity*). Here, it is first important to see that the democratic principle requires some belief in objectivity. If judges or agencies could not understand and apply statutory commands, democracy would be in vain. In that spirit, article 20(3), as well as article 97(1) of the German Basic Law (*GG*) affirm that statutes bind judges, and article II(3) of the US Constitution presupposes the possibility of their faithful execution. It follows from there that democratic constitutions reject the position of both full and partial nihilists.[269]

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105 Yale Law Journal 2031; John Hasnas, 'Hayek, the Common Law, and Fluid Drive' (2005) 1 NYU Journal of Law & Liberty 79, 92–93 (on the historical origins); Sebastian AE Martens, 'Die Werte des Stare Decisis' (2011) 66 JZ 348.

265 On the consequentialist mode of thought, see supra (text to n 43–52).

266 On the principle of proportionality in German constitutional law, see eg BVerfGE 100, 113, 175, and the seminal contribution of Peter Lerche, *Übermaß und Verfassungsrecht: Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit* (2nd edn, Keip 1999).

267 This understanding of cost-benefit-analysis is close to the understanding of Cass R Sunstein, 'The Real World Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)' (2014) 114 Columbia Law Review 167; Cass R Sunstein, 'Cognition and Cost-Benefit Analysis' (2000) 29 The Journal of Legal Studies 1059. See also Calabresi and Bobbitt (n 46) (for a more normative approach to law and economics). In detail on the different ways of using economics within law, see Philip M Bender, *Grenzen der Personalisierung des Rechts* (2022), forthcoming (ch 8).

268 On balancing in US constitutional law T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale Law Journal 943.

269 On full nihilists, see supra (text to n 147–155). On partial nihilists, see supra (text to n 156–159).

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In addition, democratic constitutions also reject the position of strong Objectivists, who believe in the possibility to apply statutes objectively but nonetheless consider judges free to disregard them.[270] The *necessary impossibility* of interpreting statutes and their *voluntary disrespect* are both devastating for democracy.

But the German Basic Law (*GG*) and the US Constitution also seem to reject a strong Subjectivist version in private law adjudication, which requires a judge to deny justice absent a statute.[271] This follows from a second set of constitutional provisions. In the United States, we can refer to the recognition of the common law.[272] In the German constitutional context, the rule of law principle is interpreted in containing a right to receive a judicial decision (*Justizgewähranspruch*)[273], which – in private law adjudication – normally does not require to be based on a statute.[274] In addition, article 20(3) of the Basic Law (*GG*) subjects the judge not only to legislation or statutes (*Gesetz*) but also to law (*Recht*) – which invokes at least some sort of authority beyond statutes.[275] Finally, the punctual welcoming of strong Subjectivism, eg in Criminal Law and in an attenuated version in other areas of public infringement of individual rights,[276] only confirms the general point of rejection for private law adjudication.

We can now turn to a third epistemological statement. In that the provisions of the US Constitution or the German Basic Law (*GG*) bind judges as higher law (and not just as political recommendations), both constitutions embrace Objectivism to the extent that productional objectivity is constitutionally positivized. This position was prominently articulated in *Marbury v Madison* for the American context.[277] Its reasoning is perfectly valid for

270 On strong Objectivists, see supra (text to n 143).
271 On strong Subjectivists, see supra (text to n 129–132).
272 See US Constitution, eg the 7th Amendment ('In Suits at common law […]').
273 See generally Bernd Grzeszick, 'Art. 20' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz Kommentar*, vol III (95th edn, CH Beck 2021) ch VII para 133; Jörg Neuner, *Allgemeiner Teil des Bürgerlichen Rechts* (12th edn, CH Beck 2020) § 4 para 76.
274 In detail on that point Jouannaud (n 131) (§ 7). See also ibid § 2 para 12.
275 eg ibid § 4 paras 61–78, interpreting the duality of legislation (*Gesetz*) and law (*Recht*) as an authorization for courts to develop the law beyond statutes. For further interpretations, see generally Bernd Grzeszick, 'Art. 20', *Grundgesetz Kommentar*, vol III (95th edn. CH Beck 2021) para 65.
276 For criminal law, see supra (n 130). For public law infringing upon individual rights, see supra (n 131).
277 *Marbury v Madison*, 5 US 137 (1803).

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the German context as well[278] – even though the procedural details in how to react to unconstitutional norms differ.[279]

Beyond these three epistemological statements (following from democracy, the need to adjudicate, and the perception of the constitution as law), we might have difficulties finding authoritative constitutional beliefs in epistemological issues. We are (still) in an area of doubt. This persistence of punctual doubt, however, is not a specificity of epistemological normativity – also other normative issues have not been settled by constitutions. It is inherent in the concept of Pragmatism, notably its fallibilism.[280]

So far, we associated norm production with the parliament and norm application with judges for the sake of simplicity. But we already mentioned that the parliament can be seen as an applier of constitutional provisions. Further pursuing that logic, we can associate norm production with constitutional lawmaking. Then, the respective constitutional nucleus, the eternity clause of the constitutions[281], is the positivized higher law. Or we can go down a level, referring to administrative rules as norm production and agency decisions as norm application. We might also change

278 See eg Basic Law (*GG*), art 1(3), which affirms the binding nature of fundamental rights also for the judiciary.

279 See Basic Law (*GG*), art 100, which establishes a monopoly of the Federal Constitutional Court in declaring invalid statutory provisions. In contrast, *Marbury v Madison*, 5 US 137 (1803) grants this right to every judge.

280 See supra (text to n 227–231).

281 In Germany this nucleus consists of Basic Law (*GG*), art 1 and art 20. It is explicitly protected by the eternity clause of art 79(3), see generally Otto E Kempen, 'Historische und aktuelle Bedeutung der "Ewigkeitsklausel" des Art. 79 Abs. 3 GG: Überlegungen zur begrenzten Verfassungsautonomie der Bundesrepublik' (1990) 21 Zeitschrift für Parlamentsfragen 354. In the US Constitution, art V (second half-sentence) protects federalism eternally, see Eugene R Fidell, 'The Constitution of 1787: What's Essential?' (2017) 67 Syracuse Law Review 605. In Iran, art 177 of its constitution protects the Islamic principles eternally. The list of explicit (eg Italian Constitution, art 139) or judicially created eternity clauses (eg in Columbia and Argentina) could be continued, see for an overview Joel I Colón-Ríos, *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (Routledge 2012) 67. Indeed, every constitution has, at least implicitly, an unchangeable nucleus, for if the nucleus of a constitution is changed, it is no longer the same constitution. In addition to these eternity clauses, we also find the idea of constitutional identity in the so-called identity-control, limiting the transfer of competencies to the EU level, cf German Basic Law (*GG*), art 23, and in the concept of a free and democratic basic order, allowing the prohibition of parties, art 21(2) and (4), see Philip M Bender, 'Ambivalence of Obviousness: Remarks on the Decision of the Federal Constitutional Court of Germany of 5 May [2020]' (2021) 27 European Public Law 285, 293.

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perspective in that we look for epistemological statements beyond the constitution, examining whether ordinary law grants discretion to judges or not[282] and which type of legitimacy a certain area of law embraces.[283] The Pragmatism pursued here is 'constitutional' not in that it only turns to the constitution but in that all epistemological compromises – also statutory ones – have to be compatible with the overall societal compromise contained in the constitution. In that spirit, this book does not only include purely theoretical contributions but also doctrinal analysis of concrete areas of law.

IV. Structural Objectivity

Objectivity can also refer to the structures within which we think, enact, and apply the law (*structural objectivity*). It intervenes at both, the productional and the applicational level and constitutes a kind of objectivity different from those with which we were concerned so far. The last part of the essay is dedicated to bringing some light to this specific way of thinking about objectivity. We will do so by first clarifying the notional reference to Structuralism (1.). Then, we will explore three main characteristics of structuralist objectivity in the legal context (2.). We will end by drawing again some parallels to private lawmaking (3.) and by pointing to the importance of structural objectivity, thereby summarizing the argument (4.).

1. Structuralism

The concept of structural objectivity builds on the interdisciplinary movement of Structuralism[284], which I will characterize – in very simplistic

282 In detail, see Ben Köhler, 'The Role for Remedial Discretion in Private Law Adjudication' (§ 6).

283 Some areas, for instance, assume a serving function of procedure (see supra n 178), embracing substantive legitimacy, whereas others sanction procedural errors independently from the outcome (see supra n 179), embracing procedural legitimacy. Additional insights might be gained by the analysis of the presumption of innocence, see Martin Haissiner, 'Innocence: A Presumption, a Principle, and a Status' (§ 10).

284 For an overview, see Gilles Deleuze, 'A quoi reconnaît-on le structuralisme ?' in François Châtelet (ed), *Histoire de la philosophie.* Tome 8 (Hachette 1972); John Sturrock, *Structuralism* (With a new introduction by Jean-Michel Rabaté, 2nd edn, Blackwell Publishing 2003) 17–24. For anthropological structuralism, see

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terms – with three premises. The first premise is that there is something different from the real and the imaginary, which could be described as symbolic or structural (*distinctness*).[285] The second premise is that these distinct structural arrangements are largely unknown. They influence our thinking without us noticing – unconsciously (*unconsciousness*).[286] The third premise is that to understand an object of inquiry, we have to turn to the system, the structure, within which it is situated, and study the different relations of this system (*relations*).[287]

In the field of law, we find a structural approach towards constitutional or statutory interpretation[288] – an approach which in the German context is part of the classical interpretative toolbox and mostly labelled 'systematic interpretation'.[289] This structural or systematic interpretation underlines the necessity to go beyond the text of the specific provision at issue and

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the seminal work of Claude Lévi-Strauss, *The Savage Mind* (4th edn, University of Chicago Press 1968) 263; Claude Lévi-Strauss, *Anthropologie structurale* (Plon 1958). See also already Ruth Benedict, *Patterns of Culture* (Routledge & Kegan Paul 1971), eg 21.

285 This is the 'first criterion' of structuralism in the outline of Deleuze (n 284) under I. ('Or le premier critère du structuralisme, c'est la découverte et la reconnaissance d'un troisième ordre, d'un troisième règne : celui du symbolique.').

286 Mentioned, for instance, ibid under IV. ('Les structures sont nécessairement inconscientes […].'). See also Lévi-Strauss, *Anthropologie structurale* (n 284) Chapitre Premier, previously published as Claude Lévi-Strauss, 'Histoire et Ethnologie' (1949) 54 Revue de Métaphysique et de Morale 363, especially 383 (seeing in the focus on unconscious structures the specificity of ethnology, which allows to distinguish it from history: '[…] l'histoire organisant ses données par rapport aux expressions conscientes, l'ethnologie par rapport aux conditions inconscientes, de la vie sociale.'); Donald HJ Hermann, 'A Structuralist Approach to Legal Reasoning' (1975) 48 Southern California Law Review 1131, 1141.

287 Deleuze (n 284) under II. ('L'ambition scientifique du structuralisme n'est pas quantitative, mais topologique et relationnelle […].'), further elaborated under III., IV., and V. See also Hermann (n 286), 1144; Sturrock (n 284) 21–22.

288 On the method of structural interpretation, see Charles L Black Jr *Structure and Relationship in Constitutional Law* (Louisiana State University Press 1969) 11.

289 See fundamentally Friedrich Carl von Savigny, *System des heutigen Römischen Rechts: Erster Band* (Deit und Comp 1840) 214 ('Das systematische Element bezieht sich auf den inneren Zusammenhang, welcher alle Rechtsinstitute und Rechtsregeln zu einer großen Einheit verknüpft […].'). One might further distinguish interpretative arguments based on the external system and those based on the internal-teleological system, see Philipp Heck, *Begriffsbildung und Interessenjurisprudenz* (Mohr 1932) 142–143. Builing on that Canaris, *Systemdenken* (n 21) 35; Bydlinski, *Juristische Methodenlehre* (n 41) 442–448 ('systematisch-logische Auslegung'), 454–455 ('teleologisch-systematische Auslegung'). It is the systematic-teleological approach based on the inner system which is particularly

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to look at the structure of the legal document or legal system as a whole. In a way, it is an application of the third premise (*relations*), but it is not directly connected to Structuralism, the movement. Indeed, as a mode of thought, structuralism is much older than Structuralism and common to every systematized acquisition of knowledge.[290] We best conceive of the systematic interpretative approach as a way to understand the statements of the legislator. It therefore belongs to applicational objectivity, not to the distinct structural objectivity. Just like we built Constitutional Pragmatism on the philosophical current of Pragmatism, not on an applied pragmatic thinking within the law (pragmatic adjudication), we develop the notion of structural objectivity based on the intellectual movement of Structuralism, not on some way of structural arguments used in legal reasoning. We again make use of the upper-case letter when we explicitly refer to the movement to avoid confusion.

So far, explicitly Structural accounts in legal theory are rare.[291] However, some legal scholarship can (implicitly) be understood as Structuralist. We might turn to comparative law analysis that focuses on the common structures of legal systems.[292] But we might especially interpret elements of the Critical Legal Studies movement as Structuralist in that it aimed at uncovering the necessary relationship between form and substance in particular and the use of legal doctrine and unconscious ideological implications in general.[293] Even some contributions in the field of law and economics can be understood as Structuralist in that they analyse the costs and benefits of norm design – a particular legal structure.[294]

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close to the American structuralist interpretation (and the original systematic interpretation as defined by Savigny).

290 On that and the distinction between 'Structuralism' and 'structuralism', see Sturrock (n 284) 22–23.

291 For one of the few explicit applications of Structuralism to law, see Hermann (n 286), 1141 ff.

292 eg Ernst Rabel, 'Private Law of Western Civilization' (1949) 10 Louisiana Law Review 1, 1; Ernst Rabel, 'Private Laws of Western Civilization: Part IV. Civil Law and Common Law' (1950) 10 Louisiana Law Review 431, 446 ff.

293 Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harvard Law Review 1685. In the German context Auer, *Materialisierung* (n 7) 43.

294 See especially Louis Kaplow, 'Rules versus Standards: An Economic Analysis' (1992) 42 Duke Law Journal 557; Louis Kaplow, 'A Model of the Optimal Complexity of Legal Rules' (1995) 11 Journal of Law, Economics, and Organization 150; Louis Kaplow, 'On the Design of Legal Rules: Balancing versus Structured Decision Procedures' (2019) 132 Harvard Law Review 992.

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2. Developing the notion of structural objectivity

We will approach the concept of structural objectivity through the three premises of Structuralism: by reference to distinctness and unconsciousness we will carve out the specific focus of structural objectivity, and by reference to relations, we will illustrate how we could make it work in the field of law.

a. Distinctness

Let us start with the *distinctness* of structure from both the real and the imaginary. To be operative in our context, we will substitute the real by the kind of objectivity we explored so far on the productional and applicational level, ie the three substantive modes of thought that aim at eliminating the self on normative grounds. In addition, we will substitute the imaginary by the self, the subjectivity or power, as we explored it throughout this essay. Structural objectivity is distinct from both: unlike the three substantive modes of thought, it does not make any normative prescriptions, but unlike subjective approaches, it limits the power of the self in substantive terms.

b. Unconsciousness and necessity

The remodelled premise of *unconsciousness* will help us to see in what exactly structural objectivity differs. If we were to make the unconsciousness as such the specificity of structural objectivity, we could say that whereas the substantive modes of thought aimed at productional or applicational objectivity consciously limit the self, structural objectivity does so unconsciously. The self can gain some sort of intermittent awareness but no complete conscious mastery while operating within the system.[295] In a way, behavioural economics is concerned with these implicit structures of

295 Claude Lévi-Strauss, *Mythologiques: Le cru et le cuit* (Tome 1, Plon 1964) 19 ('Sans exclure que les sujets parlants, qui produisent et transmettent les mythes, puissent prendre conscience de leur structure et de leur mode d'opération, ce ne saurait être de façon normale, mais partiellement et par intermittence.'). Based on that also Hermann (n 286), 1142.

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our thinking.[296] But unconsciousness, for our purposes, is only one manifestation of those limits to the power of the self that *necessarily* exist. In that sense, structural objectivity is open for whichever necessary constraints we face. Some might only persist as constraints as long as we are not aware of them, but most of them, especially classical behavioural biases[297] or physical walls (architecture[298]), will continue to be obstacles even if we know that they exist. Based on that, we can redefine 'unconsciousness' as (factual) 'necessity'. Whereas the described substantive approaches to objectivity described so far *normatively limit* subjectivity according to a substantive mode of thought, structural objectivity *necessarily channels* subjectivity according to a structure. The previously outlined modes of thought aimed at productional and applicational objectivity operate like signs that show the self the right way to take. They limit its power – but only normatively, with the persisting factual option to act otherwise. Structural objectivity equals the paths themselves. They limit the power of the self factually, without the option to act otherwise. Even if one rejects normative concepts of objectivity on the productional or applicational level, structural objectivity is still operative: the self might freely choose one path or the other – but it cannot leave the paths altogether, it cannot alter the architecture. Given the physical force behind legal commands, the distinction might be difficult in some cases, and one might look at one

296 eg Amos Tversky and Daniel Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 Science 1124; Daniel Kahneman and Amos Tversky, 'Prospect Theory: An Analysis of Decisions under Risk' (1979) 47 Econometrica 263; Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011); Richard H Thaler, 'Doing Economics Without Homo Economicus' in Steven G Medema and Warren J Samuels (eds), *Foundations of Research in Economics: How do Economists do Economics* (Edward Elgar Publishing 1996). Specifically in the legal field Christine Jolls, Cass R Sunstein and Richard Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 Stanford Law Review 1471; Philipp Hacker, *Verhaltensökonomik und Normativität: Die Grenzen des Informationsmodells im Privatrecht und seine Alternativen* (Mohr Siebeck 2017) 79 ff.

297 Daniel Kahneman, Dan Lovallo and Olivier Sibony, 'The Big Idea: Before You Make That Big Decision…' [2011] Harvard Business Review 50, 52 ('But knowing that you have biases is not enough to help you overcome them. You may accept that you have biases, but you cannot eliminate them in yourself.').

298 On architecture as regulatory tool, see generally Lawrence Lessig, 'The New Chicago School' (1998) 27 The Journal of Legal Studies 661, 663. Specifically in cyberspace, see Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 Harvard Law Review 501, 507. See also Michel Foucault, *Surveiller et punir: Naissance de la prison* (Gallimard 1975) 201 ff (on the Panopticon).

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limitation from both a normative and a factual perspective. But this only illustrates that we are concerned with different ways of thinking, not with mutually exclusive theories.

c. Relations

Let us now have a closer look at these paths – the *relations*. Structural objectivity would turn out to be a banality if we were to consider only the laws of gravity and other physical restrictions as the structure within which individuals operate. Far more complex and less evident relations (to the point that they are often unconscious) are of particular interest. In what follows, we will provide an overview of the interconnected relations with which structural objectivity is concerned.

aa. Form and substance: bundle-structures I

The first relation is the one between form and substance. A significant part of the Critical Legal Studies scholarship is dedicated to this relation, more precisely to the ideological implications which follow from the – in terms of substance – seemingly neutral choice between a *rule* and a *standard*.[299] In the spirit of this analysis, rules are commonly associated with liberalism or individualism and standards with altruism or collectivism.[300] This link is certainly too simplistic – not only because standards are concretized through the dominant societal ideology[301], which can perfectly be liberal, but also because standards can sometimes promote more individual agency than rules.[302] However, this critique is mentioned just as an aside. The important point here is that the study of the connection between form and substance can be understood as a study of structural objectivity: a lawmaker might be free in choosing a rule or a standard, but she is not free in disposing of the further normative implications that follow from

299 Kennedy, 'Form and Substance' (n 293). See also Auer, *Materialisierung* (n 7) 43.
300 Kennedy, 'Form and Substance' (n 293) 1776; Auer, *Materialisierung* (n 7) 43.
301 On that point, cf Kathleen M Sullivan, 'The Supreme Court 1991 Term – Foreword: The Justices of Rules and Standards' (1992) 106 Harvard Law Review 22, 58 ('A legal directive is "standard"-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.').
302 On the latter point in detail Bender, *Personalisierung* (n 267), forthcoming (ch 5).

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this choice. The normative implications of rules and standards can also be studied from an economic viewpoint[303] or from the perspective of the rule of law.[304] Furthermore, rules and standards are not the only formal aspects that have normative implications. Indeed, we can open the analysis of the relation between form and substance to other formal aspects such as the *complexity* of legal norms[305] and understand this connection as a broader area of research – the 'normativity of norm design'.[306] These normative insights might be helpful for pointing to the limits of a potentially unlimited, Big-Data-driven 'personalization' of the law.[307]

bb. Substance and substance: bundle-structures II

Moreover, we might add that there is not only a connection between form and substance but also between substance and substance. In other words, substantive options between which we have to choose also come in packages, in bundles. These bundles are ambivalent in that the elements of each option foster and at the same time inhibit the goals pursued. The cost-benefit-analysis provides a methodological framework in which we can talk about these different substantive connections.[308] However, as such a framework, it does not tell us what costs and benefits are triggered by a possible action. Rather, it presupposes the awareness of structural objectivity: we need to know of the different costs and benefits and their connections before we are capable of applying it. One example of the

303 See, for instance, the seminal article of Kaplow, 'Rules versus Standards' (n 294). Critically Kevin M Clermont, 'Rules, Standards, and Such' (2020) 68 Buffalo Law Review 751.

304 See, for instance, Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 Chicago Law Review 1175.

305 Kaplow, 'Optimal Complexity' (n 294); already Kaplow, 'Rules versus Standards' (n 294) 586–590. Building on that, see also Ian Ayres, 'Preliminary Thoughts on Optimal Tailoring of Contractual Rules' (1993) 3 Southern California Interdisciplinary Law Journal 1.

306 Bender, 'Default Rules' (n 48) 374.

307 Omri Ben-Shahar and Ariel Porat, 'Personalizing Mandatory Rules in Contract Law' (2019) 86 Chicago Law Review 255; Porat and Strahilevitz (n 48); Anthony J Casey and Anthony Niblett, 'The Death of Rules and Standards' (2017) 92 Indiana Law Journal 1401. Critically eg Grigoleit and Bender, 'Generality and Particularity' (n 48); Bender, 'Default Rules' (n 48).

308 cf in detail Peter Zickgraf, 'Economic Analysis of Law: Inherent Component of the Legal System' (§ 13).

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complex substantive implications of a potential policy is the issue of US citizenship for the people of Puerto Rico: the United States might be free in deciding whether to grant full citizenship or not. Likewise, Puerto Ricans might be free in vindicating full citizenship or not. This is a normative question linked to productional objectivity and beyond the interest of structural objectivity. But as soon as citizenship is granted, there will be consequences: on the one hand, Puerto Ricans will claim more rights based on their citizenship. On the other, independence movements will be weakened.[309]

cc. Thought-structures

We might also go beyond the formal or substantive paths a self can take, beyond the packaging of bundles of choice, and examine the unconscious structures and relations that dominate the process of decisionmaking. Here, we are no longer concerned with the structures that form the bundles out of which we have to choose, but we examine the structures which lead us to this or that bundle. The already mentioned analysis of behavioural biases is in that sense structuralist.[310] But also Structuralist accounts of language are particularly important here.[311] One illustration of this approach is the study of how metaphors influence the decisionmaking[312]: the way judges decide on the burden of proof, for instance, might be determined by whether they imagine a company as a person or as a network.

dd. Reception-structures

Finally, language does not only pre-structure our thought, but it also pre-structures the way people understand legal decisions. Legal concepts and language in general provide a *numerus clausus* of communicative possibilities of which the decisionmaker cannot dispose. A recent decision of the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*)

309 In detail Alvin Padilla-Babilonia, 'The Citizenship Duality' (§ 16).
310 On the behavioural analysis of biases, see supra (n 296).
311 On linguistic structuralism, see generally Sturrock (n 284) 25–47.
312 In detail Jan-Erik Schirmer, 'Metaphors Lawyers Live by: Cognitive Linguistics and the Challenge for Pursuing Objectivity in Legal Reasoning' (§ 15).

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may illustrate that point. The Court activated the 'control of arbitrariness' to declare an act of the European Central Bank and a decision of the Court of Justice of the European Union *ultra vires*, underlining that 'arbitrariness' is used in strictly technical terms.[313] However, the notion is (negatively) loaded with a history from other contexts and the Constitutional Court cannot escape this notional context in the process of legal communication just by saying that the language means something else.[314] It cannot dispose of how the recipients actually understand a notion.

3. *Parallels in private lawmaking*

Structural objectivity does not only limit the selves of individuals when making or applying heteronomous law but also when making or applying autonomous law. The fact that individuals are choosing out of specific options within a given structure might even be particularly familiar when we think of contracting parties because they use the tools of a given legal system. Especially a *numerus clausus* – a limited catalogue of typifications out of which the individual has to choose and which is common in property law, inheritance law, family law, and corporate law – makes the dependency on structure visible.[315] For instance, individuals might be free to choose between a partnership (which implies personal liability) and a corporation (which shields the shareholders from liability). But they cannot choose to create a corporation with personal liability of the shareholders or a limited liability partnership without respecting certain additional rules which aim to protect creditors. Flume went further and promoted the idea that also

313 BVerfGE 154, 17, 91–93 para 112–113 ('*PSPP*').

314 Philip M Bender, 'Ambivalenz der Offensichtlichkeit: Zugleich Anmerkung zur Entscheidung des BVerfGs vom 5. Mai 2020' (2020) 23 ZEuS 409, 421.

315 On the *numerus clausus* of property rights, see Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale Law Journal 1, 26 ff; Henry Hansmann and Reinier Kraakman, 'Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights' (2002) 31 The Journal of Legal Studies 373, 379 ff; Wolfgang Schön, *Der Nießbrauch an Sachen: Gesetzliche Struktur und rechtsgeschäftliche Gestaltung* (Dr Otto Schmidt KG 1992) 241 ff. On the *numerus clausus* in corporate law, see Holger Fleischer, 'Der numerus clausus der Sachenrechte im Spiegel der Rechtsökonomie' in Thomas Eger and others (eds), *Internationalisierung des Rechts und seine ökonomische Analyse. Internationalization of the Law and its Economic Analysis: Festschrift für Hans-Bernd Schäfer zum 65. Geburtstag* (Gabler Edition Wissenschaft 2008).

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contract law outside the realm of a classical *numerus clausus* is, in some way, based on a *numerus clausus*, a specific structure, because only those contracts are valid that the legislator recognizes as such.[316] If the individual has to use the infrastructure of the law[317], normative-legal constraints work like factual-structural limits.

In addition to this particular perspective, one can reapply all previous examples of structural objectivity on the individual level: when designing a contract, individuals have to be aware of the respective costs and benefits of the use of a rule or a standard (connection between form and substance). They will also have to consider that an additional warranty normally creates additional costs[318], which have to be distributed somehow (connection between substance and substance). Their thinking will be structured by language, especially metaphors, just as the thinking of a judge is. Finally, they do not dispose of the meaning of language, in itself a *numerus clausus*, because each notion comes with a certain (interpretative) history. Of course, they might explicitly create their own secret language[319], which would be binding according to the principle that false denominations are not harmful (*falsa demonstratio non nocet*).[320] But if they use a certain (legal) concept without further specifications, courts will interpret it in a certain way against the backdrop of certain default provisions with a pre-determined meaning.

4. Why to think about structural objectivity

The importance to unveil the structures within which we live the law is important for several aspects, some of which became already clear along this outline. Briefly sketching them out explicitly will allow us to summarize the case of structural objectivity. First, awareness of different *bundle-structures* – knowledge of the different relations between form and substance (the normativity of norm design), as well as between substance

316 Flume (n 77) 2 (§ 1 2).
317 On this dimension of law, see generally Hellgardt, *Hellgardt 2016* (n 132) 56–59.
318 On the connection between warranties and the price, see Bender, 'Default Rules' (n 48) 392.
319 For an example, see former German Imperial Court (*Reichsgericht*) RGZ 68, 6 ('*Semilodei*') (there, however, the secret language failed because both parties understood something different by the fantasy-word 'Semilodei').
320 See former German Imperial Court (*Reichsgericht*) RGZ 99, 147 ('*Haakjöringsköd*').

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and substance – allows us to apply the cost-benefit-analysis or its constitutional corollaries (the principle of proportionality or a balancing test) more accurately. As individuals, for instance, we can more consciously design contracts and decide whether a rule or a standard is more beneficial, the latter leaving room for future renegotiations.[321] In addition, by better understanding *thought structures* that unconsciously limit the self, we can (at least sometimes) open up new paths of thinking (eg by being aware that there is another metaphor we could use). Even if we will not be able to overcome many of the classical behavioural biases that structure our thought, we can at least find some remedies (such as specific and collective processes of decisionmaking[322]). We can try to be aware of the direction in which a metaphor channels our thinking. In that sense, we perceive structural objectivity as a threat to productional or applicational objectivity and we try to handle it.[323] But we can also consciously use those unconscious biases and nudge individuals in a certain direction.[324] In this way, structural objectivity can be the backbone of productional or applicational objectivity. Thought structures are necessarily ambivalent and behavioural economics makes use of structural objectivity in precisely this ambivalence. Moreover, we can become aware of the language and its interpretative history and thereby make sure that what we are saying is not misunderstood (*recipient structures*) – either by the individuals that have to comply with a public decision or by the judge that has to give effect to a private enactment. We will thereby increase general acceptance – (empirical) legitimacy – in both, substantive and procedural terms. Finally, structural objectivity might provide a path for comparing legal systems, underlining the common structures rather than the peculiarities.[325] In that

321 cf Kendall W Artz and Patricia M Norman, 'Buyer-Supplier Contracting: Contract Choice And Ex Post Negotiation Costs' (2002) 14 Journal of Managerial Issues 399.

322 Kahneman, Lovallo and Sibony (n 297), 52('[…] the fact that individuals are not aware of their own biases does not mean that biases can't be neutralized – or at least reduced – at the organizational level.').

323 Structural objectivity challenges, one could say, epistemological objectivity, see Leiter, 'Leiter 2002' (n 4) 973, both on the productional and the applicational level.

324 Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2nd edn, Penguin Books 2009); Cass R Sunstein and Richard H Thaler, 'Libertarian Paternalism Is Not an Oxymoron' (2003) 70 Chicago Law Review 1159.

325 For such a view on comparative law, see eg Rabel, 'Private Law I' (n 292) 1; Rabel, 'Private Law IV' (n 292) 446 ff.

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sense, anthropological Structuralism might yet again serve as a source of inspiration.[326]

V. Conclusion

This introductory chapter presented different ways of thinking about objectivity. It also stated why and how we should think about it. In doing so, it explored the role of the self and its power within the law. I will summarize its main findings in what follows.

Productional Objectivity (II.1.) concerns the elimination of the self on the level of lawmaking. We outlined three modes of thought – *observational*, *deontological*, and *consequentialist* – through which we can pursue that goal, each of them being more or less dominant in different theories of law. We also presented three modes of thought – *decisional*, *procedural*, and *critical* – with which we can deal with the persistence of the self on the level of lawmaking. In the way it is used here, lawmaking encompasses both heteronomous (eg statutory) and autonomous (eg contractual) norm production.

Applicational Objectivity (II.2.) concerns the elimination of the self on the level of the application of law. It is concerned with objectivity in legal interpretation. We approached the applicational level in relation to possible positions on the productional level, ie through the perspective of *adjudication*. This led us to distinguish *Subjectivists* (combining productional subjectivity and applicational objectivity), *Objectivists* (combining productional objectivity and applicational objectivity), *full nihilists* (combining productional subjectivity and applicational subjectivity), and *partial nihilists* (combining productional objectivity and applicational subjectivity). Again, we could draw some parallels to theories of contract interpretation.

Relativity of Legitimacy (III.1.) explains the relevance of productional and applicational objectivity in law. Whether we can achieve objectivity or not determines the criterion of legitimacy, which is either *procedural* or *substantive*: objectivity requires substantive legitimacy, whereas subjectivity calls for procedural legitimacy. In that sense, legitimacy is a relative concept, both because it depends on objectivity and because neither procedure nor substance can provide for it alone. This is true for *empirical* legitimacy

326 cf Lévi-Strauss, *The Savage Mind* (n 284) 263; Lévi-Strauss, *Anthropologie structurale* (n 284). See also already Benedict (n 284), eg 21 (underlining that each culture has to cope with the same issues).

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(acceptance) as well as for *normative* legitimacy (acceptability). To define the respective areas of procedure and substance for the purpose of normative legitimacy, we need a methodology.

Constitutional Pragmatism (III.2.) provides this methodology. It is a suggestion of how to overcome the epistemological difficulties in defining areas of objectivity (following a substantive logic of legitimacy) and areas of subjectivity (following a procedural logic of legitimacy). The main idea is to turn to the authority of the constitution of a given legal system to settle epistemological disputes. In focusing on beliefs (instead of truth), Pragmatism makes this constitutional turn possible (*belief-centrism*). The provisions of constitutional change can be understood as the institutionalization of doubt (*fallibilism*). In addition, Pragmatism even requires seeking answers in the constitution because it takes into account the effects of theoretical positions (*instrumentalism*). Indeed, each epistemological question has normative implications, and like other normative issues, the constitution should decide them. In doing so, constitutions normally take a nuanced approach, giving weight to procedure (eg democracy) and substance (eg fundamental rights) alike.

Structural Objectivity (IV.) refers to the structures within which we think and act. It constitutes a third dimension beyond productional and applicational objectivity (*distinctness*). Contrary to these ways of thinking about objectivity, it does not limit the self in a normative way, but it consists in the (factual) paths within which the self is bound to think and act (*necessity*). In that sense, the study of structural objectivity unveils the different relations that constitute these paths (*relations*). They can consist in connections between form and substance and constitute a theory of the normativity of norm design (*bundle-structures I*). But relations also exist between substance and substance (*bundle-structures II*). Finally, they do not only channel our options into bundles, but they also guide our thinking previous to the decision, eg in the form of biases (*thought-structures*), and they determine how our decisions are perceived by their addressees (*recipient-structures*). Knowing these structures is helpful for lawmaking, adjudication, and contracting alike.

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Part 2: Objectivity and Legal Interpretation

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§ 2 Subjectivism, Objectivism, and Intuitionism in Legal Reasoning: Avoiding the Pseudos

Hans Christoph Grigoleit[*]

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* The following paper is a summary of the speech which I delivered at the Max Planck Institute for Tax Law and Public Finance on 13 October 2020 on the occasion of the Young Scholars' Conference 'The Law between Objectivity and Power'. I have added only very few, sporadic and exemplary references. The speech format is basically retained. Some of the ideas presented in this paper are already outlined in more detail in Hans Christoph Grigoleit, 'Dogmatik – Methodik – Teleologik' in Marietta Auer and others (eds), *Privatrechtsdogmatik im 21. Jahrhundert: Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag* (De Gruyter 2017) 241 ff.

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I. Introduction

While the topic of our conference refers to the contrast of objectivity and power, my contribution will focus on what one may qualify as objectivity and its relations to what I will – for the purposes of this presentation – call subjectivism. I will use the latter term to describe two directions of legal arguments which play a crucial role basically in all legal systems:

The first direction is referring to the intention of one or more parties in private law. The second form of subjectivism reaches beyond the borderlines of private law. It relates to the interpretation of all 'authoritative' legal sources (statutes, precedents et al), which are prescribed by an institutional body (parliament; court et al) or individual person empowered to enact law. In this second respect, this paper uses the term subjectivism for any argument that aims at the intention of the legislator (parliament; court et al).

On this definition basis, I will try – in a synoptic manner, by presenting 12 statements – to sketch out some limits of subjectivism, to define some potentials of what may be established as the contrast criterion of objectivism and, finally, to establish intuitionism as a complementary and in the context meaningful third category.

II. Underlying Contextual Assumptions

To specify the context, one should clearly distinguish the reference points of subjectivism, objectivism, and intuitionism (see 1. – statement 1). Furthermore, it makes sense to orientate the distinction of subjectivism, objectivism, and intuitionism at the postulate of methodical accuracy (see 2. – statement 2).

1. Distinguishing reference points of subjectivism, objectivism, and intuitionism

Statement 1: In order to approach issues of subjectivism, objectivism, and intuitionism, one should distinguish three reference points:

(i) The relevance of the parties' intention in Private Law. It is characteristic for this sort of subjectivism that the subjective sphere of private individuals is the legitimizing factor in legal reasoning. Such subjectivism is omnipresent as a means to interpret individual declarations and contracts in private law where private autonomy (still) is the dominating principle.

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(ii) The relevance of the legislator's intention in legal methodology, in particular when 'authoritative' legal sources (see above I.) are to be interpreted. The characteristic of this second kind of subjectivism is the reference to the subjective sphere of the legislators (or the judges). It is fair to say that such subjectivism universally plays a dominant – while not exclusive – role in interpreting 'authoritative' legal sources.

(iii) The occurrence of uncertainty in legal reasoning (referred to as the uncertainty issue, see below V. 1.). In this regard, it is crucial whether or not the application of conventional legal methods provides for a coercive solution of the issue at hand. Inasmuch as such a conventional resolution cannot be established unambiguously, objectivism is challenged by intuitionism (psychologism, ideologism, historicism etc.), ie the individual intuition of the person specifying the law overlaps with objective legal methods.

2. The postulate of methodical accuracy – avoiding 'pseudo-subjectivism'

Statement 2: With regard to legal reasoning, it is crucial to be accurate in defining the source of legitimacy for legal solutions. Whenever legal reasoning refers to the 'intention' of the parties or of the legislator, one must carefully distinguish between rightfully establishing such an intention and inferring material reasons that transcend any actual 'intention'. In the latter instance, it is fictitious and inaccurate to claim the legitimacy of 'intention' or of the subjective approach. Therefore, amid an understandable tendency to claim the obvious legitimacy of the parties' or the legislator's authority, one should avoid 'pseudo-subjectivism'. Rather, one should undergo the exercise to meticulously define the relevant 'objective' arguments and establish (or reject) their legitimacy. Moreover, inasmuch as 'objective' arguments are not coercive, one should avoid 'pseudo-objectivism' by dealing with the resulting margin of intuitionism openly and in a professional order.

III. Subjectivism vs Objectivism in Private Law: Referring Legal Solutions to the Parties' Intentions

In private law, the parties' intentions are still the dominant source of legal allocations. This is evident, for example, with regard to dispositions by contracts or by wills and also with respect to the exercise of private rights.

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However, the issue of pseudo-subjectivism arises whenever legal solutions involve elements of objective fairness or equity.

Statement 3: Legal rules and doctrines, which refer fairness or equity solutions in private law to the parties' intentions, tend to be fictitious and inaccurate. They are pseudo-subjectivist in the sense that they conceal the relevant 'objective' reasons (above statement 2). In German private law (and many other jurisdictions) one quite illustrative example for such pseudo-subjectivism is the doctrine of constructive interpretation (*ergänzende Vertragsauslegung*), which refers a legal solution to the hypothetical intention of the parties (oriented at unexpected circumstances).[1] It is, in principle, preferable to directly deal with the fairness or equity principles governing the occurrence of unexpected circumstances on the doctrinal basis of an objective standard, like it has been established under section 313 BGB and in many other jurisdictions.[2] A second German law example is the former doctrine for establishing secondary contractual duties (*Schutzpflichten*) by reference to the parties intentions. This pseudo-subjective approach has been overcome by an objective foundation established by scholarly works[3] and by the courts, before the objective justification has been taken over into statutory law (sections 241(2), 311(2) and (3) BGB). Finally, one may mention as the third German law example (of many) for pseudo-subjectivism the doctrine, which suggests to establish the relevance of 'essential mistake' (*Eigenschaftsirrtum*) under section 119(2) BGB by reference to the (implied) intentions of the parties.[4]

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1 See with more detail Claus-Wilhelm Canaris and Hans Christoph Grigoleit 'Interpretation of Contracts' in Arthur S Hartkamp and others (ed), *Towards a European Civil Code* (4th ed, Wolters Kluwer Law & Business 2011), 587, 614 ff – also available under <http://ssrn.com/abstract=1537169> accessed 29 November 2021. Same critique on constructive interpretation by Jörg Neuner 'Vertragsauslegung – Vertragsergänzung – Vertragskorrektur' in Andreas Heldrich, Jürgen Prölss and Ingo Koller (eds), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, vol. I (CH Beck 2007) 902 ff.

2 For an overview see Ewoud Hondius and Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (Cambridge University Press 2011). In contrast see the preference for constructive interpretation by Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts*, vol II (4th ed, Springer 1992) 494 ff.

3 See Claus-Wilhelm *Canaris* 'Ansprüche wegen "positiver Vertragsverletzung" und "Schutzwirkung für Dritte" bei nichtigen Verträgen: Zugleich ein Beitrag zur Vereinheitlichung der Regeln über die Schutzpflichtverletzungen' [1965] JZ 475 ff.

4 See eg Werner Flume, *Allgemeiner Teil des Bürgerlichen Rechts*, vol II (3rd ed 1979) 472 ff (theory of contractual error in quality – *Theorie des geschäftlichen Eigenschaftsirrtums*). For the opposing view see Karl Larenz, *Allgemeiner Teil des Deutschen Bürgerlichen Rechts* (7th ed, CH Beck 1989), 377 ff.

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IV. Dealing with 'Authoritative' Legal Sources – The Legislator's Intention vs Objectivism

When 'authoritative' legal sources (see above I.) need to be interpreted and applied according to certain fact patterns, the legislator's intention naturally comes into view. This is because it is the legitimacy of the respective authority and its determination power that justifies the validity (in the sense of: legal relevance) of the source. However convincing an argument relating to the legislator's intention might appear to be, the scope of its determinative force must be specified with close scrutiny and in consideration of some reservations.

1. General perspective: dependence of the legislator's intention on fairness and reason

The abstract essence of these reservations is that the legislator's intention cannot be established without considering and consulting standards of fairness and reason.

Statement 4: The critical reference point of subjectivism is the legislator's intention. As a source of legal reasoning, this benchmark cannot be established and reasonably applied without consideration of external standards of fairness and reason. In this sense, subjectivism is impossible as an absolute postulate or necessarily incomplete.

2. Details: why the legislator's intention depends upon objective standards

The reservation regarding the standards of fairness and reason can be addressed in more detail if one accounts for certain rationality deficits that occur when the legislator's intention needs to be established: The first deficit – which I call the *personal soft spot* – is the lack of a reliable reference point when it comes to exploring the subjective sphere of a collective body (see a. – statement 5). The second deficit – which I call the *lingual soft spot* – is the requirement for contextualization that is inherent to the linguistic form of 'authoritative' legal sources (above I.), (see b. – statement 6). The third deficit – which I call the *dynamic dimension soft spot* – results from the abstract and general character of any 'authoritative' legal source (see c. – statement 7).

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a. The personal soft spot

Statement 5: Whenever the law is prescribed by collective bodies (parliaments or courts), there is no reliable reference point for determining an empirical intention. Consequently, the legislator's intention is a hypothetical construction that cannot be established without the use of objective standards of fairness and reason.

b. The lingual soft spot

Statement 6: An 'authoritative' legal source (see above I.) – be it set by parliaments or courts – is framed in a linguistic form that must be made accessible by the instruments of hermeneutics. This process is by no means (purely) empirical or formal. Rather, it requires contextualization and therefore consideration of standards of fairness and justice. Accordingly, the linguistic form of legal sources requires that the legislator's intention can only be established by objective standards of fairness and reason.

c. The dynamic dimension soft spot

Statement 7: An 'authoritative' legal source (above I.) – be it set by parliaments or courts – has a dynamic dimension, which results from its abstract and general character. In any given context, the legal source must be specified according to the particular factual and normative circumstances of its application. Such circumstances are – from the perspective of the legislator – infinite in number and quality and they cannot be considered exhaustively at the time of the legislative act. This dynamic dimension is further aggravated by the lapse of time between the legislative act and its application and by the resulting change of the factual and normative framework. In this sense, the information basis of the legislator's intention is necessarily fragmentary. To ensure the standard of fairness and reason of 'authoritative' legal sources in the dynamic context of application, the perspective of the legislator must be supplemented in an ongoing and micro-adapted manner by objective standards of fairness and reason.

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3. *Impossibility of complete legislative pre-determination by 'authoritative' legal sources*

As a result of the listed reservations regarding the standards of fairness and reason, an application of 'authoritative' legal sources (above I.) can in no instance be exclusively justified by reference to the legislator's intention.

Statement 8: Legal reasoning inevitably involves an element of policy evaluation that cannot be anticipated or predetermined by a legislative act or by any legislator's intent. This holds true even if the application of 'authoritative' legal sources to the fact pattern at hand appears to be clearly consistent with the wording of the source and the legislator's intention. Such a seemingly evident conclusion involves at least the implicit policy evaluation that, under the circumstances, there is no reason to supplement or deviate from the wording of the legal source and the legislator's intention.

4. *The legitimacy of correcting the legislator's intention on the application/court level*

In the light of the postulates set by standards of fairness and reason and of the dynamic dimension of any sort of 'authoritative' legal sources (above I.), it may under exceptional circumstances be methodologically legitimate to correct – and not only to supplement – the seemingly clear wording and underlying legislator's intention of an 'authoritative' legal source.

Statement 9: As a postulate set by standards of fairness and reason and of the dynamic dimension of any sort of 'authoritative' legal sources, any wording of a legal source and any legislator's intention (or policy evaluation) is under the reservation of a future change in the factual or normative framework conditions. Even the potential of an initial 'mistake' in the legislator's intention (or policy evaluation) should be qualified as a reservation of the binding effect of 'authoritative' legal sources. If (and because) there is an 'objective' standard of fairness and reason that must be employed to specify and to supplement the legislator's intention, the same standard can also be employed to correct it. Of course, such corrections can only be legitimate under a strict burden of arguments, ie if the legislator's intention has no relevant plausibility.

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V. Objectivism vs Intuitionism (Psychologism, Ideologism, Historicism etc)

The shortcomings of subjectivism and the resulting relevance of objectivism turn the spotlight of critique to the latter and to the issue of how objective – in the sense of: unbiased and therefore reliable – legal reasoning can be. One famous – and quite trendy – answer to this question more or less disregards the objective relevance of legal reasoning while stressing the overriding power of the individual intuition of the person specifying and applying the law. If one observes the practice of the law – even in the most developed legal system – it is obvious that such intuitionism (psychologism, ideologism, historicism etc) has some degree of truth to it.

However, the relevance of intuitionism is, in my view, often overstated (see 1. – statement 10). The tendency to overstate intuitionism might neglect that the alternative to intuitionism is not some sort of absolute objectivity, but intersubjective reliability among a clear majority of legal experts, which one might call 'first degree objectivity' (see 2. – statement 11). Even if such an intersubjective reliability cannot be obtained, objective legal reasoning does not become meaningless as it works as a tool to frame and critically reduce the margin of intuition – a function that can be qualified as 'second degree objectivity' (see 3. – statement 12).

1. Tendency to overstate the uncertainty issue

Statement 10: The widespread reservations against the 'objectivity' of traditional legal reasoning (Legal Realism[5] et al) misunderstand the specific objectivity of legal reasoning and tend to overstate the uncertainty issue. The critical perspective largely stems from the focus on 'tough cases', which naturally are the ones that result in the most celebrated court decisions and that dominate the scholarly discourse.

2. Intersubjective reliability as 'first degree objectivity' of legal reasoning

Statement 11: With respect to legal reasoning, objectivity should not be measured by any absolute or empirical standards. Rather, the demands of

5 Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 Harvard Law Review 457, 460 f: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law'.

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objectivity should be specified according to the character of legal reasoning. On the basis of the comprehensive body of law and of traditional legal methods, most commonplace legal judgements are trivial and uncontroversial. Being uncontroversial among a clear majority of legal experts – and thereby being intersubjectively reliable – can be qualified as 'first degree objectivity of legal reasoning'.

3. *Framing intuition as 'second degree objectivity' of legal reasoning*

Statement 12: While legal methods cannot resolve the uncertainty issue with respect to any judgement, they can frame and critically reduce the margin of intuition, in particular by three features:

Even in cases of uncertainty,

(i) the decision can be broken down into one or at least a few critical criteria,
(ii) the law can provide formal rules on the burden of argumentation,
(iii) the legal decisionmaker (judge) is called upon to neutralize her intuition professionally, ie to reflect in an unbiased way and to only feed the psychological intuition process with the relevant normative sources and with the recognized legal methods.

This framing tendency of legal reasoning can be qualified as 'second degree objectivity of legal reasoning'. It is supplemented in all modern legal systems by procedural safeguards to assure the qualification of judges and an unbiased composition of judicial panels.

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§ 3 Historical Arguments, Dynamic Interpretation, and Objectivity: Reconciling Three Conflicting Concepts in Legal Reasoning

Franz Bauer[*]

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The use of historical arguments[1] is – like all methods of legal reasoning – subject to changing trends and fashions.[2] While many common law jurisdictions have started to welcome legislative history as an interpretative aid over the course of the twentieth century, the opposite tendency can be observed in the United States:[3] the rise of textualism has put the search for legislators' past intentions on the back foot.[4] In Germany, on the other hand, the last decade has not only brought about a lively academic debate on the topic;[5] it has also witnessed a noticeable trend in the practice of our courts, particularly the German Constitutional Court, to put a stronger

1 The term is taken from the German discourse on 'historische Argumente' and refers to arguments in legal reasoning that are based on historical information. With respect to interpreting legislation their main function is to ascertain legislative intent. For further clarification see below I.1.

2 For a comparative overview see Holger Fleischer, 'Comparative Approaches to the Use of Legislative History in Statutory Interpretation' (2012) 60 Am J Comp L 401.

3 John J Magyar, 'The slow death of a dogma? The prohibition of legislative history in the 20th century' [2020] Common Law World Review 1 (focusing mainly on the United Kingdom but referring also to other Commonwealth jurisdictions and the United States).

4 On textualism's hostility towards the use of legislative history cf Antonin Scalia, 'Common-Law Courts in a Civil-Law System' in Amy Gutman (ed), A Matter of Interpretation (Princeton University Press 1997) 29–37; John F Manning, 'Textualism as a Nondelegation Doctrine' (1997) 97 Colum L Rev 673, 684–689; Tara Leigh Grove, 'Which Textualism?' (2020) 134 Harv L Rev 265, 274 and 279. See also Magyar (n 3) 25 n 132 (calling the refusal to consider legislative history a hallmark of textualism); Richard M Re, 'The New Holy Trinity' (2015) 18 Green Bag 2d 407, 411 (calling legislative history 'New Textualism's ultimate bugaboo'). On the trend against reliance on legislative history in the US Supreme Court see James J Brudney and Corey Ditslear, 'The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras' (2006) 89 Judicature 220. But see also Victoria F Nourse, 'A Decision Theory of Statutory Interpretation: Legislative History by the Rules' (2012) 122 Yale LJ 70, 72 (noting that 'legislative history's fires still burn').

5 Three doctoral dissertations on the topic were published within the last decade: Wischmeyer, *Zwecke im Recht des Verfassungsstaates* (Mohr Siebeck 2015); Tino Frieling, *Gesetzesmaterialien und Wille des Gesetzgebers* (Mohr Siebeck 2017); Markus Sehl, *Was will der Gesetzgeber?* (Nomos 2019). See also the two essay collections Holger Fleischer (ed), *Mysterium 'Gesetzesmaterialien'* (Mohr Siebeck 2013) and Christian Baldus et al (eds), *'Gesetzgeber' und Rechtsanwendung* (Mohr Siebeck 2013).

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emphasis on historical arguments in their reasoning.[6] More often than before, judgments rely solely or at least predominantly on legislative history.

An illuminating decision in this respect was handed down by the State Constitutional Court of Thuringia in July 2020.[7] The question before the court was whether introducing mandatory gender-balancing for parliamentary election lists violated constitutional principles such as the right to free elections or the freedom and equality of political parties. Since at least some of these principles were undoubtedly affected by the gender-balancing requirement,[8] the judges had to decide whether these encroachments could be justified under art. 2 para. 2 s. 2 of the Thuringian constitution. That provision obliges the state and its administration to ensure the effective equality of women and men in all areas of public life. The majority opinion answered this question in the negative and struck down the law as unconstitutional, based on one central argument: since the constitutional committee[9] had rejected an explicit reference to the composition of Parliament when drafting the provision, the Court found itself compelled to conclude that the constitution was not meant to permit a quota for election lists.[10] Further points were not even considered. The historical argument settled the issue.

It is revealing how dissenting judges *Licht* and *Petermann* replied to this reasoning. They could have raised general concerns about the legitimacy or even the theoretical possibility of legislative intent.[11] Conversely, they

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6 BVerfGE 122, 248, 282–301 = NJW 2009, 1469 paras 95–145 (minority opinion); BVerfGE 128, 193, 209–222 = NJW 2011, 836 paras 50–78; BVerfGE 149, 126, 153–159 = NJW 2018, 2542 paras 71–87. For the Constitutional Court's earlier approach cf BVerfGE 62, 1, 45 = NJW 1983, 735, 738–739. On the development in general see Bernd Rüthers, 'Klartext zu den Grenzen des Richterrechts' [2011] NJW 1856.

7 ThürVerfGH NVwZ 2020, 1266.

8 The majority and the dissenting opinions were largely in agreement with regard to this point. For a detailed and critical analysis see Claudia Danker, 'Paritätische Aufstellung von Landeswahllisten – Beeinträchtigung der Wahlrechtsgrundsätze' [2020] NVwZ 1250, 1251; Christoph Möllers, 'Krise der demokratischen Repräsentation vor Gericht' (2021) 76 JZ 338, 340–342.

9 After the German reunification, the Thuringian Parliament assigned the task of drafting a state constitution to a newly formed committee consisting of representatives from all parliamentary parties as well as academic advisors. The committee's proposal was subsequently accepted by both the parliament and a state-wide referendum. See Thomas Flint, 'Der Prozess der Verfassungsgebung in den ostdeutschen Bundesländern' (1993) 76 KritV 442, 463–465.

10 ThürVerfGH NVwZ 2020, 1266 paras 132–136.

11 On these concerns see below II.3.

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could have tried to refute the majority's argument by showing that it had actually misread legislative intent (which in fact it had[12]). Instead, they employed an argumentative move not uncommon for German courts:[13] while leaving the majority's historical analysis basically unquestioned, the dissenters simply did not regard it as decisive. They regarded the 'subjective' will of the legislator as just one aspect of interpretation that could but need not be relevant to determine the provision's 'objective' meaning.[14] In their view, the majority's strong emphasis on legislative history expressed an unduly 'static' perception of constitutional law.[15]

In the background of this disagreement looms an old but unresolved debate about the role of different types of argument in legal interpretation.[16] According to one common formula, all relevant aspects must be considered while no definite ranking applies.[17] This formula's convenient open-endedness[18] has facilitated the kind of anything-goes-attitude towards legal methodology[19] that can be found in the dissenting opinion just discussed: to counter a historical argument you need not immerse yourself in the subtleties of legal theory or undertake a diligent enquiry into the historical record. You can simply declare it irrelevant for deciding the case at hand.

The two different approaches expressed in the Thuringian election list case illustrate what could be called the classic image of historical argumen-

12 See below II.2.

13 cf eg BAG NZA 2011, 905 para 19; BFH DStR 2011, 1559 paras 20–23.

14 ThürVerfGH NVwZ 2020, 1266, Dissent Licht and Petermann paras 15 and 23.

15 ibid paras 14 and 23.

16 The debate is often labelled as concerning the aim of interpretation (*Ziel der Auslegung*); see Fleischer (n 2) 404–412; Axel Mennicken, *Das Ziel der Gesetzesauslegung* (Gehlen 1970); Gerhard Hassold, 'Wille des Gesetzgebers oder objektiver Sinn des Gesetzes – subjektive oder objektive Theorie der Gesetzesauslegung' (1981) 94 ZZP 192; Andreas von Arnauld, 'Möglichkeiten und Grenzen dynamischer Interpretation von Rechtsnormen' (2001) 32 Rechtstheorie 465, 466–481. Its origins lie in the diversification of legal methodology in the late nineteenth century, see Jan Schröder, *Theorie der Gesetzesinterpretation im frühen 20. Jahrhundert* (Nomos 2011) 27–28 and 35.

17 Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer 1991) 345–346; Reinhold Zippelius, *Juristische Methodenlehre* (11th edn, CH Beck 2012) 50–51. For an overview see Reinhard Zimmermann, 'Juristische Methodenlehre in Deutschland' (2019) 83 RabelsZ 241, 264–267.

18 There are, of course, also more nuanced accounts, eg Claus-Wilhelm Canaris, 'Das Rangverhältnis der "klassischen" Auslegungskriterien, demonstriert an Standardproblemen aus dem Zivilrecht' in Beuthien et al (eds), *Festschrift für Dieter Medicus* (Heymann 1999) 25.

19 cf Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Athenäum 1970) 121–124.

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tation. That image consists of two strands, portraying an interpretative practice that is relatively objective but necessarily static.[20] The majority's reasoning in the Thuringian case exemplifies the first strand: its focus on one simple question about the past – what did the people participating in the enactment of a legal norm intend it to mean? – is a promising way to tackle the long-observed indeterminacy of legal decision-making. That question's specific attractiveness lies in its (purportedly) empirical nature. It seems much easier to reach an agreement on historical (and therefore: empirical) facts than on normative judgments.[21] That way, interpreting the law appears to be more about knowing or discovering and less about deciding on the basis of one's own preferences. The minority dissent, on the other hand, represents the second strand of the image. According to this view, the narrow concern for past facts is bound to 'freeze',[22] to 'petrify',[23] or even to 'mummify'[24] the law, to alienate it from current social practice and needs, and to bind the present forever to the past, leaving no room to ask for the currently best solution. A dynamic interpretation of the law, adapting to new situations and changed factual or legal surroundings, becomes impossible. In short: the gain in objectivity leads to a loss in dynamic potential.[25]

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20 For the first strand cf eg Bernd Rüthers, *Die heimliche Revolution vom Rechtsstaat zum Richterstaat* (2nd edn, Mohr Siebeck 2016) 177–180; Franz Jürgen Säcker, 'Einleitung' in Franz Jürgen Säcker et al (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, vol 1 (9th edn, CH Beck 2021) paras 126–130; Christian Hillgruber in Günter Dürig et al (eds), *Grundgesetz Kommentar* (95th supp, CH Beck 2021) art 97 paras 55–74. For the second strand cf eg Ernst A Kramer, *Juristische Methodenlehre* (6th edn, CH Beck 2019) 135–142 and 155–158; Larenz (n 17) 32–35 and 316–320; Zippelius (n 17) 17–21 and 41–42; Ronald Dworkin, *Law's Empire* (first published 1986, Hart 1998) 348–350.

21 See Thomas Honsell, *Historische Argumente im Zivilrecht* (Rolf Gremer 1982) 90 (emphasising the reality of historical events as one positive feature of arguments based on legislative history); Sehl (n 5) 247 (calling the will of the legislature an empirical anchor point); Zimmermann (n 17) 263 (regarding the will of the legislature as a distinctively more objective datum).

22 Marietta Auer, 'Eigentum, Familie, Erbrecht: Drei Lehrstücke zur Bedeutung der Rechtsphilosophie' (2016) 216 AcP 239, 249–250.

23 Werner Heun, 'Original Intent und Wille des historischen Verfassungsgebers' (1991) 116 AöR 185, 206.

24 Reinhart Maurach and Heinz Zipf, *Strafrecht Allgemeiner Teil*, vol 1 (5th edn, CF Müller 1977) 125.

25 While this can justifiably be called the classic image from a German perspective, the same cannot be said for the US: textualists do not criticise the use of legislative history for yielding static law – in fact, they might regard that as an advantage – but for its arbitrariness and manipulability; see the references in n 4 and

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After clarifying the relevant terminology (I.), I will show that this view on the relations between historical arguments, dynamic interpretation, and objectivity is questionable on both counts. The extent of objectivity that is sometimes attributed to or desired of historical arguments is unattainable; still, in an attenuated way, historical information can provide a meaningful basis for rationalising legal interpretation (II.). The problem of objectivity becomes particularly pertinent with respect to dynamic interpretation and its inherent risk of arbitrariness (III.). The main section of this article addresses this problem by linking interpretative change to historical arguments, which, contrary to the classic image, can both support and constrain dynamic interpretation (IV.).

I. Conceptual Clarifications

Before examining the classic image just described it is necessary to have a closer look at its three central components: historical arguments (1.), dynamic interpretation (2.), and objectivity (3.).

1. Historical arguments

While the Anglo-American world usually employs the narrower concepts of legislative history and legislative intent,[26] the notion of a 'historical' type of argument seems to be distinctively continental.[27] Particularly the

n 58. Hence, while historical reasoning may be criticised as anti-progressive in Germany, it may evoke charges of activism in the US; cf Nourse (n 4) 73.

26 But see Jack M Balkin, *Living Originalism* (HUP 2011) 4 ('arguments from history').

27 For Austria see Gerhard Hopf, 'Gesetzesmaterialien: Theorie und Praxis in Österreich' in Fleischer (n 5) 98–99 ('historische Methode'); for Switzerland Kramer (n 20) 135–171 ('Das historische Auslegungselement'); for France see Jean-Louis Bergel, *Méthodologie juridique* (3rd edn, Presses Universitaires de France 2018) 265 ('methode […] historique'); for Belgium see Philippe Gérard, 'Le recours aux travaux préparatoires et la volonté du législateur' in Michel van de Kerchove (ed), *L'Interprétation en droit* (Facultés universitaires Saint-Louis 1978) ('interpretation historique'); for the Netherlands see Paul Scholten, *Mr. C. Asser's handleiding tot de beoefening van het Nederlandsch burgerlijk recht – Allgemeen Deel* (Tjeenk Willink Zwolle 1931) 55–59 ('Wetshistorische interpretatie'); for Germany see the following references.

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German methodological discourse[28] has been shaped by that terminology since the days of *Friedrich Carl von Savigny*.[29] Nevertheless, the concept still lacks a clear-cut definition and scholars have come up with various classifications and subdivisions.[30] Most often, it is understood as an umbrella term for all arguments based on some kind of historical information[31] and, hence, comprises quite heterogeneous types of reasoning, ranging from establishing a legally relevant custom[32] to backing up consequentialist arguments.[33] The following analysis, however, will be confined to the predominant function of historical arguments in statutory interpretation: providing evidence for legislative intent.[34] It is not only the subcategory to which the classic image of 'objective but static' most obviously applies, but also the most prevalent and characteristic example of how historical information is used in legal reasoning today. Whenever the interpretation of some type of legislation – including constitutional norms[35] and international treaties – is at issue, lawyers may argue, for example, that a rule

28 On legal methodology in Germany and the lack of a similarly distinct field in other jurisdictions see Zimmermann (n 17) 242–244.

29 Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, vol 1 (Veit und Comp 1840) 213–214. However, Savigny's understanding was considerably different from today's; see Jan Thiessen, 'Die Wertlosigkeit der Gesetzesmaterialien für die Rechtsfindung – ein methodengeschichtlicher Streifzug' in Fleischer (n 5) 57–61.

30 See eg Honsell (n 21) 1 and 214; Robert Alexy, *A Theory of Legal Argumentation* (Ruth Adler and Neil MacCormick tr, Clarendon Press 1989) 236–239; Klaus F Röhl and Hans Christian Röhl, *Allgemeine Rechtslehre* (3rd edn, Carl Heymanns 2008) 619–620; Dirk Looschelders and Wolfgang Roth, *Juristische Methodik im Prozeß der Rechtsanwendung* (Duncker & Humblot 1996) 155–159.

31 One reason for this rather over-inclusive concept in Germany might be that it lies at the intersection of two discourses, one about legal methodology and one about the utility value of legal history for legal interpretation. On the latter discourse see Reinhard Zimmermann, 'Heutiges Recht, Römisches Recht und heutiges Römisches Recht' in Reinhard Zimmermann et al (eds), *Rechtsgeschichte und Privatrechtsdogmatik* (CF Müller 1999) 29–32.

32 On the prerequisites of customary law BGH NJW 2020, 1360 para 8; Martin Klose, 'Modernes Gewohnheitsrecht' (2017) 8 Rechtswissenschaft 370, 381–389.

33 See Alexy (n 30) 239 ('learning from history'); Hans Christoph Grigoleit, 'Das historische Argument in der geltendrechtlichen Privatrechtsdogmatik' (2008) 30 ZNR 259, 268–270.

34 This subcategory of the historical argument is sometimes called the 'genetic argument'; see Ralf Poscher, 'Legal Construction between Legislation and Interpretation' in Jan von Hein et al (eds), *Relationship between the Legislature and the Judiciary* (Nomos 2017) 42; Zimmermann (n 17) 260–261.

35 On commonalities and differences between statutory and constitutional interpretation cf Kent Greenawalt, 'Constitutional and Statutory Interpretation' in Jules

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should or should not apply to a certain case, *because* those who made the rule did or did not intend it to apply.

Such statements about legislative intent can be based on different historical sources: the most common ones are specific documents from the legislative process, such as records of parliamentary debates, committee reports, or commentaries by the drafters; these documents are often collectively referred to as 'legislative history'.[36] But often enough, inferences are also drawn from the socio-economic or political context at the time of enactment[37] or from a comparison with the previous state of the law.[38]

2. *Dynamic interpretation*

Dynamic interpretation is often contrasted with static or original interpretation.[39] The static conception entails that the meaning of a legal norm must necessarily remain the same regardless of the point in time when it is interpreted. The dynamic conception, on the other hand, emphasises and welcomes the idea that the correct (or best) interpretation can change over time with respect to social developments.[40] In other words: if one has a static theory of interpretation, the same law cannot say one thing today and another thing tomorrow. A dynamic approach, by contrast, stresses that over time, it becomes less and less important what a norm was initially supposed to mean; instead, the norm's meaning can adapt to new social circumstances.[41]

L Coleman et al (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 270–271.

36 Kent Greenawalt, *Statutory and Common Law Interpretation* (OUP 2013) 77 ('"Legislative history" is a judicial term of art that […] covers the process within the legislature for the development of bills.')

37 Röhl and Röhl (n 30) 619.

38 Reinhard Zimmermann, 'Text und Kontext: Einführung in das Symposium über die Entstehung von Gesetzen in rechtvergleichender Perspektive' (2014) 78 RabelsZ 315, 325.

39 William N Eskridge, Jr, *Dynamic Statutory Interpretation* (HUP 1994) 9–11; Gert-Fredrik Malt, 'Dynamic Interpretation: Spatial and Temporal Aspects in Interpretation' in Jes Bjarup and Mogens Blegvad (eds), *Time, Law, and Society* (Franz Steiner 1995) 87–89.

40 Von Arnauld (n 16) 465.

41 ibid; Eskridge (n 39) 5–6 and 9–10.

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3. Objectivity

Objectivity, in the presently relevant sense, requires more than mere impartiality. Hence, legal interpretation cannot be understood as objective simply because the interpreter goes about her task with an unbiased attitude.[42] Instead, the interpretative practice and its outcomes have to be rationally comprehensible, convincing, and independent of subjective tastes or preferences, which some may share while others may not. This, of course, can be the case to a greater or lesser extent. Accordingly, objectivity is not an all-or-nothing concept, but one end of a continuous spectrum.[43]

It may be worth stressing that the present use of the objectivity concept is neither very specific nor particularly demanding. Intersubjectivity,[44] rationality, or determinacy could be taken as alternative choices of terminology and are used interchangeably in the following. It should be added as a final point that speaking about objectivity in such a way does not entail problematic metaphysical claims: assigning truth values to interpretative statements does not necessarily presuppose the existence of corresponding objects in the world.[45]

II. Historical Arguments and Objectivity

In order to understand the relationship between historical arguments and objectivity, I will shortly summarise why there is a problem at all and how legislative history could be a possible reply to it (1.). I will then turn to some of the objections that have been raised against historical reasoning, be they practical (2.) or theoretical (3.) in nature. Many of these objections lose their bite once we lower our expectations and acknowledge that an attenuated version of objectivity is all that can realistically be attained (4.).

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42 On such a use of objectivity in ordinary language Andrei Marmor, 'Three Concepts of Objectivity' in Andrei Marmor (ed), *Law and Interpretation* (Clarendon Press 1995) 178.

43 cf Owen M Fiss, 'Objectivity and Interpretation' (1982) 34 Stan L Rev 740, 744.

44 cf von Arnauld (n 16) 466–468.

45 Marmor (n 42) 181–191.

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1. The problem of objectivity

Robert Alexy has described as 'one of the few points of agreement in contemporary discussions of legal methodology' the observation that applying the law is more than 'a logical subsumption under abstractly formulated major premises.'[46] As reasons for the insufficiency of semantics he lists vagueness of language, conflicts between norms, lack of norms, and (legitimate) deviations from the wording.[47] In fact, hardly anyone denies the need for legal interpretation, even if they do not welcome it.[48] However, leaving the determination of the interpretative result simply to the unfettered discretion of the judge (or any other law-applying official)[49] would be unsatisfactory for two reasons. First, constitutional principles like popular sovereignty[50] and the separation of powers require, generally speaking, that political decisions are made on the legislative level while judges only apply those decisions in concrete cases; if, instead, judges were unconstrained in their interpretation, legislation would lose its significance and function.[51] Second, lack of objectivity is a problem from the individual citizen's perspective: how could one reasonably receive guidance from the law if one's fate were not to be decided by general rules but by the obscure and unforeseeable whims of a judge? Litigation would amount to no more than a coin toss.[52]

As already pointed out, the reference to historical sources is one possible candidate for overcoming the potential arbitrariness of legal interpretation. The underlying assumption is that it is easier for people to agree on empirical facts than on normative judgments.[53] However, this solution to the objectivity dilemma is subject to various lines of attack. First of all, it presupposes the objectivity of historical knowledge and, thus, imports

46 Alexy (n 30) 1.
47 ibid.
48 cf Hillgruber (n 20) para 55 (calling the need for interpretation the open flank of law's claim to objectivity).
49 On the similarities between judicial and administrative discretion Franz Bauer, 'Entscheidungsspielräume in Verwaltung und Rechtsprechung' [2014] rescriptum 98.
50 cf *Bernd Grzeszick* in Dürig et al (n 20) art 20 paras 235–247; Jörg Neuner, *Die Rechtsfindung contra legem* (2nd edn, CH Beck 2005) 86–87, 140.
51 cf Hillgruber (n 20) paras 55–74; Neuner (n 50) 85–138.
52 The litigant's perspective is taken by Dworkin (n 20) 1–3.
53 See above n 21.

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the epistemological problems of the respective debate in historiography.[54] But even if we assume that a sufficient degree of certainty about the relevant historical facts can be attained, significant practical and theoretical difficulties remain.

2. *The practical problem: the availability of historical evidence*

Historical argumentation can find itself confronted with many practical problems. The historical context may be opaque or indeterminate; legislative history documents may be scarce[55] or silent on the issue at hand.[56] Typically, the hard cases that predominantly attract the attention of courts and legal scholars have not been considered by legislators in advance.[57] Or, even worse, the historical record provides contradictory statements. Not rarely, both sides of a legal disagreement can cite some parts of legislative history that support their position.[58] Hence, it might seem as if by invoking historical arguments the problem of indeterminacy is only transferred to a different level.

Admittedly, these concerns are not unjustified. It is undeniable that historical arguments will not in each and every case produce a clear or even any result. This, however, is not a reason to abstain completely from historical interpretation. The fact that we lack the necessary information in *some* cases does not take away or delegitimise its rationalising effect whenever it is available.[59]

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54 Out of the vast literature on the issue cf eg Mark Bevir, 'Objectivity in History' (1994) 33 History and Theory 328; Jens Kistenfeger, *Historische Erkenntnis zwischen Objektivität und Perspektivität* (ontos 2011); Jörn Rüsen, *Historik. Theorie der Geschichtswissenschaft* (Böhlau 2013) 53–96.

55 This depends on the particular conventions concerning the creation of such documents in a specific legal system. On the legislative process in Germany and the respective documents Zimmermann (n 38) 316–320; Frieling (n 5) 25–39.

56 Christian Baldus, 'Gut meinen, gut verstehen? Historischer Umgang mit historischen Intentionen' in Baldus et al (n 5) 13–14.

57 Ralf Poscher, 'Rechtsdogmatik als hermeneutische Disziplin' in Jakob Nolte et al (eds), *Die Verfassung als Aufgabe von Wissenschaft, Praxis und Öffentlichkeit* (CF Müller 2014) 203, 208. Even stronger Scalia (n 4) 32.

58 Scalia (n 4) 35 ('In any major piece of legislation, the legislative history is extensive, and there is something for everybody'); Antonin Scalia and Bryan A Garner, *Reading Law* (Thomson/West 2012) 377; Heun (n 23) 200–201.

59 Von Arnauld (n 16) 475–477; James M Landis, 'A Note on Statutory Interpretation' (1930) 43 Harv L Rev 886, 893.

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At the same time, the amount of indeterminacy can and must be diminished by collecting all the evidence and carrying out the historical enquiry as thoroughly as possible. Often enough, interpreters swiftly pick single lines from the parliamentary record and jump to their desired conclusions, while ignoring or treating as irrelevant all statements that point towards a path they do not wish to follow. The Thuringian election list case provides an instructive example not only for a bold across-the-board rejection of historical arguments[60] but also for unsound historical reasoning on the majority's side:[61] while the committee members had in fact rejected the proposal that gender-balancing should become constitutionally *mandatory*, it simply does not follow that it was meant to be constitutionally *impermissible*. In other words: art. 2 para. 2 s. 2 of the Thuringian Constitution could very well justify gender-balanced election lists even if it does not make them a constitutional requirement.[62] The majority read something into the legislative history that simply was not there. It is hardly surprising that such an attitude towards historical argumentation casts considerable doubt on its objectivity.

This goes to show that historical interpretation can be convincing only if the whole process and context of legislation is carefully considered. Otherwise, the interpreter is at risk to read too much into one single remark or to treat it as more significant than it actually is. For example, a drafter's statement of intent might later have been rejected in Parliament;[63] or, a question might have been touched upon in the parliamentary debates, but only superficially or on the basis of insufficient factual information.[64] All

60 See above n 14 and 15.

61 ThürVerfGH NVwZ 2020, 1266 paras 132–136.

62 See Danker (n 8) 1252; Möllers (n 8) 343.

63 In 1994, the legal committee of the German Parliament approved of a proposed constitutional amendment while expressly rejecting the explanatory remarks provided in the proposal, BT-Drucks 12/8165, 29. In such circumstances, these initial remarks can no longer be treated as evidence for legislative intent.

64 For an example see VG Frankfurt BKR 2020, 308 para 9. Even though the relevant legal issue had been raised by experts in the committee debates, the legislature had not addressed it. The court regarded this as a conscious legislative decision. However, given the marginality of the experts' remarks and the lack of any discussion or reaction by the committee members, the historical argument is quite weak: it seems far more likely that the issue has been overlooked; see Stefan Korch, 'Delisting und Insolvenz' [2020] BKR 285, 286–287.

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this has to be taken into account before one can make a sound historical argument or, alternatively, conclude that the evidence is inconclusive.[65]

3. *Theoretical problems: will and form*

Even in cases where we can confidently assert our knowledge of what *some* participants in the legislative process intended, there are still considerable theoretical problems: why should *their* ideas count for the intent of the whole legislature despite the fact that they did not find their way into the legal text? Is the whole idea of legislative intent not a mere fiction prone to manipulation and, thus, a way to circumvent the legislative process?[66] These objections are not new. More than a century ago, *Philipp Heck* established a useful classification, dividing the different lines of criticism into four distinct arguments.[67] Here, we are concerned with the 'will argument' (collective entities like Parliament cannot form a common will) and the 'form argument' (legislative intent beyond the words of the law is not endowed with legislative authority and, hence, not binding).[68]

It is not the aim of this paper to develop an extensive response to the 'will argument'. It must suffice to spell out the underlying assumptions when talking about legislative intent. Intent as a psychological fact exists only with respect to specific individuals.[69] If the legislature consists of more than one person, the notion of legislative intent requires a mechanism of (normative) attribution. Recent works on this topic have shown,

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65 According to a more pragmatic counter-argument, such a comprehensive consideration of the historical record is simply too costly and practically infeasible; see Adrian Vermeule, *Judging under Uncertainty* (HUP 2006) 189–197; Scalia (n 4) 36; Scalia and Garner (n 58) 378. This disregards the role of legal scholarship as a possible intermediary: ideally, a look into one of the larger commentaries will provide an overview of the relevant legislative history and context and point to the respective historical material. More sceptical Baldus (n 56) 13. On the role of commentaries in different jurisdictions Zimmermann, 'Privatrechtliche Kommentare im internationalen Vergleich' in David Kästle-Lamparter et al (eds), *Juristische Kommentare: Ein internationaler Vergleich* (Mohr Siebeck 2020) 441.

66 cf Dworkin (n 20) 342–350; Eskridge (n 39) 14–34; Scalia (n 4) 29–37; Jeremy Waldron, 'Legislators' Intentions and Unintentional Legislation' in Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999) 119.

67 Philipp Heck, 'Gesetzesauslegung und Interessenjurisprudenz' (1914) 112 AcP 1, 67–89.

68 Heck (n 67) 67.

69 Frieling (n 5) 131–136.

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based on theories of collective intentionality,[70] that such an attribution is rationally feasible if structured by clear and definite rules.[71] Accordingly, they have distinguished between statements that can and statements that cannot be attributed, based on the type of intention[72] or its source.[73]

As far as the 'form argument' is concerned, one point deserves particular emphasis:[74] it is a misconception to think that the use of legislative history bestows the force of law on casual remarks by drafters or parliamentarians. While the text of the law is always authoritative due to its promulgation, statements from legislative history have a lesser status. They have to be examined carefully, checked against other statements and the general context, and evaluated with respect to the weight that the legislature has given to them. Again, a valid historical argument does not just pick a random line from the record. Instead, it requires a comprehensive investigation and evaluation of both legislative history and context. Naturally, this compromises the desired objectivity of results to some degree. At the same time, the fear of manipulation during the legislative process[75] is less warranted.

I would like to add that my position has the important pragmatic advantage that it need not declare our established social practice of legal argumentation illicit – a practice carried out by judges, lawyers, and academics and presupposed by legislators. If legislative history were inadmissible, we would have to deprive our judges from what sometimes provides the easiest explanation for a cryptic legal provision.[76] As *Lord Denning* famously put it: 'Some may say – and indeed have said – that judges should not pay any attention to what is said in Parliament. They should grope about in the dark for the meaning of an Act without switching on the light. I do not accede to this view.'[77] There is even less reason to accede to this view if one is faced with the alternative: judges will seek for guidance in commentaries and law journals. But surely, if academic writers can help to elucidate the law, why not the very people who enacted it?

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70 Wischmeyer (n 5) 225–250; Michael von Landenberg-Roberg and Markus Sehl, 'Genetische Argumentation als rationale Praxis' (2015) 6 Rechtswissenschaft 135, 150–161; Sehl (n 5) 99–127.

71 Wischmeyer (n 5) 377–398; Thomas Wischmeyer, 'Der "Wille des Gesetzgebers"' (2015) 70 JZ 957, 960–964. See also Nourse (n 4) 88–90.

72 Frieling (n 5) 202–208.

73 Wischmeyer (n 71) 964–966.

74 On additional counter-arguments see Frieling (n 5) 174–181.

75 Particularly pronounced Scalia and Garner (n 35) 376–377.

76 Greenawalt (n 35) 83.

77 *Davis v Johnson* [1979] AC 264, 276.

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4. Objectivity attenuated

Legal interpretation is never a simple discovery of empirical facts. Historical arguments are no exception. Lack of availability and evidence, ambiguities and contradictions, and the problem of attribution water down their potential for tackling the indeterminacy of legal decision-making. Still, wherever these problems can be overcome – be it through more diligent and comprehensive examination of the *whole* historical context, be it through convincing rules of attribution – historical arguments can have a significant rationalising effect on legal interpretation by providing a (more or less) solid empirical foundation and by focusing an otherwise completely open-ended debate on the question of legislative intent. Historical argumentation is not a panacea for all difficult interpretative issues. But it is a method that, if operationalised properly and diligently, brings us closer to the more desirable end of the continuous spectrum from arbitrariness to objectivity.[78]

III. Dynamic Interpretation and Objectivity

The problem of objectivity becomes particularly pertinent with respect to dynamic interpretation. Its proponents have employed flowery metaphors for the law's continuing interpretative development over time.[79] According to *T. Alexander Aleinikoff*, legislating is like building a ship and charting its initial course while leaving its further journey and its ultimate destination to subsequent navigators.[80] *Ronald Dworkin* has compared legislating to writing only the first chapter of a chain novel that is to be completed by others.[81] One is supposed to 'bring statutes up to date',[82] to interpret 'not just the statute's text but its life',[83] or to find 'the will of

78 cf Archibald Cox, 'Judge Learned Hand and the Interpretation of Statutes' (1947) 60 Harv L Rev 370, 372 (maintaining that the metaphor of legislative intent 'sets a goal to which the judge aspires even while he knows it is beyond attainment').

79 cf Fleischer (n 2) 426–427.

80 T Alexander Aleinikoff, 'Updating Statutory Interpretation' (1988) 87 Mich L Rev 20, 21.

81 Ronald Dworkin, 'Law as Interpretation' (1982) 60 Tex L Rev 527. See also Dworkin (n 20) 350 ('Hercules interprets history in motion, because the story he must make as good as it can be is the whole story through his decision and beyond').

82 Dworkin (n 20) 348.

83 ibid.

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the law', which can be wiser than the will of the legislator.[84] This use of metaphorical language raises the suspicion that it is meant to conceal the real difficulty: providing some objective standard of where to steer the ship and how to proceed with the novel. Many have pointed out this inherent risk of arbitrariness in all dynamic interpretation:[85] if judges (or other law applying officials) can freely adjust the law to new circumstances, what will guide them if not their personal moral and political opinions? What will constrain them from turning the rule of law back into a rule of men?

References to 'public opinion'[86] will hardly ever provide a useful standard to structure or guide the interpreter's decision. Firstly, public opinion is elusive and it is always tempting to take one's own view for the 'public' one.[87] But more importantly, the idea of one predominant opinion, discernable enough to base legal decisions on it, presupposes a society much more homogeneous than most of today's societies are. Public opinion on moral and political matters is diverse, fragmented, and hopelessly antagonistic. In the democratically constituted state, it is not legal interpretation but the legislative process that provides the place for fighting and deciding the battle between those different views.[88]

The plain observation that times have changed can never be enough to justify dynamic interpretation. Instead, one must take its inherent risk of arbitrariness seriously and look for a standard that can rationally constrain interpretative change. I argue in this article that historical argumentation, as far as it is available and produces reliable results, can provide such a standard for separating justified from inadmissible forms of dynamic interpretation. To substantiate that argument, I will now turn to the nuts and bolts of how historical arguments and dynamic interpretation can go hand in hand.

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84 Gustav Radbruch, *Rechtsphilosophie* (Erik Wolf and Hans-Peter Schneider eds, 8th edn, FK Koehler 1973) 207.

85 Eg Hillgruber (n 20) paras 58–62; Röhl and Röhl (n 30) 628–632; Scalia (n 4) 45 (stating that 'the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful').

86 Dworkin (n 20) 348–350.

87 cf Greenawalt (n 35) 101–102.

88 Lord Sumption, 'The Limits of Law' in NW Barber et al (eds), *Lord Sumption and the Limits of the Law* (Bloomsbury 2016) 15, 23–26. See also Rüthers (n 20) 20–23.

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IV. Historical Arguments and Dynamic Interpretation

The classic image that views historical arguments as necessarily static is mistaken. To start with, these arguments have normative force only by reference to legislative intent (1.). The perception that such a reference must lead to static interpretation disregards the important distinction between intent as meaning and intent as purpose (2.), as well as the complex interplay between these different elements of intent (3.). Since legislative purposes may under changing circumstances require different means, purposive reasoning allows for a dynamic interpretation that is structured and constrained through its link to historical information (4.).

1. The impermissibility of 'direct' historical argumentation

Historical arguments can – in a very crude and trivial way – yield static interpretation where they simply invoke the continuity of the law and thereby endow legal history with direct normative force. At least with respect to interpreting legislation such arguments are unsound. The mere fact that something used to be the law is, generally speaking, no reason that it should continue to be the law.[89] Legislators can change the historically grown state of the law at will and decide that a legal question that has been answered one way for centuries is now to be solved in a different way. In other words: whether any argument can be drawn from an older state of the law depends on whether the legislature has decided to let that state continue or not. This is a question of legislative intent. Thus, the normative force of historical arguments can never be immediate, but must draw its legitimacy from the legislative decision.

2. Meaning and purpose: two types of legislative intent

But even when historical arguments refer to legislative intent they are, according to the classic image, bound to result in static interpretation. If statements made at the time of enactment have to be treated as authoritative, one cannot deviate from them in order to take account of later developments. This view disregards an important distinction that has been

89 Grigoleit (n 33) 260–262.

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drawn between two types of legislative intent: meaning and purpose.[90] Statements of meaning refer to legislators' concrete ideas about which actions, objects, case scenarios etc. are to be covered by a specific expression. Statements of purpose spell out the goals which a legal norm is supposed to serve.[91] While intent as purpose tells us something about legislative ends, intent as meaning concerns the means that should or should not be employed to reach such ends.[92] Both concepts can be found in the Thuringian election list case: the majority based its decision on an alleged statement of meaning according to which art. 2 para. 2 s. 2 of the Thuringian Constitution was not meant to justify gender-balanced election lists, while the dissenting opinions stressed the provision's purpose to promote gender equality as a reason for such justification.[93]

Since the terms 'intent', 'purpose', and 'meaning' are used in various and often confusingly different ways, two clarificatory notes should be added. First, legislative intent is viewed here as an umbrella term with meaning and purpose as subcategories.[94] Second, the word meaning is sometimes supposed to signify the end-result of interpretation: only *after* we have interpreted the norm's language do we know its true meaning.[95] Here, instead, 'meaning' is used as a short form for 'intent as meaning' and, hence, is just one element of interpretation.[96]

Even though the distinction between meaning and purpose may be subject to uncertainties, these two types of legislative intent represent two

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90 From an Anglo-American perspective Landis (n 59) 888; Cox (n 78) 370–371; Gerald C Mac Callum, Jr, 'Legislative Intent' (1966) 75 Yale LJ 754, 757–761; Greenawalt (n 35) 96–102. From a German perspective Larenz (n 17) 328–333; Frieling (n 5) 105–110.

91 Sometimes, such purposes are explicitly established by the law itself. Although traditionally uncommon in Germany, there has been a more recent trend in this direction; see Röhl and Röhl (n 30) 246. Laws of the early modern period frequently stated their goals explicitly; see Thiessen (n 29) 53–54. Nowadays, the same is true for the recitals of European legislation; see Sebastian AE Martens, *Methodenlehre des Unionsrechts* (Mohr Siebeck 2013) 178–179. Critical of this practice Marie Theres Fögen, *Das Lied vom Gesetz* (CF v Siemens Stiftung 2007) 9–23.

92 Greenawalt (n 35) 96–102.

93 ThürVerfG NVwZ 2020, 1266 para 135; Dissent Heßelmann para 17; Dissent Licht and Petermann para 27.

94 Landis (n 59) 888; Cox (n 78) 370–371; Manning (n 4) 677–678 note 11. But see also Eskridge (n 39) 14–34 (contrasting intentionalism with purposivism).

95 cf Fiss (n 43) 740 (calling interpretation 'a dynamic interaction between reader and text, and meaning the product of that interaction').

96 See also Balkin (n 26) 12–13 (listing five different ways in which the word 'meaning' can be used).

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general normative techniques that can play out both at the level of norm design and the level of norm interpretation.

(i) At the level of norm design, *Niklas Luhmann* introduced the distinction between conditional and purposive programs, which was then adopted by German administrative law scholarship.[97] Conditional programs are characterised by an if-then-structure: 'if specific conditions are fulfilled (…), then a certain decision has to be made.'[98] Purposive programs, on the other hand, prescribe certain goals that are to be achieved and, usually, some procedural framework as to how such norms are to be concretised. To use a famous example,[99] one could either set up a rule prohibiting the driving of vehicles in the park, in order to reduce noise or to increase the safety of pedestrians, or one could explicitly spell out such goals and leave it to the park authorities to find the appropriate measures to accomplish them as far as possible. The German Building Code (BauGB) uses the latter technique when authorising local authorities to draw up a local zoning plan in accordance with a list of interests – ranging from the public need for accommodation to the demands of national defence or flood prevention – that have to be taken into account and balanced against each other.[100] Another example is, again, art. 2 para. 2 s. 2 of the Thuringian Constitution, which prescribes gender equality as a relevant objective while remaining silent on how exactly it is to be reached.[101] This type of norm design may commend itself when legislators agree on the purposes they wish to implement, but do not know or agree on the precise means that are best suited for that implementation.

(ii) At the level of interpretation, the distinction between meaning and purpose mirrors the normative structure of the two programs just described. While intent as meaning retains the binary structure of 'If A, then B' by providing definitions or examples for A and B, intent as purpose requires a similar enquiry of the interpreter as the purposive program: a (consequentialist) evaluation of which interpretation will be most useful

97 Niklas Luhmann, *A sociological theory of law* (Elizabeth King and Martin Albrow tr, Routledge & Kegan Paul 1985) 174–179. On the further development Wischmeyer (n 5) 280–297.

98 Luhmann (n 97) 174.

99 HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv L Rev 593, 607–608; Lon L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71 Harv L Rev 630, 662–663.

100 Section 1 paras 5–7 and section 2 para 3 of the German Building Code (BauGB).

101 On state objectives (*Staatszielbestimmungen*) generally Wischmeyer (n 5) 193–195.

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for attaining the goals prescribed.[102] For example, if we want to know what counts as a vehicle in respect of the vehicle ban in the park, historical information about the rule making process may tell us two different things: that the lawmakers did not consider bicycles to be vehicles (meaning) or that they were primarily concerned with the reduction of noise (purpose). In the first case, we have an immediately plausible argument not to apply the rule to bicycles. In the second case, the interpreter, in order to determine whether bicycles fall under the rule, has to figure out how they affect the degree of noise exposure in the park.

Critics have argued that the dichotomy between conditional and purposive is merely terminological: while all purposive programs can be reformulated as conditional ones (and vice versa), conditional norms may permit or even require purposive interpretation.[103] This criticism ties in well with the preceding two-level-analysis: purposive and non-purposive reasoning do not exclude each other but can and will be combined at different stages of the interpretative process. Norms of both designs rely on words that are open to interpretation. Such interpretation can, in either case, refer to both kinds of legislative intent. In short, purposive and non-purposive reasoning – the latter may also be called, with different connotations, textualist, formalist, or conceptualist[104] – are ideal types of legal reasoning, which, on their own, hardly ever provide a full account of what is going on.[105] The important point here is that these two models do not only pertain to norm design but can also help to structure legislative intent. In that context, the two models differ – as we shall see – with respect to the degree of flexibility they offer for dynamic interpretation.

3. *The interplay between different legislative intentions*

While legislators must choose between a conditional or a purposive program on the level of norm design, the legislative process leaves room

102 cf Hans Christoph Grigoleit, 'Dogmatik – Methodik – Teleologik' in Marietta Auer et al (eds), *Privatrechtsdogmatik im 21. Jahrhundert: Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag* (De Gruyter 2017) 241, 265–267.

103 Wischmeyer (n 5) 191 note 45 and 290–294. See also Esser (n 19) 142–145.

104 On the (at least tentative) identification of *Luhmann's* conditional program with conceptualist or 'mechanical' jurisprudence Wischmeyer (n 5) 284. See also Esser (n 19) 142.

105 But see Wischmeyer (n 5) 293 (doubting even any heuristic value of the dichotomy).

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for various statements of intent. This is particularly clear for legislative purposes:[106] one only has to look at the page-filling recitals of European legislation to see how many different objectives can have a bearing on the interpretation of a norm. Two observations are important for understanding the interplay between such different legislative intentions. First, where multiple and even conflicting purposes are relevant, close attention to language and its intended meaning is crucial to determine how and to what extent legislators wanted to pursue those purposes (a.). Second, purposes with different degrees of abstraction can engage with and reinforce each other (b.). Both observations raise questions of priority that can be addressed through rebuttable presumptions.

a. Multiple purposes and the presumption in favour of meaning

Legal norms sometimes aim at accomplishing more than one purpose. If one prohibits vehicles in the park this may serve to reduce pollution, noise, risk of accidents, and deterioration of pathways at the same time. These purposes could be aligned next to each other on a horizontal line: they coexist on the same level of abstraction and have an equal claim to be considered and, as far as possible, attained by the interpreter – in a similar way as all the objectives of purposive programs must be considered in the process of application.[107] Difficulties arise if some of these purposes conflict in a specific situation and, consequently, a choice is necessary as to which one takes priority.

Moreover, legal norms are often a manifestation of compromise between two opposing purposes or interests.[108] Sometimes, legislators spell out the conflict between different purposes explicitly before striking a balance between them. For instance, section 573 of the German Civil Code permits the termination of a residential lease by the lessor only if she has a legitimate interest. This is meant to protect the lessee from arbitrarily losing the centre of his life, but only as long as the lessor cannot show a good reason for the termination; in that case, her property interest prevails.[109] In other cases, the conflicting purpose is less visible. If the vehicle ban is supposed to reduce noise, there seems to be no countervailing objective at first

106 Eskridge (n 39) 27; Greenawalt (n 35) 99; Grigoleit (n 102) 265.
107 See above IV.2.
108 Grigoleit (n 102) 266–267.
109 BGHZ 213, 136, 146–147 = NJW 2017, 547 para 26 (including many references to the relevant legislative history materials).

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sight. But if that were the only purpose at stake, it would be puzzling why the park can be accessed by chattering pedestrians. Instead, two regulatory goals are in conflict here: to reduce noise and to offer recreational space for the public.

Pointing out that multiple and conflicting purposes can be relevant in interpreting one legal norm is important because it underscores the role of language and its intended meaning: it tells us how exactly the respective conflict of purposes was meant to be resolved.[110] This insight has significant consequences for situations where meaning and purpose collide, i.e. where there is 'a lack of fit between how the legislator expected the words of the statute to be understood, and what he hoped to achieve by means of the statute'.[111] Since it is primarily for the legislature to choose the means by and the extent to which its purposes are to be attained, this choice must be honoured by those who apply the law. Hence, there should be a presumption that in case of conflict intent as meaning takes precedence over intent as purpose.[112]

Other authors, instead, have advocated a priority rule in favour of purpose. They argue that, first, a norm's language is often just an inadequate way of communicating legislative purpose and, second, legislators are usually much more aware of a proposed norm's objectives than of the drafters' detailed elaborations of meaning.[113] While certainly one or both of these statements *can* be true in a specific case, their generalisation is problematic. As pointed out, the intended meaning may precisely manifest the relevant compromise, and that compromise may well be what legislators cared about most.[114] At least as a starting point, we should assume that they meant what they said. It is, however, only a starting point. *If* we have suf-

110 Frieling (n 5) 180–181. See also Eskridge (n 39) 27 and 32–33.

111 Mac Callum (n 90) 759.

112 Similar ideas are expressed by Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 249–251 and Frieling (n 5) 177–181, though both do not think in terms of a presumption. Ekins makes a stronger claim by arguing that purpose can trump meaning only in 'exceptional cases'. Frieling underscores the relevance of both meaning and purpose while demanding respect for the legislature's choice of means, but does not explicitly advocate a priority rule. See also Greenawalt (n 35) 100–101.

113 Claus-Wilhelm Canaris, 'Die Problematik der Anwendung von § 546b BGB auf die Kündigung gegenüber dem Erben eines Wohnungsmieters gemäß § 569 BGB – ein Kapitel praktizierter Methodenlehre' in Bernhard Großfeld et al (eds), *Festschrift für Wolfgang Fikentscher* (Mohr Siebeck 1998) 30–32; Canaris (n 18) 51–52. See also Larenz (n 17) 328–329.

114 Greenawalt (n 35) 99–100.

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ficient indication that legislators were primarily concerned with reaching certain goals and less so about how to do that exactly, the presumption can be rebutted.[115]

The dissenters in the Thuringian election list case disregarded this presumption when they turned too swiftly to the purpose of art. 2 para. 2 s. 2 of the Thuringian constitution, i.e. the promotion of gender equality.[116] Again, we simply do not know to what extent that goal is to be pursued in light of possible constraints on other constitutional principles. Instead, the majority's methodological starting point was correct when they searched for a concrete expression of meaning as to what the provision should require (or permit!) with respect to state elections.

b. Interconnected purposes and the presumption in favour of the lower level

However, the interrelation between purposes is often more complex than being simply one of coexistence or conflict. A legal norm may also serve a line of purposes with different degrees of abstraction that are interlinked and reinforce each other.[117] Instead of a horizontal line one could speak of a vertical line with low-level goals specifying how exactly high-level goals should be pursued. Let us assume that prohibiting vehicles in the park is meant to reduce pollution, noise, and risk of accidents for pedestrians. These low-level purposes may themselves serve a more overarching goal: enhancing the park's recreational potential. This purpose, again, may aim at improving the quality of living for citizens or the city's attractiveness for tourists.

This relation between high-level and low-level purposes is essentially the same as between low-level purposes and meaning. In the end, we can imagine a vertical line of legislative intentions with concrete ideas

115 Canaris (n 113) 15–25 refers to a case where an express statement of meaning (here: a list of statutory rights to terminate a lease) does not correlate with an express statement of purpose. As far as it seems plausible that one example found its way into the list by accident or by virtue of a misapprehension, the presumption in favour of meaning may be seen as rebutted in such a case. A counter-example is the decision BVerfGE 149, 126 = NJW 2018, 2542 paras 81–85 where there was a clear and deliberate legislative decision for a specific account of meaning. Hence, the presumption could not be rebutted. On that case cf Frieling (n 5) 180–181.

116 ThürVerfGH NVwZ 2020, 1266, Dissent Heßelmann para 17; Dissent Licht and Petermann para 27.

117 cf Greenawalt (n 35) 96–97; Grigoleit (n 102) 242.

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of meaning at the foot, low-level purposes in the middle, and high-level purposes at the top. Consequently, we can put the presumption in favour of meaning in more general terms: if we have a conflict between two or more elements of that line, there is a presumption in favour of the lower level. The reason is, once more, that the lower level shows us how exactly and to what extent the legislature wanted to accomplish the purposes on a higher level. And again, this presumption can be rebutted because legislators are free to place more weight on the higher regions of the line. Only if there is sufficient indication that the legislature was more concerned about reaching a certain goal than about how to achieve it, is it permissible to favour purpose over meaning or high-level purpose over low-level purpose.

An instructive example for this vertical line is the 'minced meat' case decided by the German Federal Court of Justice (*Bundesgerichtshof*) in 1962.[118] An executive regulation permitted the sale of minced meat in butcheries while prohibiting it in ordinary meat shops. As the term 'butchery' ('Fleischerei') was not sufficiently clear the court turned to the intentions of the lawmaker (here: the Ministry of the Interior). On the low end of the line, they found intent as meaning: 'butchery' was supposed to mean a place where large pieces of meat were professionally disjointed.[119] The immediate rationale (low-level purpose) behind that understanding was to keep transportation distances for minced meat as short as possible. The high-level purpose was to prevent bacterial contamination of fresh meat and, consequently, to protect consumer health. In interpreting the term 'butchery', the court underscored the importance of the lower level and refused to focus solely on the 'final' goal, i.e. the high-level purpose.[120]

4. The dynamic potential of historical arguments

While the horizontal line of purposes helps to understand why we need a presumption in favour of meaning, it is particularly the vertical line that enables dynamic interpretation. As long as all elements of intent on the vertical line are well-matched the interpretative setting is stable. If these elements are in conflict already at the time of enactment – usually because

118 BGHSt 17, 267 = NJW 1962, 1524. On the historical argumentation in that case Eric Simon, *Gesetzesauslegung im Strafrecht* (Duncker & Humblot 2005) 298–299.

119 Admittedly, the Court's historical reasoning is questionable as it relies on a ministerial document that was circulated only about one year after the executive regulation had been issued; cf BGHSt 17, 267, 269.

120 ibid 272. See also below IV.4.a.

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of some legislative mistake – interpretation may be more challenging, but is equally stable. If, however, a change of circumstance subsequently alters the interrelation between the elements of the vertical line, a preference for purpose can yield a change in the interpretative result. Surely, such a preference would have to overcome the presumption in favour of meaning. If it does, we face a type of dynamic interpretation that is not arbitrary but linked to and rationalised by historical information. In fact, arguments from changed circumstances are historical in two ways: (i) they are based on a legislative purpose that has to be derived from historical sources (legislative history, context etc.) and (ii) they need to show a change of circumstance as a matter of historical fact.

Before having a closer look at how this type of dynamic interpretation works it is useful to introduce another distinction. So far, we have analysed the vertical line of purposes specifically attached to a rule, i.e. the kind of objectives one would receive as a reply were one to ask: what is that rule good for? I will first have a look at such specific purposes (a.). In addition to these, legislators may also pursue some more general, supplementary objectives such as preserving systematic coherence, which can potentially justify dynamic interpretation (b.). To complete the picture, I will add a few remarks about the possibility of dynamic interpretation beyond historical arguments (c.).

a. Specific purposes

Empirical or normative developments can lead to a situation where some purpose can no longer be achieved by the originally envisaged means or where some low-level purpose has started to run contrary to the high-level purpose it was supposed to serve. Standard examples are technological progress and changed social practices. Let us assume that the regulators that banned all vehicles in the park had three distinct intentions when they established that rule: first, they thought cars should be covered (meaning); second, their aim was to reduce noise in the park (low-level purpose); and third, noise reduction was meant to enhance the park's recreational value (high-level purpose). If a car with zero noise emissions were to be constructed, that car would still be covered by the intended meaning, but

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no longer by the two purposes.[121] Hence, there is a historical argument, based on these purposes, for an exemption of these new cars from the scope of the rule. This argument would have to overcome the presumption in favour of meaning. If, however, we know (i) that noise reduction was the only relevant (low-level) aim and (ii) that banning the new cars would have absolutely no effect on noise reduction, there is a strong case for not applying the rule to these new cars.[122] Under these new circumstances, purpose would trump meaning and trigger a kind of dynamic interpretation that is backed up and justified by a strong historical argument.

The same can happen with respect to low-level and high-level purposes. If, for example, it evolved as a common social practice that people used noise-cancelling earphones in public, the promotion of recreation would no longer require the reduction of car traffic noise. Again, one would have to rebut the presumption in favour of the lower level. Still, if it were clear that recreation was the only relevant purpose and that noise reduction had no bearing on it anymore, there would be a sound argument from changed circumstances that cars should no longer be banned. High-level purpose would trump both meaning and low-level purpose.

A useful real-life example for this kind of dynamic interpretation is, again, the 'minced meat' case.[123] The defendant sold minced meat in a branch store where no large pieces of meat were processed; hence, that store could not be considered a 'butchery' in light of the intended meaning. The low-level purpose – keeping transportation distances as short as possible – also supported the prohibition since fresh meat had to be brought from the main store every day. However, due to advanced refrigeration technologies that had not yet existed at the time of the Ministry's decision, the defendant's business model did not pose any public

121 The example presupposes that the regulators were concerned about improving the recreational value *only by means of* noise reduction but not with regard to other factors like health or safety.

122 It is a different question as to how that interpretative result can be reached technically. One could either say that the new cars should not be treated as vehicles under the rule or, if one regards this as impossible, one could assume an implied exception from the rule. This technical question touches on the German debate about 'Auslegung' and 'Rechtsfortbildung' as two types of legal interpretation in a broad sense; cf Zimmermann (n 17) 256–258 and 267–268; Poscher (n 34) 41–42 (speaking of 'interpretation' on the one hand, and 'construction' on the other). Since we are only concerned with the result of such an interpretative act and not its technical classification we need not get any deeper into this distinction.

123 See above n 118.

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health threat. Consequently, the appeal court had reasoned that in light of the high-level purpose both meaning and low-level purpose could be disregarded: it considered the branch store a butchery and endorsed the defendant's acquittal. The Federal Court of Justice disagreed. Its reasoning is, in my view, best understood as saying that the presumption in favour of meaning could not be rebutted under the specific circumstances of the case. But importantly, the Court did not in principle rule out the appeal court's envisaged dynamic interpretation in face of technological progress.[124]

It should be added that the relevant change need not concern the empirical or normative reality as such, but can merely pertain to our knowledge about that reality. Legislators may have thought that some means were useful to reach certain goals when it later turns out that they are not and never had been.[125] So again, historical arguments can support dynamic interpretation in such a case. A similar type of reasoning was alluded to in the Thuringian election list case. Both dissents emphasised that after more than twenty years, the objective of art. 2 para. 2 s. 2 of the Thuringian Constitution had still not been achieved: not even a third of the state parliamentarians were female.[126] This could be read as an argument from changed circumstances or, more precisely, a changed understanding of the relevant means-ends-relation. Even if the (constitutional) legislators had thought that gender equality in Parliament could be accomplished through other ways than gender-balanced election lists, we may know better now and, hence, may re-interpret the provision in light of this new knowledge.[127] This argument was hardly fleshed out at all in the dissents, but it could be a valid one. Much depends on whether legislators in fact believed that – even without gender-balanced election lists – they would soon achieve gender equality in parliament, or whether they merely did not care as much.

124 BGHSt 17, 267, 274.

125 cf Eskridge (n 39) 30–31.

126 ThürVerfGH NVwZ 2020, 1266, Dissent Heßelmann para 26; Dissent Licht and Petermann paras 8–9.

127 See also Möllers (n 8) 338–339 (stressing the relevance of political context, particularly the recent development of the gender ratio in German parliaments).

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b. Supplementary purposes

These specific purposes may be supplemented by a more general type of objective that is not directed at achieving a precise social aim like public health but at linking the application of a norm to changing circumstances. As such, these supplementary purposes provide some kind of reservation or qualification: they require the interpreter to take into consideration not only the norm's specific purposes but also (and maybe even predominantly) external and time-sensitive social factors like public morality, language conventions, or the legal system as a whole.

Such supplementary purposes are sometimes made explicit by the legislature, e.g. when the legal text itself refers to the technological state of the art[128] or when the documents of legislative history expressly state that some legal question should remain unresolved for further consideration by courts and scholars.[129] But more often, such objectives have to be implied and, hence, need to rely on presumptions and probabilities. Consequently, they may easily appear as mere fictions and raise doubts as to their objectivity.

Hence, intentions of that kind have to be treated with great caution and restraint. The less explicit such supplementary purposes are, the more careful one has to be. This can be exemplified with regard to two important groups of supplementary purposes that I will sketch out in the following. While one may more easily assume a legislative invitation to dynamic interpretation where the language of the law refers to particularly open-ended and time-sensitive concepts (i), it is more difficult to ascribe a general intention to secure systematic coherence to the legislature (ii). In both cases, however, interpreters can turn to dynamic interpretation if there is sufficient reason to believe that the legislature allowed for or even welcomed it. Legislating is not by its nature like building a ship while leaving its further journey in the hand of the navigators.[130] But it is certainly not impermissible to do that.

(i) Legislators can invite dynamic interpretation by choosing language that is open-ended enough to embrace social change.[131] This is particularly

128 Von Arnauld (n 16) 484–485.

129 See eg BT-Drucks 14/6040, 93 or BT-Drucks 14/7752, 14. On the phenomenon in general Claus-Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz* (2nd edn, Duncker & Humblot 1983) 134–135.

130 cf Aleinikoff (n 80) 21.

131 Von Arnauld (n 16) 483–488.

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clear where the law refers to concepts like public morality[132] or customs of trade.[133] The reference to a social concept that is subject to permanent transformation strongly suggests that the legislature intended to allow for a changing interpretation in accordance with such transformations. To a lesser extent, the same can be said about all abstract or open-ended language.[134] Its use at least indicates that legislators wanted to avail themselves of the gradual shifts of meaning that all abstract concepts undergo over time and authorise corresponding interpretative adjustments.[135] An example is section 823 of the German Civil Code, which provides inter alia for the liability of someone who injures another person's health. Hardly anyone would understand the term 'health' to refer merely to illnesses known at the end of the nineteenth century. Instead, it is to be interpreted in light of current medical knowledge.[136]

It must be emphasised, however, that the interpreter has to look carefully at all available historical information before assuming an invitation to interpret dynamically. Legislators *can* permit dynamic interpretation but they need not do so. Accordingly, it has been a contentious question in German constitutional law, whether the protection of 'marriage' in art. 6 of the German Constitution can be understood dynamically (and, hence, could possibly include same sex marriages) or whether it exclusively refers to the notion of marriage prevalent in the 1940s.[137]

(ii) A less explicit supplementary purpose is the intention to secure systematic coherence. At least in some areas of the law, a large number of norms are deeply interlinked, refer to each other, and pursue the same (specific) purposes.[138] Altering one norm in such a system produces various ramifications. Consequently, legislators may want to ensure that individual norms are interpreted in light of the whole system and, hence,

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132 eg sections 138, 242, 826 of the German Civil Code (BGB).

133 eg sections 151 s 1 and 157 of the German Civil Code (BGB).

134 cf von Arnauld (n 16) 483–488 (distinguishing between legal principles, indeterminate elements in legal rules, and generic terms); Balkin (n 26) 6–7 (contrasting determinate rules with standards and principles).

135 Auer (n 18) 248–250.

136 Karl Larenz and Claus-Wilhelm Canaris, *Lehrbuch des Schuldrechts*, vol II/2 (13th edn, CH Beck 1994) 377–378.

137 cf Carsten Bäcker, 'Begrenzter Wandel' (2018) 143 AöR 339; Jan Philipp Schaefer, 'Die "Ehe für alle" und die Grenzen der Verfassungsfortbildung' (2018) 143 AöR 393. See also Auer (n 20) 250 and 266–268.

138 Such a set of norms can also include higher ranking (eg constitutional) law; cf Zimmermann (n 17) 260. On the limits of a constitutionally informed interpretation of statutory law Neuner (n 50) 128–131; Scalia (n 4) 20 note 22.

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that changes within that system can trigger a different interpretation of an unchanged norm. For example, a norm's (specific) purpose may have seemed rather commonplace at the time of enactment; subsequently, however, it may turn into an outlier or misfit as new provisions concerning similar fact situations no longer adhere to the same purpose. Does that objective become irrelevant or at least lose weight even though the norm at issue has not changed?

Certainly, one cannot simply assume a tacit reservation in favour of systematic coherence. It is not impermissible (reproachable as it may be) to legislate for the exclusive benefit of some interest or voter group. Whether some rule is to be viewed as a systematically incoherent slip or a conscious decision to grant an exceptional privilege is the legislator's and not the interpreter's choice.[139] Hence, there is a presumption that specific purposes are to take precedence over systematic coherence. However, this presumption is rebuttable where legislators in fact placed more weight on systematic concerns. If they did not say so explicitly, one has to look for other signs that point towards legislative priorities. If, for example, the respective field of law has a strong systematic character or if the rules concerned are not distinctly regulatory in nature, this can be treated as a mild indication in favour of systematic coherence.

c. Dynamic interpretation beyond historical arguments

Even strong supporters of legislative intent have to admit that historical arguments will not always do the trick.[140] As already mentioned, legislative history and context may be silent on the issue at hand[141] and, consequently, the interpreter must resort to other considerations (like systematic coherence or general expediency) in order to decide whether or not to interpret dynamically. But even where we have been able to find and attribute legislative intent, there may be, under exceptional circumstances, reasons to conclude that the initially envisaged purposes are no longer relevant.

This is not the place for a comprehensive theory of the exceptional circumstances that might justify assuming a change of purpose. Instead, I will only point towards two examples. The first concerns the emergence

139 Neuner (n 50) 122–123; Hillgruber (n 20) para 57.
140 cf Neuner (n 50) 139–177; von Arnauld (n 16) 493.
141 See above II.2.

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of additional purposes. At the end of the nineteenth century, the drafters of the German Civil Code had given certain privileges to civil servants[142] and spouses[143] with respect to their liability. In the absence of any limiting considerations, these privileges applied to all areas of life. Later on, the social significance of road traffic increased tremendously and the legislature began to establish clear and rigorous standards of care in the law of traffic. Hence, a new legislative purpose emerged that could not have been foreseen, considered, and balanced against other goals at the time when the privileges were enacted. The Federal Court of Justice concluded that this new purpose had to be taken into account and excluded road traffic from the privileges' scope of application.[144] The second example concerns the substitution of purposes.[145] Sometimes, the initial goal of a rule becomes impermissible due to new constitutional requirements; if, however, a permissible goal can be substituted for the original one, it would be odd to demand that the legislature, in order to effect a change of purpose, must first abolish the rule before enacting the exact same rule again.

It seems, therefore, possible that major purposive shifts in the legal system can also have an effect on the purposes that were initially meant to be pursued by a rule. However, such deviations from the initial legislative intentions presuppose compelling arguments that have to overcome a strong presumption against such changes. In any case, these rare exceptions should not obscure the central point of this article: as a general rule, it turns on legislative intent, based on historical arguments, whether dynamic interpretation is permissible or not.

V. Conclusion

I have argued in this article that the classic image of historical arguments as being objective but static is over-simplistic and misleading on both counts.

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142 Section 839 para 1 s 2 German Civil Code (BGB).

143 Section 1359 German Civil Code (BGB).

144 BGHZ 53, 352 = NJW 1970, 1272; BGHZ 68, 217 = NJW 1977, 1238. See also Honsell (n 21) 163.

145 cf Neuner (n 50) 149–151. For an example from German family law see Marie Herberger, *Von der 'Schlüsselgewalt' zur reziproken Solidarhaftung* (Mohr Siebeck 2019) 127–130.

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(1) Historical arguments cannot provide the kind of definite objectivity that is sometimes attributed to them. While lack of evidence, ambiguities, and the need for normative attribution necessarily water down that claim, historical arguments can still have an important rationalising effect on our interpretative practice due to their empirical foundation. This effect depends very much on how properly the historical enquiry is carried out.

(2) Nor are historical arguments by their very nature static. A closer look at legislative intentions reveals that they can operate in different ways. Distinctions can be drawn between intent as meaning and intent as purpose as well as between different subcategories of purposes such as low-level and high-level ones or specific and supplementary ones. While there is a presumption that legislators generally try to solve a problem in the most concrete and definite way, there are also cases where they prefer to choose the ends and leave it to the interpreters to find the required means. Hence, changed circumstances can lead to a dynamic re-evaluation without deviating from legislative intent. Instead, the appeal to historical purpose allows for an interpretation that aligns the legislature's initial plan with modern day conditions and provides the necessary standard to structure and rationalise interpretative change.

The Thuringian election list case not only presents the classic image of historical interpretation that I have taken as a starting point for my argument. It also exemplifies two classic mistakes: an all too easy across-the-board rejection on the one hand and an unjustified jumping to conclusions on the other. The majority rightly searched the legislative history for statements on how the constitutional provision was supposed to be understood.[146] This is what the presumption in favour of meaning requires. But they were unable to demonstrate that the constitutional legislators had in fact considered gender balanced election lists impermissible. That could have opened up the debate for a historical argument based on purpose: possibly, the constitutional legislators had erred and time had shown that their objective could not be reached without the new measure.[147] But these questions remained unresolved because both sides decided to have it the easy way.

Ultimately, what really matters is the quality of historical argumentation. In recent years, a slight turn in the debate has been noticeable: away from theoretical all-or-nothing controversies to more sophisticated

146 See above IV.3.a.
147 See above IV.4.a.

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accounts of how to operationalise arguments from legislative intent.[148] I have tried to show why we should welcome and further pursue this new trend. Attempts to disavow historical arguments for yielding static law are unwarranted and keep us away from doing the actual work: sorting out the historical context as best we can.

148 Sehl (n 5) 20. See Nourse (n 4) 76 (arguing that 'we must move beyond the great debates about abstract questions of legislative intent'); Wischmeyer (n 71) 964–966 (providing criteria for the practical operationalisation of legislative history); Frieling (n 5) 209 and 215 (trying to provide a method for distinguishing relevant from irrelevant statements of intent).

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Part 3: Objectivity and Constitutional Law

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§ 4 The Law between Objectivity and Power from the Perspective of Constitutional Adjudication

Peter M Huber[*]

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I. The Judiciary between the Rule of Law and Democracy

Talking about the law between objectivity and power requires some preliminary reflections on the role of law in the political order and the functions it has to fulfill. And it requires some remarks on the state function in which the law is, if not the only, by far the most important precept: the judiciary.

1. Historical overview

In Germany, courts have played a greater role in political life than in all other European countries. Its 'constitution', the ´constitution` of the Holy

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Roman Empire of the German Nation, like in England, has its oldest roots in the 13th century and was gradually shaped by fundamental laws since then.[1] But different from England German courts – due to the complex system of governance – gained power by applying and interpreting those fundamental laws. The two supreme Courts – the *Reichskammergericht* in Wetzlar (est. 1495)[2] and the *Reichshofrat* in Vienna (est. 1497) were supposed to settle conflicts between the Emperor and the princes, independent cities and other entities of the Empire, and they quite often did so successfully . imposing a first step of the freedom of religion in the aftermath of the Augsburg religious peace of 1555 or in banning the persecution of witches in the 17th century in Bamberg. Reflecting these experiences, Immanuel Kant stated in a tiny booklet published in 1797 that '*Right* [i.e. law] *must never be adapted to politics; rather politics must always be adapted to right* [i.e. law]'.[3]

This path was deepened during the 19th century and led to the establishment of the '*Rechtsstaat*', the specific German concept of a state governed by of the rule of law. In spite of the fact that the revolution of 1848/49 failed, the *Rechtsstaat* paved the way for a historic compromise between the bourgeoisie and the monarchy: upholding monarchical supremacy on the one side but binding the monarchical executive to laws that had to be passed by Parliament in which representatives of the bourgeoisie were assembled. Hence infringements of life, liberty, and property required a statutory empowerment, and it was up to the courts to make sure that state measures did not go beyond the respective statutory empowerments. This path has been followed until today. It has even been widened after World War II when courts and academics did their best to optimize this heritage embodied in the idea of the *Rechtsstaat*, which had – like all other legal values – been betrayed by the Nazi regime.

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1 See among others *Statutum in favorem principum* (1231), *Golden Bull* (1356), *Augsburg Religious Peace* (1555) and *Westphalian Peace Treaty* (1648).

2 First seated in Frankfurt, the *Reichskammergericht* was later moved several times (to Worms, Augsburg, Nürnberg, Regensburg, Speyer, Esslingen, and again Speyer) until at last it took up its seat in Wetzlar.

3 Immanuel Kant, 'Über ein vermeintliches Recht, aus Menschenliebe zu lügen' (1797) in Königlich preußische Akademie der Wissenschaften, *Akademieausgabe*, vol VIII (De Gruyter 1923) 423, 429: 'Das Recht muss nie der Politik, wohl aber die Politik jederzeit dem Recht angepasst werden'; translation by James W Ellington, see Immanuel Kant, *Grounding for the Metaphysics of Morals: with On a Supposed Right to Lie Because of Philanthropic Concerns* (James W Ellington tr, 3rd edn, Hackett Publishing 1993) 67.

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2. Two pillars of the Constitution

a. General observations

Today, reflections on law, courts and power in Germany must start with art. 20 par. 3 GG (*Grundgesetz*, i.e. Basic Law) which reads: '*Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.*'

According to the prevailing interpretation of this provision by the *Bundesverfassungsgericht* (Federal Constitutional Court of Germany) and legal doctrine art. 20 par. 3 GG serves as an acronym for the principle of '*Rechtsstaat*' as a whole.[4] The provision (primarily addressing the legislator) establishes the primacy of the Constitution as the supreme law of the land and codifies (with respect to the executive and the judiciary) what has been considered as the core of the principle of *Rechtsstaat* since the 19th century: the '*Gesetzmäßigkeit der Verwaltung*', a legal figure which comprises the principle of legality (*Vorrang des Gesetzes*) and the requirement of a statutory provision or reserve of the law (*Vorbehalt des Gesetzes*), meaning that laws – i.e. statutes – must be obeyed and that any infringement of freedom and property rights by an administrative act or other measures of the executive requires an empowerment by a parliamentary statute.

The answer to the question of how the law has to be located between objectivity and power depends on the institutions addressed. Regarding the legislator, the role of the law is ambivalent. On the one hand, the constitution and – as long as Germany's membership lasts – European Union law bind the legislator and therefore diminish its power. On the other hand the law – i.e. statutes – is first and foremost an emanation of power, in a democracy the power of the respective majority in Parliament. Statutes are by far the most important instrument by which Parliament and its majority try to steer the state and its institutions and which they can use to achieve their political objectives. If we look at the executive branch, i.e. government and administration, legal boundaries multiply, minimizing its scope of action. This is reflected, among others, in art. 80 par. 1 sentence 2 GG and underlines the German concept of law, especially public law, which is primarily understood as a tool with which the power of the (once monarchical) executive is contained and domesticized and

4 See Peter M Huber, 'Rechtsstaat' in Matthias Herdegen, Johannes Masing, Ralf Poscher and Klaus Ferdinand Gärditz (eds), *Handbuch des Verfassungsrechts* (CH Beck 2021), § 6 no 17.

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much less as an instrument which is primarily meant to legitimize all sorts of actions by the executive (as in the French doctrine). The idea of limiting power by law more or less also applies to the judiciary.

Nevertheless, the law has two functions also in the German legal order: On the one hand, under the perspective of concept of a state governed by the rule of law (*Rechtsstaat*), it is an instrument for the protection of freedom and equality rights laid down in the constitution from unlawful infringements, on the other hand, from a democratic perspective, law is the most important mechanism with which popular sovereignty and the will of the ruling majority (in Parliament) are put into effect. In this respect it serves to legitimate state measures. In this sense art. 20 par. 3 GG states with regard to the executive as well as the judiciary that both are bound by law and justice (*Gesetz und Recht*) entailing two constitutional dimensions: By binding the exercise of public authority to the rule of law in a formal way, the constitution wants to safeguard liberty and property of the people by the requirements of legality (*Vorrang des Gesetzes*) and a statutory provision (*Vorbehalt des Gesetzes*). At the same time, the principle of legality (*Vorrang des Gesetzes*) provides for democratic legitimation as it obliges government, administration and courts to follow the lines set out in the statutes which have been adopted by the ruling majority (in parliament). Both dimensions of law i.e. statutes – the limiting and the empowering one - have been reflected in the jurisprudence of the *Bundesverfassungsgericht* and provide the basis for the so-called *Wesentlichkeitsdoktrin*.[5]

This is supported by the way democratic legitimation is provided for under the *Grundgesetz* and how accountability of public authorities is secured. In general, the principles of democracy (art. 20 par. 1 and 2 GG) and popular sovereignty (art. 20 par. 2 sentence 1 GG) require that all measures public authorities are responsible for can be traced back to the political will of the people, not only in a mere theoretical but in particular also in a practical sense. Elections are therefore considered as procedures with a strong plebiscitary dimension with regard to persons and the content of politics, and the right to vote under art. 38 par. 1 sentence 1 GG does not only provide for an individual right to cast a ballot under the conditions mentioned in this provision (free, equal, direct, confidential, general) but also as a substantive right to political self-determination.[6]

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5 See in detail BVerfGE 150, 1, 96 ff (no 191 ff) – ZensusG 2011.

6 See BVerfGE 89, 155, 188 – Maastricht; 123, 267, 353 – Lisbon; 126, 286, 302 ff – Honeywell; 134, 366, 382 ff (no 23 ff) – prel req OMT; 142, 123, 203 (no 153) – OMT; 146, 216, 252 f (no 52 f) – temp inj CETA; 151, 202, 275 (no 92) – European Banking Union; BVerfG, Order of 25 April 2021 – 2 BvR 547/21, no 82 – ERatG.

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It is generally acknowledged that, in a technical sense, there are three major ways to provide for democratic legitimation of measures taken by state authorities: direct elections or appointments by representatives accountable to parliament which provide for democratic legitimation in a personal sense (*organisatorisch-personelle Legitimation*), statutes, regulations, and other instruments by which parliament and its majority can determine or influence the content of measures taken by government or administration (*sachlich-inhaltliche Legitimation*), and constitutional provisions such as art. 88 sentence 2 GG (*Bundesbank*, ECB) or art. 97 par. 1 GG (independence of judges) which are considered to provide a specific sort of institutional legitimation conferred by the *pouvoir constituant* (*institutionelle Legitimation*).[7] Other instruments such as reports to parliament, participation rights or judicial control may also play a role in this respect. In the outcome, it is not decisive through which channels democratic legitimation is provided for but that measures taken by public authorities can effectively be based on a sufficient level of democratic legitimation, i.e. accountability to parliament or the people itself. In its opinion of November 7th 2017 dealing with the democratic legitimation of the *Deutsche Bahn AG*, a privatized company completely owned by the Federal Republic of Germany, the *Bundesverfassungsgericht* has held:

> The relationship of accountability between the people and state authority is established by parliamentary elections, laws enacted by Parliament setting legal standards (…). The notion that 'state authority derives from the people' must be tangible to both the people and state organs, and it must take effect in practice. This requires that a sufficient measure of democratic legitimation – a certain level of democratic legitimation – be achieved (…). Only the Parliament elected by the people can confer democratic legitimation upon the organs and public officials (…) at all levels. In case officials and organs do not receive legitimation by way of direct elections, the democratic legitimacy of exercised state power generally requires that the appointment of public officials be attributable to the sovereign people and that they carry out their functions with sufficient functional-substantive legitimation. In terms of personnel, a sovereign decision is democratically legitimated if the appointment of the responsible public official can be attributed to the sovereign people in an uninterrupted chain of legitimation; functional-substantive legitimation is conferred by the fact that public officials are bound by the law (…).[8]

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7 See Ernst-Wolfgang Böckenförde, 'Demokratie als Verfassungsprinzip', in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol II (3rd ed, CF Müller 2004), § 24 no 9 ff.

8 BVerfGE 147, 50, 127 f (no 198) – DB AG and BaFin.

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b. The judiciary between rule of law and democracy

When it comes to the judiciary, however, the accents between the two constitutional dimensions shift. In principle, courts do not infringe individual rights but protect them. Though also courts may make mistakes and under certain conditions – when issuing an arrest or search warrant for example – also affect citizens' liberty or property,[9] they are regarded as the guardians of individual rights, not their menace. Art. 19 par. 4 GG, therefore, guarantees effective legal protection by courts for anyone who claims that his or her individual rights have been violated by public authorities.[10]

Against this background it is obviuous that art. 20 par. 3 GG when subjecting courts under the rule of law – the principle of legality and the requirement of a statutory provision – must aim at something else than the protection of individual rights and interests. The answer can be found in the principle of democracy as described above. It is the main emphasis of art. 20 par. 3 GG with regard to the judiciary. In this respect, binding courts to statutes approved by Parliament is by far the most important instrument to provide for democratic legitimation of decisions, sentences, temporary injunctions, etc. In this perspective, the law, i.e. the statute, is the most important instrument by which popular sovereignty is exercised with regard to independent courts and by which political preferences of the ruling majority (in parliament) can be enacted.

II. Jurisprudence and Power

1. General remarks

This concept would be smashless if judges were – as again *Montesquieu* put it – only *'la bouche qui prononce les paroles de la loi*'.[11] If this were the case court decisions applying the law would lack any subjective dimension,

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9 Peter M Huber, 'Art. 19' in Hermann von Mangoldt, Friedrich Klein and Christian Starck (eds), *Grundgesetz. Kommentar*, vol. I (7th ed, CH Beck 2018), no 440 ff; Andreas Voßkuhle, *Rechtsschutz gegen den Richter: Zur Integration der Dritten Gewalt in das verfassungsrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 Abs. 4 GG* (CH Beck 1993) 1 ff, 255 ff.

10 The same guarantee derives from art 2 par 1 read in conjunction with art 20 par 3 GG if the infringement is caused by fellow citizens.

11 Montesquieu (n 1). On the context and reception of this statement see again Ogorek (n 1), 288 f); Guttner (n 1), 213 f.

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they would merely be an automatic application of decisions taken by others. However, this has never been the idea of judges neither in the common nor in the civil law system. Scholars have always been aware of the fact that every language entails etymological uncertainties and ambiguities, that it is impossible to foresee the variety of life, and that Parliament would be overstrained should we expect that it can settle any conflict that may arise in a society in which millions of people live together in advance. *Hans Kelsen* has therefore rightly identified the work of judges as a sort of concretization of the applicable standards of law in a specific case and that this concretization doesn't differ in a substantive way from what the legislator or the executive branch do as their decisions – statutes, administrative acts – can equally be regarded as a (political) concretization of the legal standards applicable to the respective decision.[12]

Judgments, sentences, and temporary injunctions, therefore, are an exercise of public authority and (individual) power. This is why the judiciary is regarded as the third branch of powers under art. 20 par. 2 sentence 2 GG and it is also the reason why art. 20 par. 1 and 2 sentence 1 GG requires democratic legitimation also for all measures taken by courts. These findings are even worsened if one takes into consideration that – as in a lot of legal systems influenced by German doctrine and especially in Germany – according to the established case law of the *Bundesverfassungsgericht* and ordinary courts as well as to the prevailing opinion among scholars the *Grundgesetz* is considered a 'living instrument' and statutes are interpreted mainly with regard to there objective in a timeless manner. This means that the point of reference is less what the mothers and fathers of the constitution or the drafters of a statute had in mind when drafting a rule, but what the solution they tried to achieve for the circumstances under which they lived would require under the present social, political and economic conditions. Needless to say, this entails a considerable amount of discretion for judges who have to apply the same rule decades or even centuries later.

2. *The* Bundesverfassungsgericht *and Power*

What has been said about courts in general also applies to the *Bundesverfassungsgericht* in particular. Though it is a constitutional organ on the same

12 Hans Kelsen, *Reine Rechtslehre* (first published 1934, Jestaedt 2008) 101 ff; Hans Kelsen, *Reine Rechtslehre* (2nd ed 1960, Jestaedt 2017), 423 ff, 597 ff.

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level as the President, Parliament, and Government, it is first and foremost a court (art. 92 GG, § 1 par. 1 BVerfGG) bound by the rule of law and applying the rules and standards common to independent courts all over the Western world. Nevertheless, there are some peculiarities to be observed when it comes to the relationship between law and power concerning the *Bundesverfassungsgericht*:

The law which the *Bundesverfassungsgericht* applies and from which the standards of its jurisprudence derive is, in principle, only the Constitution itself, the *Grundgesetz*. It comprises about 150 articles that provide for the foundation of the entire legal system including the application of European and international law in Germany. Its provisions – with the exception of some recent amendments – fit more or less into the "requirements" in the *Napoleonic* sense: they are short and vague ('*courtes et obscures*').[13] They leave much room for divergent understandings and different methods of interpretation and concretization with the effect that the *Bundesverfassungsgericht* is sometimes perceived rather as a substitute legislator than a court. Three more recent examples out of several hundred in the jurisprudence of the Court may illustrate that:[14]

– On July 25th 2012 the *Bundesverfassungsgericht* rendered its second judgment on the Federal Statute on General Elections (*Bundeswahlgesetz* – BWG) within five years[15] declaring § 6 par. 5 BWG, which allowed successful candidates in a constituency to keep their seat in the *Bundestag* no matter what the result of their political party under the proportional vote was, unconstitutional if one (or several) political parties would gain more than 15 seats beyond their respective entitlement under proportional representation. The Court affirmed that the voting system in Germany is a system of proportional representation, which would be spoiled if additional seats won according to a majority vote were above the number of 15 out of 598. Thus, it differed from a decision from April 10th 1997 in which four justices had indicated that adding a number of about 5 percent of the seats beyond proportional representation was tolerable.[16] As the formation of a parliamentary group requires

13 The complete quotation reads: 'Il faut qu'une constitution soit courte et obscure.'

14 See also Peter M Huber, *Grundrechtsschutz durch Organisation und Verfahren als Kompetenzproblem in der Gewaltenteilung und im Bundesstaat* (VVF 1988), dealing with several judgments that were heavily discussed at the time.

15 BVerfGE 131, 316 ff – Überhangmandate III. The preceeding decision mentioned (issued in 2008) was BVerfGE 121, 266 ff – Landeslisten.

16 BVerfGE 95, 335, 365 – Überhangmandate II.

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about 5 percent of Members of Parliament, which practically means about 30 seats, the Court decided in 2012 that adding at most 50% of such an additional parliamentary group would leave the electoral system as such untouched. It admitted however that there was no compelling legal argument for this result but regarded its reasoning at least plausible.[17]

– In a judgment of March 5th 2015, the Second Senate derived the requirement to provide an ´adequate` alimentation for judges and public prosecutors is subject to a limited judicial review of the relevant statutory provisions from the constitutional guarantee of the civil service enshrined in art. 33 par. 5 GG. This judicial review comprises a control whether the decisions of the legislator are based on evidently inadequate or inappropriate considerations and entails the necessity of an overall assessment of various criteria taking into account the specific groups that may be compared.[18] To conduct this overall assessment, parameters should be used that are derived from the principle of alimentation and that are economically reasonable to determine a framework with specific numeric values to achieve an alimentation structure and a level of alimentation that are, in principle, constitutional. The Court then found five suitable parameters based on its case-law concerning the principle of alimentation which have indicative value in determining the level of alimentation required under the Constitution: (1) a clear discrepancy between the development of remuneration of judges and public prosecutors on the one hand and the development of collectively agreed wages in the civil service on the other hand, (2) the money wage index as well as (3) the consumer price index; (4) furthermore an internal comparison of remuneration as well as (5) a cross-comparison with remuneration paid by the Federation or, respectively, by other *Länder*. If a majority of these parameters are fulfilled, the alimentation is presumed to be below the constitutional requirements (1st level of review). This presumption may be further corroborated or rejected by taking into account further alimentation-related criteria in order to strike an overall balance (2nd level of review). On a third step, an assessment is needed as to whether this deficiency can be justified under the Constitution by way of exception. The principle that the alimentation must be appropriate to the respective public function is part of the

17 BVerfGE 131, 316, 370 – Überhangmandate III.
18 BVerfGE 139, 64 ff – R-Besoldung I.

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institutional guarantee of a professional civil service enshrined in art. 33 par. 5 GG. To the extent that this principle conflicts with other constitutional values or institutions, for example, the prohibition on taking on new debt in art. 109 par. 3 first sentence GG, it must be reconciled with them by striking a careful balance in accordance with the principle of proportionality (*praktische Konkordanz*). In addition, when setting the level of remuneration, the legislature must adhere to certain procedural requirements and give sufficient reasons.

– In its decision of May 19th 2020 on the foreign surveillance of the Federal Intelligence Service (*Bundesnachrichtendienst*)[19] the First Senate held that foreign surveillance in principle does not violate fundamental rights of foreigners under the German constitution. However legal protection requires an effective control – not by courts but by an oversight body such as a parliamentary or governmental commission. From the freedom of telecommunication guaranteed in art. 13 GG and the principle of proportionality the Court derived that the oversight body must be institutionally independent which includes a separate budget, an independent personnel management and procedural autonomy. It must be equipped with the personnel and resources required for an effective accomplishment of its tasks and have all empowerments necessary for an effective oversight over the Federal Intelligence Service. The Court even required that this oversight would not be obstructed by the third-party rule.

Though all this reasoning may sound plausible, in some respect it rather resembles a legislative setting than a mere interpretation of constitutional provisions.

III. Objectivity and Dogmatics

Against this backdrop, it becomes clear that there is a tension between the requirements of the principle of democracy and popular sovereignty on the one hand and the practical capacity of the legislator to bind and steer the judiciary on the other. Though some sort of discretion for judges is inevitable, especially if it comes to procedural questions, it is – under the perspective of the principles of democracy and the rule of law – rather a

19 BVerfGE 154, 152 ff – BND-Auslandsaufklärung.

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necessary evil than a constitutional value. The constitution aims at a situation in which people can rely on the objectivity of the judiciary. Discretion and space for (individual) political (micro-)decisions are detrimental to the predictability of court decisions, the principle of legal certainty, the reliability of the respective jurisprudence, and to the law itself. It therefore must be contained as far as possible.

1. *Dogmatics as a tool to reduce judicial power*

One of the functions of law therefore is to reduce the scope of maneuver of judges, their discretion, and the risk that they cross borders into the realm of mere politics. The most important device with which overreaching judicial power can be avoided is dogmatics.[20]

Dogmatics forces judges to interpret the law in a methodical way with traditional tools such as wording, context, telos, history and in conformity with the constitution (*verfassungskonforme Auslegung*) and the law of the European Union (*unionsrechtskonforme Auslegung*) and to observe the interpretation that higher courts have delivered.

Dogmatics, at least in a civil law system like the German, thus provides for predictability, reasonableness, and coherence of the jurisprudence and thus reduces the impact of (individual) preferences, political convictions, and beliefs that a judge may have. Thereby, it secures a certain extent of objectivity. Dogmatics helps to maintain a coherent legal order and to avoid contradictions within it. At the same time, it reduces the risk of (arbitrary) discretion of judges.[21]

Thirdly, in the way it is applied at least in legal orders influenced by the German legal thinking, dogmatics is an established and to a large extent reliable technique by which judgments, sentences, etc. can be bound to the will of the legislator and the will of the constitution. It thus provides for the democratic legitimation of the jurisprudence (*sachlich-inhaltliche Legitimation*)[22] – a circumstance which some common law lawyers who

20 See Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Athenäum Fischer 1970) 116 ff; Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd ed, Springer 1991), 3 ff; Jannis Lennartz, *Dogmatik als Methode* (Mohr Siebeck 2017).

21 See Peter M. Huber, Rechtsprechung und Rechtswissenschaft, JZ 2022,1, 4 f.

22 See Andreas Voßkuhle and Gernot Sydow, 'Die demokratische Legitimation des Richters' [2002] JZ 673, 678 ff; Axel Tschentscher, *Demokratische Legitimation der dritten Gewalt* (Mohr Siebeck 2006), 193; Guttner (n 1), 302 ff.

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tend to despise dogmatics and to make fun of it haven't thought about seriously enough.

2. *Constitutional adjudication, special techniques, and case law*

As has been shown above, democratic legitimation of the jurisprudence of the *Bundesverfassungsgericht* via the content of the constitution and the statutes the Court has to apply (*sachlich-inhaltliche Legitimation*) is evidently lower compared with ordinary courts. The interpretation of the constitution is a quite complex challenge that normally goes far beyond the task of applying a statute. However its power is far reaching. Decisions of the *Bundesverfassungsgericht* to a large extent rank as federal statutes (§ 31 par. 2 BVerfGG) and are binding for all German authorities (§ 31 par. 1 BVerfGG).

Nevertheless, dogmatics, i.e. constitutional doctrine, and the Statute on the *Bundesverfassungsgericht* (*Bundesverfassungsgerichtsgesetz* – BVerfGG) also provide for a certain degree of predictability. Traditional instruments of interpretation such as wording, context, telos, and history also apply to the interpretation of constitutional law, and special techniques such as the coherence of the constitution (*Einheit der Verfassung*), the optimization of constitutional values, constitutional comparison, international and European standards, the idea of a due process of law, rules like '*in dubio pro libertate*', general principles of the legal order, proportionality as a remedy for conflicting constitutional principles (*praktische Konkordanz*) etc. have been developed by the Court as well as the academia to provide for more objectivity in constitutional adjudication. Though the *Bundesverfassungsgericht* has never stuck to only one theory or understanding of the constitution it has acknowledged different concepts that can be found in its jurisprudence over the decades. This especially applies to fundamental rights which are first and foremost considered guarantees against infringements by public authorities but also as values, the basis of differentiated duties to protect, entitlements to subsidies, participation, etc.

From a procedural point of view, criteria have been developed to demarcate the competence of the *Bundesverfassungsgericht* from the responsibility of ordinary courts or the Court of Justice of the European Union. The *Bundesverfassungsgericht* refrains from adjudicating civil, criminal, or administrative law but limits its control to the standard of arbitrariness or

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a violation of specific constitutional values (*Heck'sche Formel*).[23] The same applies with regard to the European Court of Justices which according to art. 19 par. 1 sentence 2 TEU is first and foremost responsible for interpreting Union Law (however not in an arbitrary way).[24]

Finally, objectivity is also provided for by the established case law of the Court which prevents opinions of individual justices from becoming dominant at least in a short period of time.

Though there is no '*stare decisis* doctrine' in Germany's civil law system, the 158 (official) volumes in which the jurisprudence of the *Bundesverfassungsgericht* has been published since its establishment in 1951 provide a legal framework that reduces the Court's enormously wide scope of discretion and – together with dogmatic tools as mentioned above – helps to prevent it from crossing the line to 'mere' politics. To a certain extent, the decisions of the Court are binding for itself as a plenary decision of both Senates is required if one Senate wants to differ from the interpretation of a constitutional provision by the other (§ 16 par. 1 BVerfGG).

Moreover, the established case law of the Court also has a guiding effect on other cases. Though the Court is free to change its opinion – and the prescriptions in the statute on the *Bundesverfassungsgericht* dealing with its composition show that the legislator may even want continuous adjustments – the members of the Court show great reluctance to give up an established interpretation, a dogmatic figure or institution their predecessors have developed without good reason. As a rule, jurisprudence that has been established once is upheld unless arguments for a change outweigh. If a justice can refer to a prior decision of the Court or – even more important – the proper Senate, this is an argument in itself and a sort of presumption that the argument is right and doesn't need a broader debate. On the other hand, if justices want to change an existing line of jurisprudence they have to put forward strong arguments to convince their colleagues and have to prepare them in a differentiated and deliberated way.[25] In this respect, court deliberations are conservative under a struc-

23 Established jurisprudence since BVerfGE 18, 85, 92 f – Spezifisches Verfassungsrecht; see Klaus Schlaich and Stefan Korioth, *Das Bundesverfassungsgericht* (11th ed, CH Beck 2018), no 280 ff.

24 BVerfGE 154, 17, 91 ff (no 112 f) – PSPP.

25 On the *Bundesverfassungsgerichts's* culture of deliberation see Gertrude Lübbe-Wolff, *Wie funktioniert das Bundesverfassungsgericht?* (Universitätsverlag Osnabrück 2015), 23 ff.

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tural point of view.[26] This can to some extent be regarded as a little equivalent to the *stare decisis* doctrine in common law. Though this practice of legal reasoning has not been reflected very thoroughly in the case law of the *Bundesverfassungsgericht* – different from the *Bundesgerichtshof*, the *Bundesarbeitsgericht*, the *Bundessozialgericht*, and the *Bundesfinanzhof*[27] – this provides for some objectivity and effectively limits the scope of discretion the Court has when interpreting the constitution. In addition, it helps to protect legitimate expectations of the parties, politics, and the public.

IV. The Bundesverfassungsgericht *as a Constitutional Organ*

It has been cleared already in the 1950s that the *Bundesverfassungsgericht* is not only a Federal court but also a constitutional organ ranking on the same level as the Federal President, *Bundestag* and *Bundesrat*, and the Federal Government.[28] As such it disposes of considerable power. The list of procedures in art. 93 GG proves that almost every political question can be shaped as a constitutional issue and thus become a case in Karlsruhe. History shows that from the dissolution of the *Bundestag*[29] and the deployment of German troops abroad,[30] the use of nuclear energy[31] to details of European integration[32] there is scarcely any topic that does not fall under the jurisdiction of the *Bundesverfassungsgericht*. Moreover, the consti-

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26 In this vein Martin Kriele, *Theorie der Rechtsgewinnung* (2nd ed, Duncker & Humblot 1976), 258 ff, 330 f.

27 BAGE 12, 278, 284; BSGE 40, 292, 295 f; BFHE 78, 315, 320; BGHZ 85, 64, 66. For an analysis of these and other decisions with regard to the problem of *stare decisis* in the German legal system see Guttner (n 1), 21 ff.

28 Bundesverfassungsgericht, 'Denkschrift des Bundesverfassungsgerichts vom 27. Juni 1952' (1957) 6 JöR 144 ff (so-called *Statusdenkschrift*).

29 BVerfGE 62, 1 ff – Vertrauensfrage I; 114, 121 ff – Vertrauensfrage II.

30 BVerfGE 89, 38 ff – Somalia; 90, 286 ff – Out-of-area-Einsätze; 104, 151 ff – NATO-Konzept; 108, 34 ff – Bewaffnete Bundeswehreinsätze; 117, 359 ff – Tornadoeinsatz Afghanistan; 118, 244 ff – Afghanistan-Einsatz; 121, 135 ff – Luftraumüberwachung Türkei; 140, 160 ff – Evakuierung aus Libyen.

31 BVerfGE 47, 146 ff – Schneller Brüter; 49, 89 ff – Kalkar I; 53, 30 ff – Mülheim-Kärlich; 81, 310 ff – Kalkar II; 104, 249 ff – Biblis A.

32 BVerfGE 37, 271 ff – Solange I; 73, 339 ff – Solange II; 89, 155 ff – Maastricht; 97, 350 ff – Euro; 102, 147 ff – Bananenmarktordnung; 113, 273 ff – Europäischer Haftbefehl; 123, 267 ff – Lisbon; 126, 286 ff – Honeywell; 129, 124 ff – EFS; 132, 195 ff – temp inj ESM; 134, 366 ff – prel req OMT; 135, 317 ff – ESM; 140, 317 ff – Identitätskontrolle; 142, 123 ff – OMT; 146, 216 ff – prel req PSPP; 151, 202 ff – European Banking Union; BVerfGE 154, 17 ff – PSPP.

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tutionalization of the legal order since the 1950s[33] has made it possible to construe almost every issue under the point of view of the constitution.

The lack of strong democratic legitimation provided by the content of the constitution therefore has to be compensated via other tools: the election of the justices by Parliament with a 2/3 majority for a single period of 12 years according to § 6 par. 1 sentence 2, § 7 BVerfGG (*personelle Legitimation*) and by the expressive role the *Grundgesetz* itself attributes to the *Bundesverfassungsgericht* as one of five constitutional organs (*institutionelle Legitimation*).

70 years of state practice show that despite inevitable differences and mistakes the *Bundesverfassungsgericht* has found a convincing balance between the necessary obedience to the law, i.e. the constitution, a partially self-imposed objectivity, and a responsible exercise of its power. It has thus promoted individual justice, the stability of the constitutional order, and the welfare of the nation.

33 Huber (n 5), § 6 no 12 ff.

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§ 5 Conceptual and Jurisprudential Foundations of the Debate on Interpretive Methodology in Constitutional Law: An Argument for More Analytical Rigor

Daniel Wolff

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I. Introduction

Methodological questions are questions of power ('Methodenfragen sind Machtfragen').[1] Following this insight, the fundamental debates about methodology in American constitutional law are not surprising. A great variety of different methodological camps compete with each other, but the core divide is between originalists and living constitutionalists.[2] Originalists, who are particularly concerned with the notion of objectivity,[3] argue that the written Constitution must be interpreted according to the meaning that its text conveyed to its drafters and ratifiers. In contrast, living constitutionalists deny that an originalist approach to constitutional interpretation is practicable or even possible in many cases. They maintain that the Constitution must adapt to changing times and to the changing values of the American people.

Until recently, this debate has unfolded with little attention to conceptual and jurisprudential concepts.[4] Especially the distinction between positivist and alternative accounts of law like those of natural law theory has been largely disregarded.[5] Neither proponents of originalism nor of the many varieties of living constitutionalism always articulate and defend their jurisprudential assumptions.[6] The pretension generally present on both sides of the debate is that the positions are commonsensical and without need for jurisprudential analysis or foundations.[7] Only in recent years have scholars begun to express their invocation of jurisprudence.[8]

The resulting lack of the debate's conceptual and jurisprudential rigor has led to a situation where originalists and living constitutionalists are regularly talking past each other. To clear up this indeterminacy and in

1 Bernd Rüthers, 'Wer schafft Recht? Methodenfragen als Macht- und Verfassungsfragen' [2003] JZ 995, 996.
2 It is important to note that there is not just disagreement among the participants of the debate. See Matthew D Adler, 'Interpretive Contestation and Legal Correctness' (2012) 53 Wm & Mary L Rev 1115, 1122–1123.
3 See Robert W Bennett, 'Objectivity in Constitutional Law' (1984) 132 U Pa L Rev 445.
4 See also Christopher R Green, 'Constitutional Truthmakers' (2018) 32 Notre Dame JL Ethics & Pub Pol'y 497, 498.
5 See André LeDuc, 'Paradoxes of Positivism and Pragmatism in the Debate about Originalism' (2016) 42 Ohio NU L Rev 613, 615.
6 See André LeDuc, 'The Ontological Foundations of the Debate over Originalism' (2015) 7 Wash U Jurisprudence Rev 263, 265.
7 See LeDuc (n 5) 621.
8 ibid 655.

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order to make a more fruitful debate possible, this paper explores the theoretical background of the great methodological debate and makes three central claims:

First, labeling the debate as a dispute over constitutional interpretation is inaccurate. I argue that the great debate is, in fact, not a controversy about constitutional interpretation, but rather about what American constitutional law consists of. I will try to demonstrate this by distinguishing between theories of law, theories of interpretation, and theories of adjudication.

Second, one of the most dominant jurisprudential categorizations of originalism by non-originalists (living constitutionalists) does not stand up to scrutiny, namely the claim that originalism is a combination of a positivist conception of constitutional law and a formalist theory of adjudication.[9] In doing this, I will try to clarify what kind of theories legal positivism and formalism are, and what their relationship is. The questions to be answered are: does formalism follow from legal positivism (or vice versa), or does formalism – unlike legal realism, which is essentially predicated on a positivist conception of law – have no conceptual connection with legal positivism? I will argue that legal positivism is a theory of law which is linked to a formalistic theory of legal reasoning. Yet, it is incompatible with formalism as a theory of adjudication, which is itself indefensible. Thus, my claim is not only that there is no necessary or close connection between positivism and formalism. Instead, I will defend the proposition that the two theories are incompatible with each other.

Third, I will demonstrate which theories of constitutional law, constitutional reasoning, and constitutional adjudication originalism and living constitutionalism actually put forward. Regarding originalism, I will show that the modern mainstream of originalism does have a shared jurisprudential foundation in a positivist conception of the law. Furthermore, originalism is first and foremost a positivist theory of American constitutional law, and not – as 'old' originalism – primarily a theory of constitutional adjudication based on formalism. From modern originalism's positivist

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9 See, eg, George Kannar, 'The Constitutional Catechism of Antonin Scalia' (1990) 99 Yale LJ 1297, 1307 & 1339 who speaks of Scalia's 'positivist formalism' and explains that 'Scalia's approach is not only positivist and textualist, but also formalistic, in many respects a throwback to more "mechanical" days', see also Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History Originalism* (The Johns Hopkins Series in Constitutional Thought, The Johns Hopkins University Press 2007) 168.

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conception of constitutional law follows a theory of legal reasoning, but not a fully developed theory of adjudication.

Regarding living constitutionalism, I will claim that theories of living constitutionalism are primarily theories of constitutional adjudication. While pointing out their implicit theories of law and legal reasoning, I will demonstrate that compared to originalism, non-originalist theories do not offer different theories of constitutional epistemology, but different accounts of American constitutional law. The fact that originalism and living constitutionalism do not share the same account of American constitutional law is in my view a decisive factor for the fruitlessness of the current methodological debate in the United States.

Before I can lay out my argument in more detail, I need to make three preliminary remarks, concerning, first, the reasons why we should care about the theoretical background of the great methodological debate, second, the assumptions this paper is based on, and, third, the central claims of today's originalism.

1. Preliminary no 1: why we should care

Before turning to a detailed discussion of the issues just mentioned, it makes sense to point out why it is important to unfold the theoretical structure and the jurisprudential assumptions of the great debate and especially of originalism. Can we not simply dismiss originalism as a legal instrument to promote conservative causes, as scholars like Reva Siegel, Robert Post, and others have done?[10] I do not agree with those liberal critics of originalism on this point and I think that to ask and answer this question is important because of three reasons:[11]

For starters, the attraction of originalism persists. The idea of the founding as a kind of constitutional 'Big Bang' that permanently established the framework of the American constitutional universe exercises a strong hold on the American imagination: 'A widely shared cultural premise of this sort simply cannot be ignored even when it is thought to be inappropriate.'[12]

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10 See Robert Post and Reva Siegel, 'Originalism as a Political Practice: The Right's Living Constitution' (2006) 75 Fordham L Rev 545.

11 All three points were previously made by James A Gardner, 'Positivist Foundations of Originalism: An Account and Critique' (1991) 71 BU L Rev 1, 4–6.

12 ibid 4.

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Furthermore, American courts continue to speak the language of originalism.[13] The US Supreme Court regularly engages in originalist reasoning and declares its unwillingness or lack of authority to substitute its judgment for that of the founders. Thus, the use of originalist vocabulary is simply obligatory for participants in the American legal system.[14]

Finally, criticizing originalism on its own terms may provide at least a limited alternative to the uncertainty left in the wake of fundamental hermeneutic critiques of legal interpretation by legal sceptics. Critics from this perspective typically argue that texts lack any fixed, objective meaning and that judges create the meaning of the Constitution each time they seek to interpret the text.[15] In this paper, it must suffice to note that it is not senseless to speak of norms with a fixed meaning (at least for core cases) and that serious philosophical and linguistic theories account for this observation.[16] A critique of originalism that does not also challenge the foundations of so many other important contemporary beliefs about the world may thus hold some appeal.[17]

2. *Preliminary no 2: some assumptions*

In this paper, I will not deal with other assumptions of the debate. I shall, eg, assume that a meaningful reconstruction of the original public meaning of the Constitution's text is possible, in just the ways that originalists suppose.[18] Further, I embrace the view that laws do not only function as the basis for predicting the decisions of courts or the actions of other legal officials, but as accepted legal standards of behaviour and that language is a

13 The situation is very different in other legal systems. The notion that the meaning of a constitution is 'fixed' at some point in the past and authoritative in present cases is rejected in most leading jurisdictions around the world. See Jamal Greene, 'On the Origins of Originalism' (2009) 88 Tex L Rev 1, 3.

14 See Gardner (n 11) 4–5.

15 For those who are pessimistic about the recoverability of the original meaning of the constitutional text, originalism is not necessarily flawed, but necessarily irrelevant to contemporary constitutional practice. See Keith E Whittington, 'Originalism: A Critical Introduction' (2013) 82 Fordham L Rev 375, 395.

16 See, eg, Frederick Schauer, 'Formalism' (1988) 97 Yale LJ 509, 520–525.

17 See Gardner (n 11) 5–6.

18 cf ibid 4.

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significant factor in channelling behaviour through law. Thus, I reject linguistic nihilism[19] as well as 'rule-scepticism'[20] in their absolute variations.

3. *Preliminary no 3: a brief summary of today's originalism*

To be able to discuss originalism in a meaningful way, one needs to lay out a representative description of its claims. This is easier said than done, as originalism is commonly understood not as a single thesis but as a large family of theories.[21] In the following, I will try to point out the central components of originalist thought which most modern-day originalists share.

Originalism's core idea is that the discoverable public meaning of the US Constitution at the time of its initial adoption is authoritative for purposes of later constitutional interpretation.[22] The two crucial components of originalism are the claims that the constitutional meaning was fixed at the time of the textual adoption ('fixation thesis') and that the discoverable historical meaning of the constitutional text has legal significance and is authoritative, at least in most circumstances. Lawrence Solum has called the second claim the 'contribution thesis' – the idea that the linguistic meaning of the Constitution constrains the content of constitutional doctrine.[23]

While this 'new' originalism encompasses many features of the old version, there are also significant differences[24]: first, the terms of the debate

19 See Frederick Schauer, 'Easy Cases' (1985) 58 S Cal L Rev 399, 422–423.

20 See HLA Hart, *The Concept of Law* (3rd edn Oxford University Press 2012) 136 ('Yet "rule-scepticism", or the claim that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them, can make a powerful appeal to a lawyer's candour. Stated in an unqualified general form […] it is indeed quite incoherent; for the assertion that there are decisions of courts cannot consistently be combined with the denial that there are any rules at all. […] In a community of people who understood the notions of a decision and a prediction of a decision, but not the notion of a rule, the idea of an authoritative decision would be lacking and with it the idea of a court.').

21 See Mitchell N Berman, 'Originalism is Bunk' (2009) 84 NYU L Rev 1, 16.

22 See Whittington (n 15) 377.

23 See Lawrence B Solum, 'District of Columbia v. Heller and Originalism' (2009) 103 Nw U L Rev 923, 954; see also Whittington (n 15) 378.

24 See Whittington (n 15) 409.

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have shifted from talking about 'original intent' to 'original meaning'.[25] Second, old school originalists, like Judge Robert Bork,[26] argued for a narrow reading of constitutional provisions or 'strict construction', as they were strongly committed to judicial restraint,[27] while new originalism emphasizes the value of fidelity to the constitutional text as its driving principle. Its interpretive goal is, therefore, not to restrict the text to the most manageable, easily applied, or majority-favouring rules. Rather, the goal is to faithfully reproduce what the constitutional text requires.[28] Thus, there is agreement today on the separation between the interpretive approach (originalism) and judicial posture (judicial restraint).[29] Third, new originalism makes use of a variety of constitutional arguments, not just of only one. Nonetheless, also for today's originalists, the original meaning is the decisive interpretive criterion that cannot be overridden by other considerations when seeking to interpret the Constitution.[30]

II. Conceptual Clarifications: Theories of Law, Theories of Interpretation, and Theories of Adjudication

Beginning in 1997 with a paper by Gary Lawson[31] and continued by two illuminating articles by Mitchell Berman and Kevin Toh in 2013,[32] participants of the originalism vs living constitutionalism debate have laid the foundations for a more differentiated analysis by distinguishing between three different sets of theories, namely theories of constitutional

25 See ibid 378. The most influential author for this development was the former Justice of the US Supreme Court Antonin Scalia; see for an account of the development of originalist thought Steven G Calabresi, *Originalism: A Quarter Century of Debate* (Regnery Publishing 2007).

26 See Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (Touchstone Books 1990).

27 See Mitchell N Berman and Kevin Toh, 'On What Distinguishes New Originalism from Old: A Jurisprudential Take' (2013) 82 Fordham L Rev 545, 556.

28 See Whittington (n 15) 386.

29 See ibid 391–394; but see Berman (n 21) 14.

30 See Whittington (n 15) 407.

31 See Gary Lawson, 'On Reading Recipes ... and Constitutions' (1997) 85 Geo LJ 1823.

32 Berman and Toh (n 27); Mitchell N Berman and Kevin Toh, 'Pluralistic Non-Originalism and the Combinability Problem' (2013) 91 Tex L Rev 1739.

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law, theories of constitutional interpretation (or constitutional reasoning), and theories of constitutional adjudication.[33]

The common starting point of Lawson, Berman, and Toh is the insight that labelling originalism and living constitutionalism as conflicting theories of interpretation is inaccurate. A theory of constitutional interpretation may be thought of as a theory of how to discover constitutional law, or as a theory of how judges should decide constitutional cases based on their findings of what the law consists of.[34] Articulating this insight first, Lawson subdivided the broad and undifferentiated terrain of theories of constitutional interpretation into (descriptive) theories of interpretation and (normative) theories of adjudication. For him, '[t]heories of interpretation concern the meaning of the Constitution', whereas '[t]heories of adjudication concern the manner in which decision-makers (paradigmatically public officials, such as judges) resolve constitutional disputes.'[35] Thus, theories of interpretation allow us to determine what the Constitution means, while theories of adjudication enable us to determine what role the Constitution's meaning should play in a particular legal decision made by an adjudicator.[36]

This conceptional distinction between theories of interpretation and theories of adjudication helps to explain why the great debate about originalism and living constitutionalism has been rather underproductive, as it is often unclear whether the respective participants are talking about interpretation or adjudication.[37] A prominent figure who has contributed to this confusion is Justice Antonin Scalia, who wrote two bestselling books that have the word 'interpretation' in their respective titles,[38] although his writings were predominantly concerned with developing a theory of adjudication. His aim was to sketch out an adjudicative theory about how to decide cases in the context of a specific legal system and on the basis

33 Scott Shapiro makes a similar distinction on the jurisprudential level. He proposes to distinguish 'legal reasoning' from 'judicial decision making'. See Scott J Shapiro, *Legality* (The Belknap Press of Harvard University Press 2011) 248.

34 See Berman and Toh (n 32) 1748.

35 Lawson (n 31) 1823; see also Gary Lawson, 'Did Justice Scalia Have a Theory of Interpretation?' (2017) 92 Notre Dame L Rev 2143, 2143–2149.

36 See Lawson (n 31) 1824; see also Berman and Toh (n 27) 546–547.

37 See Lawson (n 35) 2145.

38 Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in Amy Gutmann (ed), *A Matter of Interpretation*, (Princeton University Press 1997); Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (American Casebook Series, West Academic Publishing 2012).

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of a certain conception of representative government and the role of the judiciary in a democracy.[39]

Berman and Toh drew one more theoretical distinction, assuming that constitutional interpretation — the activity that Lawson had already correctly distinguished from the broader activity of constitutional adjudication — aims at the Constitution's legal meaning ('what the law is'). Furthermore, they refined Lawson's distinction by shifting the focus from the question of how we should go about discovering the law, and therefore from theories of legal reasoning to what the law consists of, namely to theories of constitutional law. They convincingly argue for this shift of the debate by looking closely to elaborating what it means to engage in legal interpretation:

> Suppose (…) constitutional interpretation is a theory regarding how (…) persons (…) should go about discovering what the constitutional law is (…). (…) [S]uch a theory would aim to give guidance regarding how to conduct a particular inquiry. It would be a theory of legal or constitutional epistemology. Essential to appreciate is that such a theory must presuppose an account of what it is that we are trying to discover, which is to say that it must presuppose an account of what the law is or consists of.[40]

Thus, they claimed that a theory of constitutional interpretation must presuppose a theory of the law, ie, of the ultimate facts, principles, and criteria that determine or constitute American constitutional law. In fact, this presupposed account of fundamental legal principles or facts, they correctly claimed, is much more important than the respective epistemological theory.[41] To illustrate this point they give the example of an originalist theory of the law, according to which the constitutional law is fully determined by what a hypothetical reasonable person at the time of ratification of a provision would have understood the authors to have said. The corresponding originalist theory of legal reasoning would prescribe how decision-makers should go about determining what such a hypothetical reasonable person would have understood the authors to have said.[42] Against this backdrop, Berman and Toh, but also other authors

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39 See Lawson (n 35) 2158–2162. On the living constitutionalist side, the same criticism applies to Philip Bobbitt's important book *Constitutional Interpretation* (Blackwell Publishers 1991) which is predominantly concerned with developing and defending a theory of constitutional adjudication.

40 Berman and Toh (n 27) 550.

41 See also Green (n 4) 509 ('What the Constitution is comes first. Those who get that wrong are quite unlikely to get much else right.').

42 Berman and Toh (n 27) 551.

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like Stephen Sachs, persuasively argue that most of the disputes over interpretation are, in fact, about the sources and the content of American constitutional law.[43]

To summarize: the issue of what judges should do in the course of resolving constitutional disputes (theory of constitutional adjudication) is distinct from the issue of what the ultimate determinants of legal content consist of (theory of the law), and also from the epistemological question of how to determine the content of the respective constitutional law (theory of interpretation/legal reasoning).[44]

III. Jurisprudential Reflections: Originalism is Not and Cannot be a Combination of Legal Positivism and Formalism

As mentioned above, originalism is frequently categorized by non-originalists as an amalgam of legal positivism and formalism. I disagree with this categorization on jurisprudential grounds. In what follows, I will sketch out the central features of legal positivism (1.) and formalism (2.), before analysing their relationship (3.). I will argue against a common misconception according to which formalism and legal positivism are necessarily linked. The classic objection to this claim alleges that both theories are discrete and completely unrelated: 'Whereas positivism is a theory of law, formalism is a theory of adjudication'.[45] However, I will go one step further and defend the proposition that legal positivism and formalism are, in fact, incompatible with each other.

1. Legal positivism

Legal positivism is a theory of law, ie, a theory about the nature of law. Such a theory aims to explain certain familiar features of societies in which law exists, and proposes to do so by analysing the 'concept' of law.[46] As there are numerous variants of legal positivism, we need to identify their

43 See Stephen E Sachs, 'Originalism as a Theory of Legal Change' (2015) 38 Harv J L & Pub Pol´y 817, 829; see also William Baude, 'Is Originalism Our Law' (2015) 115 Colum L Rev 2349, 2353–2354 (footnote 13).

44 See Berman and Toh (n 32) 1745.

45 See Brian Leiter, 'Positivism, Formalism, Realism' (1999) 99 Colum L Rev 1138, 1145.

46 ibid 1141.

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common features to proceed with our analysis. The following three theses constitute the core of the concept of legal positivism:[47]

The most important common feature, the so-called 'Social (Facts) Thesis' holds that what counts as law in any particular society is fundamentally a matter of social fact, not value. By focusing upon social facts, legal positivism purports to account for law entirely on human terms, by human institutions and actions; notions of natural law are dispensed with.[48]

The second claim of legal positivism, the so-called 'Separability Thesis', states that what the law is and what the law ought to be are separate questions. Legal positivists argue that we cannot assume in advance that law will have any particular content or that its content will have any particular moral quality.[49] Thus, 'law' and 'morals' are regarded as distinct and should be separated for purposes of legal analysis.[50] In this regard, legal positivism is opposed to the natural law tradition, which is committed to some sort of proposition like *Lex iniusta non est lex* ('an unjust "law" ... is no law').[51] The positivist response is summed up in John Austin's aphorism, '[t]he existence of law is one thing; its merit or demerit is another',[52] and in Hart's insistence that 'it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though, in fact, they have often done so.'[53]

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47 These principles are the ones that most 'legal positivists' commonly advance. HLA Hart notes that the term 'positivism' is used 'to designate one or more' of five propositions and that major figures in the history of legal positivism – Jeremy Bentham, John Austin, and Hans Kelsen – neither held all five nor held the ones they shared in exactly the same form. See Hart (n 20) 302; see also Brian Leiter, 'Realism, Hard Positivism, and Conceptual Analysis' (1998) 4 Legal Theory 533, 534–535 (omitting the 'Sources Thesis').

48 See Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Clarendon Law Lectures, Oxford University Press 2001) 152; see also LeDuc (n 5) 626.

49 See Richard Stacey, 'Democratic Jurisprudence and Judicial Review: Waldron's Contribution to Political Positivism' (2010) 30 Oxf J Leg Stud 749, 755.

50 See Edward A Purcell Jr, 'Democracy, the Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History' (2015) 66 Fla L Rev 1457, 1461.

51 Augustine and Robert P Russel (tr), *The Free Choice of The Will* (The Catholic University of America Press 1968) 426.

52 John Austin and Wilfrid E Rumble (ed), *The Province of Jurisprudence Determined* (Cambridge University Press 1995) 157.

53 Hart (n 20) 185–186; see also Jeremy Waldron, 'Can There Be a Democratic Jurisprudence' (2009) 58 Emory LJ 675, 697.

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The so-called 'Sources Thesis' holds that law is necessarily based on an identifiable and authoritative source. That source is – according to Austin – the 'command' of a 'sovereign' or, – according to Hart[54] – the decision of an official who follows procedures and applies rules 'recognized' as authoritative. Furthermore, in order to be valid, any particular rule or decision must be traceable to such an authoritative legal source, independent of its substantive content. As Jeremy Waldron writes: 'the fundamental insight remains: a norm is law, not by virtue of its content, but by virtue of its source.'[55]

Although leading legal positivists said rather little about legal interpretation or adjudication[56], one finds the frequent claim in legal scholarship that legal positivism is committed to a jurisprudential conception often called 'legal formalism'[57]. Legal positivism is supposed to be committed to formalism because of the positivist thesis that the existence of the law never depends on moral facts. It is said that legal positivism treats legal reasoning as an amoral activity, and prohibits judges – just as formalism – to take into account considerations like fairness, justice, efficiency, and institutional design when deciding cases.[58] Before I can evaluate this claim in more detail, we need to have an idea of what formalism entails. Thus, in the next section, I will outline the central features of legal formalism.

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54 See Leiter (n 45) 1144–1145.

55 Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999) 33.

56 Hans Kelsen serves as an example, as he was rather uninterested in legal adjudication. Insofar as he tackled questions of legal adjudication, his approach was closer to legal realism than to formalism. See Horst Dreier, *Rechtslehre, Staatssoziologie und Demokratie* (fundamenta juridica, Nomos 1990) 145 f.

57 Classic authors arguing in favour of a connection between formalism and positivism are eg Roscoe Pound, *Law and Morals* (University of North Carolina Press 1924) 46–50; Morris R Cohen, 'Positivism and the Limits of Idealism in the Law' (1927) 27 Colum L Rev 237, 238; Felix Cohen, 'The Ethical Basis of Legal Criticism' (1931) 41 Yale L J 201, 215; Wolfgang Friedmann, *Legal Theory* (5th edn Stevens 1967) 289; Julius Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control: A Study in Jurisprudence* (2nd edn William S Hein & Co 1973) 138–140. See eg Anthony J Sebok, *Legal Positivism in American Jurisprudence* (Cambridge Studies in Philosophy and Law, Cambridge University Press 1998) 108, for a more recent statement in favour of a connection between formalism and positivism ('Formalism [rightly understood] […] was a form of positivism.').

58 Shapiro further points out that this argument is supposed to attack positivism, as formalism is regarded – at least in the American legal academy – as an 'embarrassing and pernicious theory'. Shapiro himself opposes formalism. See Shapiro (n 33) 239–240 & 245.

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2. *Legal formalism*

Legal formalism is understood as being primarily a theory of adjudication. Yet, there are widely divergent uses of the term. In the following, I cannot present an accurate account of all the varieties of modern-day formalism.[59] Rather, I will only set out the basic features of the theory.

a. The core of the theory: decision-making (only) according to rules

Following Frederick Schauer's insights,[60] the concept of decision-making according to rules lies at the heart of the theory of 'formalism'. Schauer explains that formalism is the way in which rules achieve their 'ruleness' precisely by doing what is supposed to be the failing of formalism, namely:

> screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account. Moreover, it appears that this screening off takes place largely through the force of the language in which rules are written. Thus, the tasks performed by rules are tasks for which the primary tool is the specific linguistic formulation of a rule. As a result, insofar as formalism is frequently condemned as excessive reliance on the language of a rule, it is the very idea of decisionmaking by rule[s] that is being condemned (…) as a prescription for how decisionmaking should take place.[61]

What makes formalism formal is the fact that taking rules seriously involves taking their mandates as reasons for decision independently of the reasons for decision lying behind the rule. Rules, therefore, supply reasons for decision qua rules. When the reason supplied by a rule tracks the reasons behind the rule, then the rule is in a way superfluous in the particular case. Rules become interesting when they point toward a different result than do the reasons behind the rules. The refusal to abstract the rule from its reasons is not to have rules.[62]

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59 Formality was also the heart of Christopher Columbus Langdell's classic theory. The aspiration of Langdell's 'classical orthodoxy' was that the legal system be made complete through universal formality, and universally formal through conceptual order. See Thomas C Grey, 'Langdell's Orthodoxy' (1983) 45 U Pitt L Rev 1, 11.

60 See also Duncan Kennedy, 'Legal Formality' (1973) 2 J Legal Stud 351, 358–359 (offering another influential, and similar, conception of legal formality).

61 Schauer (n 16) 510.

62 See ibid 537.

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Formalism so understood is the rival theory to legal functionalism. Functionalism focuses on outcomes, and especially on the outcomes which the particular legal decision-makers deem optimal. Rules get in the way of this process. Thus, functionalism can be perceived as a theory of legal decision-making that seeks to minimize the space between what a particular decision-maker concludes, all things considered, should be done, and what some rule says should be done.[63]

Formalism, therefore, impedes optimally sensitive decision-making and is in no way inherently 'just'.[64] Rather, it is inherently stabilizing and, therefore, conservative, in the nonpolitical sense of the word. By limiting the ability of decision-makers to consider every factor relevant to an event, rules make it more difficult to adapt to a changing future. A rule-bound decision-maker is precluded from taking into account certain features of the present case and can, therefore, never reach a more appropriate decision than a decision-maker seeking the optimal result for a case through a rule-free decision.[65]

On a closer look, however, formalism is only superficially about rigidity. More fundamentally, it is about the allocation of power.[66] Formalism disables decision-makers from considering factors that may appear important to them and allocates power to some decision-makers and away from others. Formalism, therefore, achieves its value when it is thought desirable to narrow the decisional opportunities and the decisional range of a certain class of decision-makers.[67] Thus, Schauer's formalism is a way of judicial decision-making that is completely amoral. Legal decision-makers, according to formalism, can only refer to rules, but not to moral considerations like fairness, justice, efficiency, etc. As Scott Shapiro sums up this theoretical framework: 'Economics and justice are for the legislature; logic and legal materials are for the courts.'[68]

b. The three key claims of formalism

When we go one more step to provide a slightly thicker account of formalism, the one most critics of originalism have in mind, we discover

63 See Schauer (n 16) 537.
64 Schauer (n 16) 539.
65 See ibid 542.
66 See ibid 543.
67 ibid 544.
68 Shapiro (n 33) 243.

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that formalism is not only a theory of adjudication but also and maybe even predominantly a descriptive theory about the content of the law.[69] According to legal formalism, legal systems are consistent and complete normative systems. Thus, every legal question is supposed to have exactly one correct answer. Against this background, formalism's adjudicative theory states that the role of the judge is to find and apply this single right answer without resorting to moral considerations of any sort. Judges discover the law by locating a set of principles within the available legal materials and then, by using these norms, derive specific answers to legal questions. According to this concept, legal reasoning is solely an exercise in linguistic competence, conceptual analysis, and logical calculation.[70]

The previous paragraph can be fleshed out in the following three theses, which are broad enough to allow for competing interpretations of the central claims of formalism: first, judges are always under a duty to apply existing law. They are not allowed to disregard or modify the rules. Thus, judges must decide cases without resorting to moral reasoning, as they are supposed to use only 'logic', where logic is broadly construed to include the operations of deduction, induction, and conceptual analysis. One can call this feature of formalism the 'Mechanical Judging Thesis',[71] as judges are supposed to act like legal machines without any discretion.[72]

Second, law is entirely determinate: for every legal question, there is one, and only one, correct answer ('Determinacy Thesis'). Formalists thus deny that there are factual situations ungoverned by law, or 'gaps' in the law. Nor do they accept the possibility of legal inconsistencies, ie, factual situations governed by two or more mutually unsatisfiable rules.

For particular rules to cover all possible cases and therefore all factual situations, they would have to be infinite and in consequence not knowable for judges. Hence, formalism is – thirdly – committed to what Scott Shapiro calls 'Conceptualism'. Conceptualism claims that the mass of lower-level legal rules can be derived from a limited number of higher-order general principles containing abstract concepts. By knowing a limited number of top-level principles, a judge can derive the lower-level rules that enable him to correctly answer all legal questions and resolve all legal

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69 The following discussion draws heavily on Grey (n 59) 6–11; Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 U Chi L Rev 1175; Schauer (n 16); Leiter (n 45) 1146–1147 and especially Shapiro (n 33) 239–242.

70 See Shapiro (n 33) 239–240.

71 But see Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 Colum L Rev 605 (offering a classic critique of this thesis).

72 See Shapiro (n 33) 242.

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disputes.[73] Conceptualism carries with it a commitment to the notion of coherence of the law as an implicit organizational principle,[74] which itself implies the integration of single rules 'within a unified structure' in which 'the whole is greater than the sum of its parts, and the parts are intelligible through their mutual interconnectedness in the whole that they together constitute.'[75]

3. *The case against the compatibility of legal positivism with formalism*

Having outlined the central features of legal positivism and formalism, it becomes understandable why legal positivism is often associated with formalism. The argument goes that as legal positivism is committed to the idea that law is a matter of social fact alone and never of moral fact, interpreters of such social facts must not rely on moral facts. Only social facts are relevant, for only they determine legal content. Like formalism, then, legal positivism demands that legal interpretation be completely amoral. It is confined to the amoral operations of linguistic comprehension, induction, analysis, and deduction.[76]

All of this is true. Yet, the problem of this argument is that formalism is not a theory of legal reasoning, of discovering the law, but a theory of adjudication, ie, of judicial decision-making. Thus, formalism is not only concerned with pure legal epistemology, which – as based on legal positivism and, therefore, on the privileging of social facts – does in fact indicate that legal reasoning is amoral. Rather, formalism's claim is that judges must not rely on moral considerations to decide legal disputes and do not need to do that, because the law never runs out.

In what follows, I will show that formalism is unworkable and incompatible with legal positivism, as far as formalism is committed to the amorality of adjudication. (b.).[77] To begin with, I will try to rebut a different claim, made by Brian Leiter and others, that 'positivism, as a theory of law, has no conceptual connection with formalism' (a.).[78]

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73 See Shapiro (n 33) 241–242.
74 See Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 2012) 42.
75 ibid 13.
76 See Shapiro (n 33) 245.
77 cf ibid 248.
78 Leiter (n 45) 1140.

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a. Leiter argues that '[i]f positivism is one's theory of law, nothing substantial follows about one's theory of adjudication.' For him legal positivism entails

> no theoretically substantial claims about the nature of adjudication. A formalist about adjudication might be a positivist, but he could just as well be a natural lawyer. A positivist about the nature of law might think Realism gives the correct description of appellate adjudication. The two doctrines – positivism and formalism – exist in separate conceptual universes.[79]

I do not agree. Although Leiter and others[80] are certainly right that legal positivism is not committed to a distinctive theory of adjudication, adjudication must always be concerned (at least among other things) with the law, as long as adjudication is defined as 'legal' decision-making. Thus, a theory of law has always at least some implications for adjudication. As courts are forums created to resolve controversies on the basis of and to enforce the law, we are having a hard time to comprehend a court whose decision-making is entirely independent of the law.[81] Therefore, theories of adjudication and theories of law are, contrary to Leiter's claim, not fully independent of each other. Accordingly, I also disagree with Gary Lawson's claim that the 'relationship between interpretation and adjudication, even as an ideal matter, is decidedly contingent.'[82] Rather, theories of law and theories of legal interpretation on the one side, and theories of adjudication on the other side, can either be necessarily connected to, compatible with, or incompatible with each other.

b. My argument against formalism's compatibility with legal positivism is based on two considerations, the first of which was already articulated by HLA Hart, Hans Kelsen and Scott Shapiro. Especially HLA Hart insisted that positivism is a form of anti-formalism. He focused his critique on formalism's 'Determinacy Thesis' and argued that no legal system could be completely determinate, because complete guidance of conduct is impossible. As social facts cannot pick out norms that settle every possible question, the law will necessarily be moderately indeterminate. Against

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79 Leiter (n 45) 1151.

80 See, eg, John Gardner, 'Legal Positivism: 51/2 Myths' (2001) 46 Am J Juris 199, 211–214.

81 It is important to note that positivism does not entail a full fletched theory of the institutional function of courts. Rather, positivism regards the institutional function of a judge as a contingent legal position ultimately determined by social practice. See also Shapiro (n 33) 255.

82 Lawson (n 35) 2158.

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this background, judges have to rely on moral consideration in at least some cases.[83] In the following, I will flesh out this argument in some more detail and try to demonstrate that positivism is also incompatible with formalism's commitment to conceptualism.

The starting point of the argument against the compatibility of formalism with legal positivism is formalism's claim that judicial decision-making is devoid of moral reasoning because social facts determine the content of the law. This thesis would only be correct if the law were in fact completely determinate. For only if every case is resolvable according to law, and the law is determined by social facts alone, every case is resolvable by social facts alone. Thus, only when the law resolves every issue will judicial decision-making (adjudication) be entirely taken up by legal reasoning.

Yet, the assumption that there is a legal rule for every case is simply indefensible.[84] Because the law has gaps and inconsistencies and is therefore at least in some cases indeterminate, a judge who is obligated to decide the case cannot successfully employ legal reasoning, and therefore has no choice but to rely on policy arguments in order to discharge his or her duty and resolve the respective legally unregulated dispute.[85]

The second argumentative step is to point out that legal positivism is not committed to the complete determinacy of the law. On the contrary, legal positivism is in fact committed to partial indeterminacy because transmitting standards of conduct to others to settle every contingency in advance is simply impossible.[86] Thus, the fact that language is partially indeterminate – for the abstract concepts of the law have an 'open texture' – entails that the law will be partially indeterminate. Hart himself distinguished between a 'core' of determinacy of legal texts, surrounded by a penumbra of indeterminacy.[87] Consequently, judges must look beyond the law and rely on other considerations to decide cases unregulated by law.[88]

As Scott Shapiro explains, by acknowledging the relative indeterminacy of the law, Hart was merely following the implications of his own commitment to legal positivism. For legal positivists, the social facts that alone determine the content of the law are those that concern actions guiding

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83 See HLA Hart, 'Positivism and the Separation of Law and Morals' (1957) 71 Harv L Rev. 593, 606–616; see also Shapiro (n 33) 247 & 260, for a lucid summary of Hart's position.

84 See Leiter (n 45) 1152; Shapiro (n 33) 247–248.

85 See Shapiro (n 33) 247–248.

86 ibid 248.

87 See Hart (n 20) 12, 123, 134 & 147–154.

88 See Shapiro (n 33) 250.

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conduct. In the case of legislation, the guiding action is the selection of linguistic texts. The 'open texture'[89] of language guarantees that any finite linguistic text will be silent on a range of possible issues.[90] At some point, guidance by social facts, and hence the law, must run out, leaving judges without law to rely on to resolve disputes.[91] Accordingly, it follows from a positivist conception of the law that judicial discretion and, therefore, moral adjudication is inevitable in cases where there is no law to apply.[92] This so-called 'Discretion Thesis' is regarded by most positivists[93] (and non-positivists[94]) as yet another necessary feature of legal positivist theory.[95]

The second argument against formalism's compatibility with legal positivism focuses on formalism's commitment to conceptualism. Conceptualism insists on coherence as an organizational principle and this principle presupposes to a certain extent a natural law theory of law. Thus, formalism is not only a theory of adjudication but also implies a fragmentary theory of law. From the perspective of formalism, law (and not just adjudication) is partially autonomous and only intelligible as an internally coherent phenomenon. Against this backdrop, formalism – as an emphatically universal theory – is necessarily conjoined with natural law theory. Ernest J Weinrib, probably the most important modern-day theorist of formalism in North America, admits this. For him, formalism 'is not positivist', as it offers 'a conception of juridical relations that is prior to positive law', and

89 See Hart (n 20) 124–135.

90 See also Shapiro (n 33) 251 (pointing to Hart's claim that there are right answers to many legal questions, because general terms have core instances).

91 cf Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 351–352 ('If "interpretation" is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. The interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value (…). From a point of view directed at positive law, there is no criterion by which one possibility within the frame is preferable to another.').

92 See Hart (n 20) 172; see also Shapiro (n 33) 250–251, for a summary of this view.

93 See, eg, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 182.

94 See, eg, Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 17.

95 But see Kenneth Einar Himma, 'Judicial Discretion and the Concept of Law' (1999) 19 Oxf J Leg Stud 71, 73–82 (arguing against the 'Discretion Thesis' being one of legal positivism's core theses).

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'conceptual categories that inform the content of law without themselves being posited by legal authority.'[96] He concludes by saying: 'In comprehending the social and historical arrangements established by positive law as the possible expressions of a coherent order, formalism does not ignore the history, positivity, and social reality of law. Rather, formalism claims to be their truth.'[97]

4. Conclusion

In this section, I tried to demonstrate why originalism cannot be – as is often argued – an amalgam of legal positivism and legal formalism: because the two theories are incompatible with each other. Under a positivist legal theory, law is determined by social facts alone and legal reasoning is necessarily amoral, but legal adjudication cannot be completely amoral, because the law runs out in some, typically hard cases, so that there will be no right answer, and judges will enjoy unregulated discretion to decide the respective case. Thus, the law is moderately indeterminate according to legal positivism and positivism, therefore, moderately anti-formalist.[98] Furthermore, formalism's commitment to conceptualism presupposes to a certain extent a natural law theory of the law.

After we have figured out what originalism is not in jurisprudential terms, it is time to unveil the actual jurisprudential foundations of originalism and its opponent, living constitutionalism. This is what I plan to do in the last part of the paper.

IV. Reconstructing the Great Methodological Debate with the Help of the Conceptual Distinctions and Jurisprudential Insights Identified

In the methodological debates between contemporary originalists and living constitutionalists, one gets the impression of radically divergent and conflicting positions. Whereas originalists argue that they give priority to the meaning of the Constitution's text, (pluralistic) living constitutionalists claim that legal decision-makers should not only interpret the writ-

96 Weinrib (n 74) 81.
97 Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 Yale LJ 949, 1112.
98 cf Shapiro (n 33) 266–267.

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ten words of the US Constitution but also use other legal tools, such as tradition, prudence, precedent, purposes, and related consequences, to find legal answers.[99] On a closer look, however, originalists and living constitutionalists offer answers to different questions. The originalist claim articulates a position about what constitutional law consists of, namely the meanings (the 'semantic facts') of the inscriptions in the text that is called the 'United States Constitution'.[100] The position of living constitutionalists, in contrast, claims to have an answer to the question of how judges should decide constitutional disputes and is, therefore, arguing primarily for a theory of adjudication. As a view on what constitutional law is or what it consists of does not by itself entail or presuppose a fully developed theory of how judges have to adjudicate constitutional disputes and vice versa, originalist and non-originalist positions can theoretically be compatible with each other. Notwithstanding, the actual proponents of these views are very likely to reject the other view. Originalists maintain that judges must enforce the written Constitution and most non-originalists reject the idea that constitutional law consists solely of the meanings of the constitutional text.[101] Thus, originalists and living constitutionalists, first and foremost, but implicitly, disagree on the content of American constitutional law.[102]

In the following, I will provide more details and sketch out the respective positions by using the three-layered taxonomy from above.[103] I will argue that although originalism may have been motivated by the particular practice and problems of judicial review,[104] especially 'new' originalism is

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99 cf Berman and Toh (n 32).

100 Although Originalism is sometimes articulated also in a nonpositivist version, the positivist originalist line of the theory is very dominant today. See LeDuc (n 5) 615. It was also dominant in the past. See, eg, Henry P Monaghan, 'Our Perfect Constitution' (1981) 56 NYU L Rev 353 (arguing that the Constitution cannot be made perfect because it must be understood as it was adopted, because it is positive law); Bork (n 26) 144; Scalia (n 38) 45; Frank H Easterbrook, 'Textualism and the Dead Hand' (1998) 66 Geo Wash L Rev 1119 (arguing that we must privilege the original understandings of the constitutional text because they are the law).

101 See Berman and Toh (n 32) 1739–1740.

102 See Sachs (n 43) 821 & 833.

103 Non-originalists, who have frequently challenged the originalist position about what American constitutional law consists of, have themselves hardly ever specified their own account of US constitutional law. Furthermore, they have only rarely been explicit about whether what they are offering is a theory of legal reasoning or a theory of adjudication. See Berman and Toh (n 32) 1748.

104 See Whittington (n 15) 400.

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neither predominantly a theory of constitutional reasoning nor a theory of constitutional adjudication. Rather, originalism is foremost a positivist theory of constitutional law.[105] This can be demonstrated by pointing to a representative passage for modern originalist thought in an article co-authored by two leading originalists, namely Steven Calabresi and Saikrishna Prakash,[106] where they argue: 'Originalists do not give priority to the plain dictionary meaning of the Constitution's text because they like grammar more than history. They give priority to it because they believe that it and it alone is law.'[107]

1. *Theories of constitutional law: what does American constitutional law consist of?*

Originalism's theory of constitutional law holds that there is an ontologically independent constitution.[108] It ultimately consists solely of (some form of) the fixed semantic meanings of the inscriptions in the constitutional text,[109] regardless of an evaluation of its content and, therefore, independent of its moral value.[110] Thus, originalism evokes basic tenets of legal positivism: the constitution consists of specific social facts ('Social Thesis'), and moral considerations are not sources of constitutional law.[111]

Originalism, so understood, does not rest on a normative or conceptual, but on a factual claim about the content of the constitutional law of the United States: the original Constitution was and, including any lawful changes pursuant to it, is still America's constitutional law.[112] Originalists argue it is a distinctive feature of the American legal system that it fixes a particular starting date – the Founding, ie, the ratification of the original

105 See André LeDuc, 'Competing Accounts of Interpretation and Practical Reasoning in the Debate over Originalism' (2017) 16 UNH L Rev 51, 52-53; see also Berman and Toh (n 27) 546 ('In a nutshell, old originalism was (chiefly) a theory of adjudication, whereas new originalism is (chiefly) a theory of law'); see Purcell (n 50) 1487–1490, for a historical account of legal positivism in the jurisprudence of the US Supreme Court.

106 See Berman and Toh (n 32) 558–559.

107 Steven G Calabresi and Saikrishna B Prakash, 'The President's Power to Execute the Laws' (1994) 104 Yale LJ 541, 552.

108 See LeDuc (n 6) 269.

109 See Berman and Toh (n 27) 561.

110 See Adler (n 2) 1127–1128.

111 See LeDuc (n 5) 631.

112 See Sachs (n 43) 819 & 839.

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Constitution – that separates the changes that do not need legal authorization from those that do.[113] In the American legal system, the original Constitution is taken as having a certain sort of prima facie validity, ie, it is regarded to be irrelevant for the validity of the original Constitution, whether it was lawfully created under the standards of some earlier time. Insofar, the ratification of the US Constitution represents a boundary in time, separating the present legal system from older systems.[114] Consequently, each change in American constitutional law since the Founding needs a justification framed in legal, and not just in social or political terms.[115] A change is legal when it complies with the 'rules of change' laid out at the Founding in Article V. The claim is that only such law that is rooted in the Founder's law is part of the American legal system.[116]

Overall, originalism's account of American constitutional law can be roughly summarized in three claims: first, all rules that were valid as of the Founding, except as lawfully changed, remain valid over time; second, a change was lawful if and only if it was made under Article V; third, no rules are valid except by operation of the first and the second claim.[117]

The commitment to this conception of American constitutional law is mirrored in many aspects of the American legal practice. For example, the Constitution is treated by legal actors as a binding legal text, originally enacted in the late eighteenth century. The ratification of the Constitution is regarded as the crucial historical event which established the ultimate criterion of legal validity.[118] Furthermore, legal actors reject any official legal breaks or discontinuities from the Founding.[119] Against this background and instead of showing that originalism is the normatively most appealing theory, many 'new' originalists argue that they are originalists because they are legal positivists, as positivism points towards originalism, at least in the American legal system.[120]

The originalist claim that American constitutional law consists (only) of the written Constitution, including its formal amendments, may appear

113 See ibid 820.
114 See ibid 845 & 849.
115 See ibid 821.
116 ibid 839–840 & 864.
117 ibid 845.
118 See Adler (n 2) 1129.
119 See William Baude & Stephen E Sachs, 'Grounding Originalism' (2019) 113 Nw U L Rev 1455, 1477–1478; Charles L Barzun, 'The Positive U-Turn' (2017) 69 Stan L Rev 1323, 1381.
120 See Baude (n 43) 2352.

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obvious.[121] Yet, it is at least conceivable that the meaning of the constitutional text and the content of the rules of constitutional law are not identical. In other words, to equate the two is to take a substantive position.[122] Consequently, there is a broad range of hypothetical non-originalist alternatives, and many of them are, in fact, put forward in the debate.

The first alternative to the originalist account is a position of constitutional nihilism, according to which there is no such thing as an objective, independent constitution. Constitutional pragmatists like Richard Posner arguably hold such a view, as they focus on the merits of the outcome of constitutional decision-making.[123]

Besides this 'lawlessness alternative', but still opposed to an independent constitution is the claim that the constitutional law of the United States of America consists simply in the practices of the American legal system. Under such a theory, the most decisive practitioners are courts and administrative agencies, and the ultimately relevant practices the opinions of Supreme Court Justices in constitutional cases.[124] David Strauss's 'Common Law Constitutionalism' represents such an account of American constitutional law.[125]

The third alternative worth mentioning is a natural law account of constitutional law. According to modern natural law theory, moral facts are essential ingredients in determining legal content and must always supplement social facts, such as the provenance of an authoritative text or linguistic conventions that determine the text's plain meaning.[126] Among others, the two important proponents of non-positivist, natural law originalism, Justice Clarence Thomas and Randy Barnett have such an understanding of American constitutional law.[127] Whereas Thomas advocates for an interpretive natural law originalism that takes into account the natural

121 See LeDuc (n 6) 269.
122 See Solum (n 23) 953; see also Berman and Toh (n 27) 547.
123 See Richard A Posner, 'Bork and Beethoven' (1990) 42 Stan L Rev 1365, 1369; Richard A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press 2003); for a similar assessment of Posner's position see LeDuc, (n 6) 331.
124 See LeDuc (n 6) 333.
125 David A Strauss, *The Living Constitution* (Inalienable Rights Series, Oxford University Press 2010).
126 See Shapiro (n 33) 238.
127 See for an account of the shortcomings of natural law originalism Mikolaj Barczentewicz, 'The Limits of Natural Law Originalism' (2017) 93 Notre Dame L Rev Online 115.

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law principles enshrined in the Declaration of Independence,[128] Barnett pleads for a stronger form of natural law originalism, as he believes that the source of the rights protected by the Constitution is natural law, not positive law.[129]

A fourth alternative is a different positivist position that argues for the addition of other constitutional sources.[130] One might imagine a theory that regards the Declaration of Independence, the Federalist Papers and Abraham Lincoln's Gettysburg Address just as important constitutional facts, as the inscriptions of the US Constitution.[131] Similarly, a pluralist non-originalist (and not exclusively) positivist theory of decision-making, like the one Philip Bobbitt has influentially put forward,[132] implies that the Constitution's text is not the exclusive source of American constitutional law. Thus, pluralists implicitly claim that American constitutional law consists of multiple facts and considerations, namely of the meanings of the inscriptions in the constitutional text, the Framers' and ratifiers' intentions, judicial precedents, extrajudicial societal practices, moral values and norms of the American people and standards of prudence.[133]

The ontological pluralism of scholars like Bobbitt and Stephen Griffin ('the sources of American law are plural')[134] have to be distinguished from pluralistic conceptions of constitutional evidence (epistemic pluralism). Richard Fallon's 1987 Harvard Law Review article[135] offered such an epistemic pluralism. Similar to Bobbitt's account, Fallon sketched out five modes of constitutional argument, but unlike Bobbitt, who insists on the incommensurability of the different constitutional arguments ('modal-

128 See Clarence I Thomas, 'Toward a "Plain Reading" of the Constitution: The Declaration of Independence in Constitutional Interpretation' (1987) 30 How LJ 983, 985–986, 989.

129 See Randy E Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press 2004) 53–54; see for more details LeDuc (n 5) 645–648.

130 cf LeDuc (n 5) 667.

131 See for a step in this direction Akhil Reed Amar, *America´s Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books 2012) 245-275; see also Philip Bobbitt, 'The Constitutional Canon' in Jack Balkin and Sanford V Levinson (eds), *Legal Canons* (New York University Press 2000) 331.

132 See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press 1982); Bobbitt (n 39).

133 See Berman and Toh (n 32) 1751; Sachs (n 43) 830.

134 Stephen Griffin, 'Pluralism in Constitutional Interpretation' (1994) 72 Tex L Rev 1753, 1761.

135 Richard H Fallon Jr, 'A Constructivist Coherence Theory of Constitutional Interpretation' (1987) 100 Harv L Rev 1189, 1190.

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ities'), Fallon proposed an algorithm to resolve intermodal conflicts. For him, the different constitutional arguments are simply different evidences. Thus, he does not argue for a Bobbitt-like ontological pluralism that assumes a pluralism of constitutional sources.[136]

2. *Theories of legal interpretation: how to determine the content of American constitutional law?*

From the common originalist position that American constitutional law consists solely of the semantic contents of the inscriptions in the constitutional text follows a certain epistemological position: in order to discover the relevant constitutional law, ie, to figure out what the constitutional law calls for, the semantic meanings of the inscriptions in the constitutional text (in their syntactical context) must be revealed, and by way of discovering the semantic meaning one also discovers its legal meaning, as the semantic meaning constitutes the law.[137] Any facts that bear on what the inscriptions mean are good evidence for beliefs about what the Constitution calls for.[138] Against this backdrop, constitutional disagreement must be understood as disagreement about the meaning of constitutional provisions.[139]

As originalists assume that words have an objective social meaning and that this meaning can typically be discovered by empirical investigation, the originalist epistemological position calls for strictly non-normative, empirical reasoning.[140] Consequently, constitutional reasoning, according to positivistic originalists, is a formalistic process.[141] Originalists do not evaluate whether the meanings of the respective constitutional provisions are prudent, sensible, or moral,[142] since moral considerations do not play a role in making legal statements true or false.[143]

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136 See Green (n 4) 514-516.
137 See Berman and Toh (n 27) 547–48.
138 Berman and Toh (n 32) 1744.
139 See LeDuc (n 6) 268.
140 See Berman and Toh (n 32) 1744.
141 LeDuc (n 105) 93.
142 See LeDuc (n 6) 286.
143 See Baude (n 43) 2351; see also Berman (n 21) 22 (pointing out that originalism's notions of constitutional law and legal decision-making are well captured in Chief Justice Taney's notorious opinion in Dred Scott).

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The epistemological position of (ontological) non-originalist pluralists is something like the following: in order to figure out what the constitutional law calls for, one should find out multiple kinds of facts or considerations, namely the ones that constitute American constitutional law (see above).[144]

For pragmatists like Richard Posner, who hold the view that an ontologically independent constitution does not exist, there is no such thing as a theory of interpretation or of legal reasoning. Consequently, they deny the existence of any 'truthmaker' external to the practice of judging, ie for them there is nothing that makes claims about 'the Constitution' true. Against this background, pragmatists reject expressions like 'correctly' or 'incorrectly decided cases', because from their point of view there exists no metric common to all people to decide which solution of a difficult constitutional case is right or wrong.[145]

3. Theories of adjudication: how must courts resolve constitutional disputes?

Originalists claim that the first and central task of constitutional decision-making is to interpret the Constitution.[146] When the meanings of the relevant inscriptions of the constitutional text are clear, judges must decide the cases before them according to the meanings of those inscriptions.[147] Thus, originalists are committed to the 'priority of interpretation', ie, the claim that constitutional adjudication must begin with the interpretation of the meaning of the constitutional text, as well as to the 'primacy of interpretation', namely the proposition that the reading of the constitutional text by means of interpretation provides a privileged ground on which to decide the case at hand.[148] Consequently, originalists, in contrast to non-originalists, do not accept doctrines that conflict with the meaning of the respective constitutional text. This 'dogma' is probably the most crucial point of disagreement between originalists and non-originalists.[149]

However, as we have seen above, the constitutional law is indeterminate in some cases, which is why formalism is indefensible and furthermore in-

144 See Berman and Toh (n 32) 1751–1752.
145 See Richard A Posner, 'A Political Court' (2005) 119 Harv L Rev 31, 41; see also Green (n 4) 513–514 (analysing 'truthmakerless constitutional theories').
146 See LeDuc (n 105) 65.
147 See Berman and Toh (n 32) 1746.
148 LeDuc (n 105) 61.
149 See Whittington (n 15) 408.

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compatible with legal positivism. Nearly all of today's originalists acknowledge this:

> Uncertainty and indeterminacy are inherent in the originalist approach to constitutional interpretation. The evidence of the historical meaning of particular provisions of the constitutional text may often be inadequate to guide the modern interpreter. Constitutional provisions may have been vague in their original usage, leaving uncertainty about how they should be clarified or elaborated. The law may have gaps that do not adequately guide political actors, even when action is necessary. Such considerations suggest that there are limits to what constitutional interpretation can accomplish.[150]

It is precisely at this point that originalists differ among themselves on how best to respond to this uncertainty. Their positivist grounding does not give them any guidance on this issue, as legal positivism as a theory about the nature of law has nothing to say about legally unregulated cases. Thus, originalist's theories of legal reasoning and legal adjudication are not congruent concerning situations of legal indeterminacy, ie, although all coherent originalists agree on their theory of the law and their theory of legal reasoning, there is no such agreement on the issue of legal adjudication in legally indeterminate cases.

There are, in essence, two possibilities for originalists to supplement their theory of adjudication, as Keith Whittington has pointed out. First, they can supplement originalist constitutional interpretation with non-originalist constitutional construction. Constitutional construction characterizes the constitutional elaboration within the interstices of the discoverable meaning of the constitutional text, to permit constitutional decision-making.[151] In fact, most modern originalists believe that constitutional adjudication includes not only interpretation but also constitutional construction.[152] Notwithstanding, originalists stay committed to the priority of interpretation.

The second possible response to the indeterminacy problem is the usage of default rules. A particularly prominent default rule would be a rule that judges should defer to legislators on disputed constitutional questions

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150 See Whittington (n 15) 403; see also Lee J Strang, 'Originalism's Promise, and Its Limits' (2014) 63 Clev St L Rev 81, 96.

151 See Whittington (n 15) 403; see also Keith E Whittington, *Constitutional Construction: Divided Powers and Constitutional Meanin*g (Harvard University Press 2001) for a comprehensive analysis of this concept; see also Jack Balkin, *Living Originalism* (Harvard University Press 2011); Lawrence B Solum, 'Originalism and Constitutional Construction' (2013) 82 Fordham L Rev 453.

152 See Berman and Toh (n 27) 554.

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whenever the constitutional meaning is unclear.[153] Following this option, courts would be limited to legal reasoning.[154]

Apart from the non-interpretive response to the indeterminacy problem, a theory of adjudication can have several other features, which are not predetermined by originalism's commitment to legal positivism, as for example what standard of certainty judges must reach before determining to act on their perception of a constitutional violation against the constitutional judgments of other government officials. Consequently, there is room for disagreement among originalists over how such questions should be answered, and there is as yet little agreement among originalists over such questions of constitutional adjudication.[155]

Concerning the theory of adjudication of non-originalists, the main difference to the respective originalist account is that non-originalists argue that even when the meanings of the relevant inscriptions of the constitutional text are clear, judges should decide the cases before them not merely according to the meanings of those inscriptions, but also in light of certain nonsemantic, including normative considerations.[156]

V. Conclusion

By distinguishing theories of law, theories of legal reasoning and theories of adjudication, I have tried to show – first – that the great debate is, in fact, not about constitutional interpretation, but about what American constitutional law consists of. Second, I have argued against the thesis of many non-originalists that originalism is a combination of a positivist conception of constitutional law and a formalist theory of adjudication, by showing that formalism is not only a flawed theory but also incompatible with positivism. Third, I have demonstrated that originalism is based on a positivist conception of American constitutional law, from which only an incomplete theory of adjudication follows, whereas living constitutionalism is primarily a theory of constitutional adjudication. The different versions of non-originalist living constitutionalism embrace a broad variety of different implicit theories of constitutional law that are all in conflict with the one originalism puts forward.

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153 See, eg, Lee J Strang, 'The Role of the Common Good in Legal and Constitutional Interpretation' (2005) 3 U St Thomas LJ 48, 70–72.

154 See Whittington (n 15) 404 & 406.

155 See Whittington (n 15) 401.

156 See Berman and Toh (n 32) 1747.

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It is important to note that positivist jurisprudence, by its terms, says nothing about whether, when, or why one ought to obey positivist law.[157] The originalist theory of positive constitutional law, therefore, needs to be based on a respective justification. To analyse whether a persuasive justification is provided by today's originalists or could at least theoretically be developed, is, however, a task for another paper.

157 See Jeffrey A Pojanowski and Kevin C Walsh, 'Enduring Originalism' (2016) 105 Geo LJ 97, 117.

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Part 4: Objectivity and Private Law

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§ 6 The Role for Remedial Discretion in Private Law Adjudication

Ben Köhler[*]

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I. Introduction

Inquiring about objectivity in law necessarily implies to inquire about subjectivity. One of the most dignified forms of subjectivity is discretion, a legally sanctioned form of subjectivity.[1] Discretion, in a broad sense, is ubiquitous in adjudication. Albeit bound by rules of procedural and

* The author thanks Philip M Bender, Dr Jennifer Trinks and Christian Kolb as well as the participants of the Young Scholars conference and of the Aktuelle Stunde at the Max Planck Institute for comparative and international private law for their invaluable comments and corrections.

1 See, for the distinction of discretion and arbitrariness, HLA Hart, 'Discretion' (2013) 127 Harv L Rev 652, 656.

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substantive law, adjudicators enjoy considerable discretion in the conduct of the proceedings or the interpretation and application of substantive rules. It is thus not surprising that discretion has been in the focus of legal theory for quite some time.[2] This debate, most prominently associated with the controversy between Hart and Dworkin,[3] revolves around the relationship between rules, principles, and judicial discretion in the face of hard cases and open-textured rules.[4] The scope of this contribution is more modest. It is only concerned with one of the most overt forms of judicial discretion: remedial discretion. Remedial discretion describes the power of adjudicators to choose and calibrate remedies. While other forms of judicial discretion with respect to the interpretation of legal texts or the construction of legal concepts are often hidden behind methodology or judicial philosophies, remedial discretion can be openly exercised with little attempt to conceal its discretionary nature. In this context, discretion is a feature, not a bug. In its most basic form, it comes down to the question of whether the judge deems the remedy to be appropriate in the particular case. This over-simplistic description of remedial discretion serves as a starting point to distinguish remedial discretion from other forms of discretion in adjudication. These other forms of discretion include discretion on how to conduct the proceedings, decisions *ex aequo et bono* as are recognised in some arbitral laws or rules,[5] the construction and development of legal rules by adjudicators, including discretion in judicial law-making,[6] the application and concretisation of open legal terms such as negligence, good faith and reasonableness[7] or the judicial control of the exercise of discretion by administrative entities or third parties. The focus here is solely on discretion in the choice and calibration of remedies.

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2 See eg Ronald Dworkin, 'Judicial Discretion' (1963) 60 Journal of Philosophy 624, 638; Barry Hoffmaster, 'Understanding Judicial Discretion' (1982) 1 Law and Philosophy 21, 55; see, monographically on German private law, Barbara Stickelbrock, *Inhalt und Grenzen richterlichen Ermessens im Zivilprozeß* (Otto Schmidt Verlag 2002).

3 Dworkin (n 2) 624; see on this issue: Kent Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges' (1975) 75 Colum L Rev 359; Scott J. Shapiro, 'The Hart-Dworkin Debate: A Short Guide for the Perplexed' in Arthur Ripstein (ed), *Ronald Dworkin* (Cambridge University Press 2007) 22.

4 Greenawalt (n 3) 363 ff; Shapiro (n 3) 22.

5 See, eg, Article 28 (3) of the UNCITRAL Model Law on International Commercial Arbitration.

6 Dworkin (n 2) 638; Greenawalt (n 3) 363 ff.

7 Francesco Parisi, *Liability for Negligence for Judicial Discretion* (2nd edn, UC Berkeley 1992) 393.

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Discretionary remedies are recognised in English equity, even if historical interpretations of the role of discretion differ.[8] Although the discretionary nature of equitable remedies is not controversial as such, recently a debate has ensued about the role of discretion in the choice of remedies in different common law jurisdictions.[9] Proponents of what has been labelled *discretionary remedialism*[10] defend the judicial discretion in the choice and calibration of private law remedies.[11] According to this argument, while the question of liability should be rule-based, the adjudicator should enjoy discretion in the choice of the order she makes in response to the liability.[12] The debate has brought some of the obvious, yet sometimes neglected problems of remedial discretion, such as rule of law concerns or adverse consequences of indeterminacy, back into the focus of the discussion.[13]

In contrast to most common law jurisdictions, at least German private law does not recognise a general concept similar to remedial discretion. Rather, relief is granted as a matter of right as a consequence of the establishment of certain legal requirements.[14] Judicial discretion is confined to and hidden behind the interpretation and application of the legal requirements without extending to a separate decision on the choice or calibration of the remedy. Nevertheless, remedial language has crept into international instruments. For instance, the Convention on Contracts for the International Sale of Goods (CISG) operates a distinction between obligations and remedies.[15] The international prevalence of the term 'remedy' is accompanied by an academic interest in the concept in civil law

8 See, for instance, Peter Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 UW Austl L Rev 1, 9; contra Simon Evans, 'Defending Discretionary Remedies' (2001) 23 Sydney L Rev 463.

9 Birks (n 8) 1; Evans (n 8) 463; Paul Finn, 'Equitable Doctrine and Discretion in Remedies' in WR Cornish, Richard Nolan, Janet O'Sullivan & Graham Virgo, Restitution, Past, Present and Future – Essays in Honour of Gareth Jones (Hart 1998) 251, 274.

10 See for this term Birks (n 8) 1.

11 Evans (n 8) 463; Finn (n 9) 274.

12 Evans (n 8) 463.

13 Birks (n 8) 15; Matthew Harding, 'Equity and the rule of law' (2016) 132 Law Quarterly Review 278, 289.

14 Franz Hofmann and Franziska Kurz, 'Introduction to the 'Law of Remedies', in Franz Hofmann & Franziska Kurz (eds), *Law of Remedies – a European Perspective* (Intersentia 2019) 9.

15 See, for instance, Articles 45, 61 CISG; see for further examples from EU law and soft law, Franz Hofmann, *Der Unterlassungsanspruch als Rechtsbehelf* (MohrSiebeck 2018) 100 ff.

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jurisdictions.[16] Despite this newly found interest in remedies, the question of discretion in remedial decisions has received relatively little comparative attention.[17] It is the purpose of this paper to shed some light on the idea of discretionary remedies from a comparative perspective. Based on this analysis, it will discuss whether a greater role for remedial discretion is desirable in civil law jurisdictions.

The paper will define remedial discretion for the purposes of this contribution (II.), before it will outline some examples of remedial discretion in English law and try to identify functional equivalents in German law (III.). Based on this comparison, it will add some remarks on the merits of remedial discretion (IV.).

II. Remedies, Discretion, and System-building: Some Classifications

Unlike the German unitary concept of *Anspruch* that includes both the right and the relief sought but excludes matters of procedure and enforcement, common law systems traditionally draw a distinction between right and remedy.[18] The word remedy can be understood in very different ways.[19] In a judicial context, it is commonly understood to describe the relief a person can seek from a court in reaction to an infringement or threatened infringement of a right.[20] This definition is confined to judicially obtained remedies to the exclusion of so-called self-help remedies.[21] It implies that a remedy requires a right it can vindicate.[22] At the same

16 Helge Dedek, 'From Norms to Facts: The Realization of Rights in Common and Civil Private Law' (2010) 56 (1) McGill Law Journal 77; Hofmann & Kurz (n 14) 9; Hofmann (n 15) 13 ff; Ruth Sefton-Green, 'Why are Remedies not a Legal Subject in Civilian Law' in Alexandra Popovici, Lionel Smith & Régine Tremblay (eds), *Les intraduisibles en droit civil* (Thémis 2014) 255.

17 But see for a comparative discussion including discretion Dedek (n 16) 104; Hofmann (n 15) 35–49, 77–83.

18 Dedek (n 16) 81.

19 See Peter Birks, 'Rights, Wrongs, and Remedies (2000) 20 Oxford Journal of Legal Studies 1, 9 ff, who identifies five different possible meanings.

20 Andrew Burrows, *Remedies for torts, breach of contract and equitable rights* (4th edn, Oxford University Press 2019) 3; but see for a different definition, Rafael Zakrzewski, *Remedies reclassified* (Oxford University Press 2005) 43 ff.

21 Burrows (n 20) 4; see for a broader definition Paul S. Davies, 'Remedies in English Private Law' in Franz Hofmann & Franziska Kurz (eds), *Law of Remedies – a European Perspective* (Intersentia 2019) 27, 32.

22 See, on the relationship between right and remedy from a comparative perspective, Dedek (n 16) 86.

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time, the court is not necessarily bound to order one specific remedy in reaction to an actual or threatened infringement of such a right.[23] The definition is difficult to apply to civil law jurisdictions. For the purposes of this paper, the civilian analogue will be understood to be the legal consequences of a cause of action, ie which kind of relief a party can obtain and to what extent a court can calibrate or moderate the extent of that relief.

Based on this understanding, the paper is interested in those remedial decisions that vest judges with discretion as to the choice or the calibration of the remedy. Even more so than 'remedy', the term discretion comes in many varieties and can be understood very differently, depending on the context.[24] As a starting point, discretion can be described as a power 'to choose between two or more alternatives, when each of the alternatives is lawful'.[25] Going beyond this broad definition, it seems possible to distinguish different forms of discretion. Ronald Dworkin, for example, has identified three types of discretion.[26] The first weak form of discretion denotes a value judgment that does not follow from the mechanical application of rules. The second weak form of discretion describes a final decision that is not subject to further review. The third form of discretion, labelled as strong discretion by Dworkin, allows the adjudicator to decide without being bound by any rules or standards.[27] For the purposes of remedial discretion, this distinction is useful to identify two different meanings of discretion. The first and the third type refer to the indeterminacy of the decision and the extent to which the adjudicator is bound to render a certain decision.[28] While, at first sight, there seems to be a categorial difference between the value judgment and an entirely unbound decision, these two types of decisions can also be understood as two points on the spectrum of indeterminacy of judicial decision-making.[29] This is especially true for

23 Evans (n 8) 474.

24 See, eg, Dworkin (n 2) 624; Stephen M Waddams, 'Judicial Discretion' (2001) 1 Oxford U Commw LJ 59.

25 Aharon Barak, *Judicial Discretion* (Yale University Press 1989) 7; Zakrzewski (n 20) 85.

26 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 32, 33, 69.

27 Dworkin (n 26) 69.

28 See, for a distinction between indeterminacy and limited review, Waddams (n 24) 60 ff.

29 Evans (n 8) 482; Greenawalt (n 3) 366; Zakrzewski (n 20) 87; see concerning the remedial constructive trust, Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75 (3) Cambridge Law Journal 528, 531.

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the exercise of discretion in the choice and calibration of remedies. The discretion can be limited to value judgments that determine which remedies are available but can also combine value judgments with a broader discretion to choose among different remedies or to make discretionary determinations as to quantum. Almost never, however, will adjudicators be completely free in their discretion without having to take account of the legal framework, broad standards, guiding considerations or existing precedent.[30] Even in cases of rather broad discretion, the exercise of their discretion has to remain within the confines of the law and respect the rationale of the provision or principle and, more generally, must not be arbitrary.[31]

The second form of discretion identified by Dworkin does not relate to the indeterminacy but to the limited review of a decision.[32] In this sense, discretion denotes a pocket of sovereign power of the adjudicator. At least in theory, the lack of an appellate review can be distinguished from the indeterminacy of the decision, as also fully determinate decisions can be final and not subject to review, while wholly indeterminate decisions can be subject to full review.[33] Despite the different meanings, remedial discretion in a proper sense will combine these two aspects of discretion, that is a level of indeterminacy and a limited review, at least to some extent. The distinction offers a framework that can help to measure the extent of remedial discretion and understand or question the rationales for discretion in remedial decisions.

Finally, a further distinction as to the jurisprudential guidance on the exercise of remedial discretion seems helpful. This distinction can be drawn between discretionary remedies that are shaped and further developed by precedent on the one side and other discretionary remedies that do not develop into coherent systems of well-settled criteria on the other.[34] The former category can be called system-oriented exercise of discretion.[35] In system-oriented discretionary decisions, the exercise of dis-

30 Evans (n 8) 485; Harding (n 13) 293.
31 Evans (n 8) 485; Waddams (n 24) 60.
32 Dworkin (n 26) 69.
33 Greenawalt (n 3) 365; Waddams (n 24) 61.
34 See for a similar point Kit Barker, 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right' (1998) 57 Cambridge LJ 301, 317; see also Harding (n 13) 292, who argues that all judicial decision-making is system-oriented.
35 Harding (n 13) 294; see, similarly, Zakrzewski (n 20) 88, with the terms 'rule-building' and 'rule-compromise' discretion, citing Carl Schneider, 'Discretion and rules: a lawyer's view' in Keith Hawkins (ed), The Uses of Discretion (Clarendon Press 1992) 64.

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cretion is placed in the broader context of the private law system, takes note of other decisions and further shapes the criteria for future cases.[36] A prerequisite for such a system-oriented exercise of discretion is normally the existence of at least a limited review of the discretionary decision by an appellate or supreme court in order to ensure coherence and provide precedent for future discretionary decisions. The latter category, ie the not-system-oriented discretion, describes discretionary decisions that are not developing into a coherent system of criteria but rather remain highly indeterminate and perhaps even incoherent. The reasons for such a lack of systemisation can be manifold. One of the reasons could be a lack of a sufficient reasoning, ambiguity of the legislative rationales, and a limited review by superior courts. The lack of systemisation may, however, also be purposeful if the discretion is intended to be exercised exclusively with regard to the individual circumstances of the case.[37] According to the aforementioned dimensions of discretion, the non-system-oriented remedies will therefore typically combine a high degree of indeterminacy with a limited appellate review.

III. 'Remedial' Discretion: Some Comparative Observations

The comparative part will begin with remedial discretion in English law in the first subpart (1.) and will then turn to German private law in the second subpart (2.), before adding some brief comparative remarks (3.).

1. Remedial discretion in English law

This subpart will give a short overview of remedial discretion in equitable remedies (a.) and of some examples of statutory discretion (b.) before briefly recapitulating the recent debate on discretionary remedies (c.).

36 Harding (n 13) 294.
37 Zakrzewski (n 20) 88: 'rule-failure discretion', citing Schneider (n 35) 62.

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a. Remedial discretion in equitable remedies

Equitable remedies, such as specific performance, injunctions or account of profits, are traditionally described as discretionary.[38] However, as has been noted frequently, this discretion has long been transformed from a conscience-based decision to one that is based on precise criteria and precedent.[39] In most cases, the decision on equitable remedies will be as predictable as a decision on non-discretionary remedies at law.[40] This development is perhaps most obvious in the case of specific performance. In contrast to most civil law systems, specific performance has traditionally not been the standard remedy in case of breaches of contract in English law.[41] Rather, under the common law, the obligor is primarily entitled to damages suffered as a consequence of the breach.[42] Specific performance was developed as a supplementary equitable remedy, discretionary in nature and only to be awarded exceptionally if, due to the circumstances of the case, damages were not an adequate remedy for the obligor.[43] Today, specific performance, albeit still discretionary in name, does not depend on the free exercise of discretion by the adjudicator but rather on the satisfaction of certain well-settled criteria.[44] Although the success of an application for specific performance is thus largely guided by precedent, there are a few remnants of the discretionary nature of specific performance, most notably in the court's determination whether damages are actually adequate in a given case.[45] Another criterion that leaves room for the exercise of equitable discretion can be seen in the qualification that the order of specific performance may be refused if it would cause severe

38 Steven Elliott, 'Introduction' in John McGee & Steven Elliott (eds), *Snell's Equity* (34th edn, Thomson Reuters 2020) 14-002.

39 Elliott (n 38) 14-002; Harding (n 13) 289.

40 Burrows (n 20) 402; see for a discussion of discretionary elements in common law remedies, David Wright, 'Discretion with Common Law Remedies' (2002) 23 Adelaide Law Review 243.

41 Ewan McKendrick, *Contract Law* (13th edn, Red Globe Press 2019) 421.

42 McKendrick (n 41) 421.

43 Burrows (n 20) 402; Edwin Peel, *Treitel on the Law of Contract* (14th ed, Sweet & Maxwell 2015) 21-016; Graham Virgo, *The Principles of Equity and Trusts* (4th edn, OUP 2020) 672.

44 Birks (n 19) 16; Burrows (n 20) 402; Peel (n 43) 21-029.

45 Jens Kleinschmidt, 'Article 9:102 (1)' in Nils Jansen & Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) para 22; see also McKendrick (n 41) 422: 'the law is at an uncertain stage here'.

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hardship for the defendant.[46] This balancing exercise between well-settled criteria and the remaining discretion for the judge in the individual case was recently acknowledged by Lord Neuberger in *Coventry v Lawrence*.[47] Concerning the discretion in the order of an injunction (or damages in lieu of the injunction), Lord Neuberger expressly approved Millet LJ's observation[48] that 'reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion' and that 'none of them is a binding authority on how the discretion should be exercised'.[49] At the same time, Lord Neuberger emphasised that it is important for courts to lay down criteria for the exercise of the discretion, not to entirely fetter it but to make it predictable.[50] This statement illustrates that, while discretionary remedies are awarded according to criteria developed by long-standing case law, a pocket of true discretion remains for judges in the decision of individual cases.[51] The equitable remedies are thus an illustration of the system-oriented exercise of discretion described above, in that an initially broad discretion is curtailed by the development of rule-like criteria and guidance in case law.[52]

b. Statutory discretion

Apart from the traditional discretionary remedies in equity, remedial discretion can also be based on particular statutes vesting the courts with the exercise of remedial discretion.[53] Iterations of such statutory discretion

46 *Patel v Ali* [1984] Ch 283; Burrows (n 20) 431; Janet O'Sullivan, 'Specific Performance' in John McGee & Steven Elliott (eds), *Snell's Equity* (34th edn, Thomson Reuters 2020) 17-045; Peel (n 43) 21-030.
47 *Coventry v Lawrence* [2014] UKSC 13 [121]; Hofmann & Kurz (n 14) 9.
48 *Jaggard v Sawyer* [1995] 1 WLR 269, 288.
49 *Coventry v Lawrence* [2014] UKSC 13 [120].
50 *Coventry v Lawrence* [2014] UKSC 13 [121].
51 Hofmann & Kurz (Fn 14) 9; Zakrzewski (n 20) 92.
52 But see Zakrzewski (n 20) 93: discretionary remedies in equity as an example of rule-failure discretion.
53 See on this distinction, Birks (n 19) 24.

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can, for example, be found in family,[54] succession[55] and company law.[56] Instead of settling the availability of the remedy abstractly, the statute vests the court with discretion as to whether to grant the remedy or not in specific cases. The focus here will be on one of the most important examples of judicial discretion: the family provision in English succession law.

While the prevailing narrative of English succession law has for a long time focused on the freedom of testation, testators only enjoyed unrestricted freedom of testation for a relatively short period of time.[57] Today, testamentary freedom is curtailed by the power of courts to order a family provision under the Inheritance Act 1975 in order to protect family members and other dependants of the deceased from her testamentary dispositions or from the insufficiency or absence of an intestate share.[58] Unlike the compulsory portion of German law that provides claims for fixed quota of the hypothetical intestate share,[59] the family provision is a discretionary system, aspiring to uphold testamentary freedom and achieve more individualised justice in hard cases at the same time.[60] Pursuant to s 2 of the Inheritance Act 1975, a court may, 'if it is satisfied that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as

54 Part II of the Matrimonial Causes Act 1973; see, for a comparative perspective, Anne Röthel, 'Familiäre Vermögensteilhabe im englischen Recht: Entwicklungen und Erklärungsversuche' (2012) 76 RabelsZ 131, 136.

55 Sections 2, 3 of the Inheritance Act 1975.

56 Section 1157 (1) Companies Act 2006, providing for the discretion of the court to relieve, wholly or in part, a corporate officer from liability 'on such terms as it thinks fit'; see eg *Re D'Jan of London Ltd*, [1993] B.C.C. 646, 649; see, for a comparative perspective, Philipp Scholz, *Die existenzvernichtende Haftung von Vorstandsmitgliedern in der Aktiengesellschaft* (Jenaer Wissenschaftliche Verlagsgesellschaft 2014) 326; see also Section 996 Companies Act 2006.

57 Roger Kerridge, 'Family Provision in England and Wales' in Kenneth GC Reid, Marius J De Waal & Reinhard Zimmermann, *Comparative Succession Law III: Mandatory Family Protection* (Oxford University Press 2020) 384, 389; Richard Oughton, *Tyler's Family Provision* (3rd edn, Butterworths 1997) 3; Brian Sloan, *Borkowski's Law of Succession* (4th edn, OUP 2020) 289.

58 See, for comparative accounts of the family provision in England, Kerrdige (n 57) 384 ff; Röthel (n 54) 147; Reinhard Zimmermann, 'Zwingender Angehörigenschutz im Erbrecht. Entwicklungslinien jenseits der westeuropäischen Kodifikationen' (2021) 85 RabelsZ 1, 40 ff.

59 See s 2303 (1) BGB.

60 Oughton (n 57) 45; see for an overview of the legislative discussions, Marion Trulsen, *Pflichtteilsrecht und englische family provision im Vergleich* (MohrSiebeck 2004) 21 ff.

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to make reasonable financial provision for the applicant', make a variety of orders, including orders of periodical and lump sum payments or of transfer of property.[61] The Act limits the scope of applicants to certain dependants, most importantly current and unmarried former spouses as well as children of the deceased.[62]

The court has discretion concerning two different questions. In a first step, it needs to determine whether a reasonable financial provision has been made.[63] This test is supposed to be an objective value judgment that is, in principle, focused on the situation of the applicant and not (exclusively) on the decisions of the testatrix.[64] In a second step, if no reasonable provision has been made, the court can choose different orders from the proverbial 'toolbox' in s 2 Inheritance Act 1975.[65] In both of these exercises, the court must take certain general as well as applicant-specific criteria into account that are set out in s 3 of the Inheritance Act 1975, although s 3 Inheritance Act 1975 neither institutes a hierarchy amongst the criteria nor contains directions as to the weighting of different considerations.[66] Additionally, s 3 (1) (g) of the Inheritance Act 1975 encourages the court to consider any other matter it may deem relevant, thereby opening the door widely for all kinds of submissions by imaginative plaintiffs.[67]

The extent of discretion in the determinations under ss 2, 3 of the Inheritance Act 1975 is well illustrated by the notorious *Ilott v The Blue Cross* saga.[68] In this case, that prompted six judgments in ten years,[69] the mother of the applicant had in her will divided her estate between different animal charities without considering her daughter from whom she had been estranged for most of her daughter's adult life.[70] After the daughter had been awarded a provision of £50,000 of the net estate of £486,000 by

61 Inheritance Act 1975, s 2 (1) (a), (b), (c).
62 Inheritance Act 1975, s 1 (1).
63 Kerridge (n 57) 394; Zimmermann (n 58) 44.
64 *Ilott v The Blue Cross* [2017] UKSC 17 [16] (Lord Hughes).
65 Sloan (Fn 57) 306.
66 Kerridge (n 57) 394; Sloan (n 57) 316.
67 Mary Ann Glendon, 'Fixed Rules and Discretion in Contemporary Family Law and Succession Law' (1985-1986) 60 Tul L Rev 1165, 1187.
68 *Ilott v The Blue Cross* [2017] UKSC 17; see on this decision Kerridge (n 57) 399 ff; Brian Sloan, 'Ilott v The Blue Cross (2017): Testing the Limits of Testamentary Freedom' in Brian Sloan (ed), *Landmark Cases in Succession Law* (Hart 2019) 301; see for comparative analysis, Francesca Bartolini & Francesco Patti, 'The freedom to disinherit children' (2018) 2 ZEuP 428; Zimmermann (n 58) 45 ff.
69 Sloan (n 68) 308 ff.
70 *Ilott v The Blue Cross* [2017] UKSC 17 [4].

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the District Judge, who characterised the deceased's decision as capricious and unfair as well as harsh and unreasonable, the judgment was reversed by the High Court on appeal. The High Court argued that, in light of the earning capacity of the daughter, a significant justification for the order of a family provision was lacking. This decision was, in turn, reversed by the Court of Appeal which ordered a new hearing before the High Court. Upon reversal, the High Court upheld the initial conclusions of the District Judge in a judgment that was again reversed by the Court of Appeal which increased the provision to £143,000 coupled with an additional option to claim up to £20,000.[71] Finally, the Supreme Court restored the first order issued by the District Judge that had awarded £50,000 to the plaintiff.[72] As Lady Hale emphasised in her concurring opinion, it is striking to see the variety of tenable solutions under s 2, 3 of the Inheritance Act 1975, not only with respect to the question of reasonable provision but also to the order chosen by the court under s 2.[73]

Ilott v Blue Cross has reinforced the impression that courts have thus far not been able to develop coherent supplementary criteria in order to render decisions under ss 2, 3 Inheritance Act 1975 predictable and consistent. Unlike the traditional equitable remedies that are granted and denied according to firmly established criteria, court orders under s 2 of the Inheritance Act 1975 are still truly discretionary and the exercise of the discretion does not seem to be system-oriented in terms of the above classification. As pointed out by Lady Hale, this leads to the puzzling result that in *Ilott v The Blue Cross* it would have been entirely consistent with the Inheritance Act 1975 to either award no family provision at all, to award a family provision of £50,000 or to award a family provision of more than £143,000.[74] This is arguably less a failure on the part of the courts but rather a consequence of the chosen discretionary regime that aims to provide a flexible mechanism for the administration of individualised justice in an area of law in which strongly held political and moral intuitions are prevalent.[75]

The example of the family provision shows that discretion does not necessarily develop in a system-oriented manner if courts are not able to formulate guidelines or rules of thumb for standard cases. This is, however, not simply a consequence of the statutory nature of the discretion. For

71 [2016] 1 All ER 932[62-64] (Arden LJ).
72 *Ilott v The Blue Cross* [2017] UKSC 17 [48].
73 *Ilott v The Blue Cross* [2017] UKSC 17 [65] (Lady Hale).
74 *Ilott v The Blue Cross* [2017] UKSC 17 [65] (Lady Hale).
75 *Ilott v The Blue Cross* [2017] UKSC 17 [66] (Lady Hale).

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instance, s 25 of the Matrimonial Causes Act 1973 institutes a list of different considerations similar to s 3 of the Inheritance Act 1975 that courts shall consider and weigh in their decision on financial provision after divorce. Despite this broad discretion, it has been noted that courts tend to share matrimonial property equally between spouses after divorce.[76] While courts retain full discretion to stray from the principle of equal division of property,[77] it can serve as a starting point and anchor for the court's reasoning and lead to a system-oriented exercise of discretion under the Matrimonial Causes Act 1973.

c. Remedial constructive trusts and 'discretionary remedialism'

Despite its long history in equity and the manifold contemporaneous examples, discretion in the choice and calibration of remedies has been controversial recently.[78] In a debate that was initially sparked by the controversy over remedial constructive trusts,[79] the general role for discretion in the law of remedies came into focus.[80] A remedial constructive trust is defined as a constructive trust that is not created by the operation of law (so-called institutional constructive trust), but by the order of the judge in the exercise of her discretion as a 'just response' to a certain conduct.[81] Proponents of the remedial constructive trust and, more generally, of what has been labelled as discretionary remedialism defend the role of discretion in the choice of remedies.[82] Acknowledging with candour that this kind of judicial discretion exists, it is argued, is preferable to

76 Jens Scherpe, 'The Financial Consequences of Divorce in a European Perspective' in Jens Scherpe (ed), *European Family Law, Vol. III: Family Law in a European Perspective* (Edward Elgar 2016) 146, 171.

77 Röthel (n 54) 138; Scherpe (n 76) 171.

78 Birks (n 8) 1; Evans (n 8) 463; see for a comparative perspective on the debate, Hofmann (n 15) 44 f.

79 See the much-debated decision of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 714-715 (Lord Browne-Wilkinson).

80 Birks (n 8) 1; Birks (n 19) 1.

81 Lord Neuberger, 'The remedial constructive trust – fact or fiction', Speech at the Banking Services and Finance Law Association (https://www.supremecourt.uk/docs/speech-140810.pdf, 1 October 2020) [8]; see, for a critical review of this distinction, Liew (n 29) 528.

82 Evans (n 8) 463; Finn (n 9) 274.

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holding on to the (unrealistic) notion of the judge finding the law.[83] This approach was criticised with great fervour by *Peter Birks*, with respect to remedial constructive trusts but also more fundamentally regarding the foundations of discretionary remedialism.[84] He objects to a greater role for discretion on the basis that outcomes would become unpredictable and settlements arbitrary and that, more importantly, citizens would be deprived of their dignity while courts would jeopardize their authority in pluralistic societies.[85] The discussion about the role of remedial discretion in constructive trusts is still open. In contrast to jurisdictions like Canada and Australia,[86] English law has thus far refused to recognise the remedial constructive trust.[87] The main reason for this reluctance has been the perception that remedial constructive trusts give judges too wide a discretion than is advisable in respect to proprietary rights,[88] although it seems at least plausible that the discretion could be exercised in a system-oriented manner.[89]

The above examples have shown that remedial discretion is not simply a label or a terminological remnant of equity jurisdiction. While it is certainly true that many remedies that are discretionary in name follow criteria that are firmly established in case law, there are still important pockets of discretion in the choice and calibration of these remedies. English law also still knows remedial decisions that are truly discretionary, for example the family provision under the Inheritance Act 1975. Although the discretionary nature or the extent of the discretion are criticised by some,[90] English law seems generally confident to vest judges with discretion to choose the appropriate remedies in important areas of law.[91]

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83 Evans (n 8) 489.
84 Birks (n 19) 23: 'nightmare trying to be a noble dream'.
85 Birks (n 19) 23 f.
86 See, for an overview, Ying Khai Liew, *Rationalising Constructive Trusts* (Hart 2017) 245 ff.
87 *Bailey v Angove's PTY Ltd* [2016] UKSC 47 [27] (Lord Sumption); *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619 [84] (Etherthon LJ).
88 *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619 [84] (Etherthon LJ)
89 Liew (n 86) 255.
90 Birks (n 8) 15; contra Harding (n 13) 292 ff.
91 *Dart v Dart* [1996] 2 FLR 286 (294) (CA) (per Thorpe LJ).

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2. Remedial discretion in German law

The situation is different in German private law. Although it is possible to distinguish subjective rights and the resulting claims,[92] there is no firm and clear distinction between right and remedy.[93] Rather, rights are judicially claimed as *Anspruch*,[94] a term that includes the relief sought but excludes procedural questions, particularly the enforcement of the court order.[95] The question of the existence and extent of remedial discretion loses thus some of its precision when applied to German law (a.). The inquiry will therefore, turn to provisions of German law that, at least at first glance, allow courts to exercise discretion in choosing or moderating legal consequences (b.–d.).

a. No theory of remedial discretion in private law (yet)

As noted above, there is no established concept of remedy in German private law and, likewise, there is no concept of remedial discretion. Discretion, in general, is not a concept that pervades private law.[96] Limitations on the availability of relief in specific situations are not understood as remedial restrictions but rather as restrictions of the right itself.[97] Recently, there have been attempts to establish a distinction between a ground right and a remedial right inspired by the common law right and remedy-dichotomy.[98] On that basis, it has been argued that an equivalent of remedial discretion can be found in the weighing of interests in the proportional

92 Jan Felix Hoffmann, 'Remedies in Private Law from a German Perspective' in Franz Hofmann & Franziska Kurz (eds), *Law of Remedies – a European Perspective* (Intersentia 2019) 45, 48, distinguishing property and remedial rights; Hofmann (n 15) 173, 181, who distinguishes *Stammrechte* and *Rechtsfolgenrechte*; see, for a detailed discussion of further classifications, ibid 173 ff.

93 Hoffmann (n 92) 48.

94 See, for a definition of *Anspruch* (translated as claim), s 194 (1) BGB: 'The right to demand that another person does or refrains from an act (claim) is subject to limitation'.

95 See, generally for the comparison between *Anspruch* and remedy, Franz Hofmann, '"Anspruchsdenken" und "Remedydenken" im deutschen Privatrecht' (2018) Juristische Schulung 833; see also Hoffmann (n 92) 47.

96 Hofmann (n 15) 77.

97 Hofmann (n 15) 81-83; see also Hoffmann (n 92) 57, who argues that therefore there is no need to introduce discretionary remedial rights.

98 Hofmann (n 15) 173 ff; 462 ff.

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enforcement of certain property rights.[99] It remains to be seen whether such a theory of remedial discretion will gain widespread recognition.[100]

Judges are sometimes tasked with the equitable quantification of the claim.[101] To allow an equitable quantification in individual cases, the German Civil Code operates with open terms like 'appropriate' (*angemessen*) or 'equitable' (*billig*).[102] It is noteworthy, however, that most of these issues relate to problems of quantification of the claim, something that is inherently fact-dependent and difficult to fix in an abstract manner. The judge is thus not so much determining which remedy is appropriate but rather how the claim should be quantified. Consequently, while it is possible to describe this operation as remedial discretion, there seems to be an important difference whether a judge has discretion to grant or moderate a remedy or is simply tasked with quantification. The discretion in the family provision, for example, not only pertains to quantum but also to the basic question whether a provision is granted and, if so, in what form.[103] Additionally, a notable feature of some of these quantifications is that the precise determination of the sum is guided by uniform tables. These tables, albeit not legally binding, are widely followed for the allocation of maintenance[104] and for damages for pain and suffering.[105] If courts wish to deviate from the tables, they are generally expected to justify the deviations.[106] A reference to valuations in the tables does, however, not entirely relieve the court from the exercise of discretion in a particular

99 Hofmann (n 15) 223 ff; 462 ff., particularly for injunctive relief.

100 See Hofmann (n 15) 211 ff, 462 ff; see, for a critique of this approach, Christian Berger, 'Franz Hofmann: Der Unterlassungsanspruch als Rechtsbehelf' (2021) 221 AcP 732, 735 f.

101 Anne Röthel, *Normkonkretisierung im Privatrecht* (MohrSiebeck 2004) 171.

102 See, with further examples, Röthel (n 101) 45, 171.

103 Section 2 of the Inheritance Act 1975.

104 See for child maintenance, Düsseldorfer Tabelle 2020 (https://www.olg-duesseldorf.nrw.de/infos/Duesseldorfer_Tabelle/Tabelle-2020/Duesseldorfer-Tabelle-2020.pdf, 1st October 2020).

105 See on these tables, Oliver Brand, '§ 253 BGB' in Beate Gsell, Wolfgang Krüger, Stephan Lorenz & Christoph Reymann (eds), beck.online-Grosskommentar (CH Beck 2020) para 56; Hartmut Oetker, '§ 253' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg (eds), Münchener Kommentar zum Bürgerlichen Gesetzbuch (8th edn, CH Beck 2019) para 37.

106 Oberlandesgericht Bremen, Decision of 16 March 2012 – 3 U 6/12, (2012) Neue Juristische Wochenschrift-Rechtsprechungs-Report Zivilrecht 858, 859; Oetker (n 105) para 37, with further references.

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case. It still has to justify why the individual case is comparable to the standard case as described in the table.[107]

b. Contract concretisation and adaptation

Exceptionally, however, judicial discretion may play a role in the contract concretisation and adaptation. The first example of judicial discretion concerns the control and modification of unilateral determinations by one of the parties.[108] Pursuant to s 315 (3) BGB, judges may control the exercise of discretion by a party to a contract if the contract stipulates that one of the parties can unilaterally determine the content of the contractual obligations. If the determining party is bound to make the determination in an equitable manner ('nach billigem Ermessen'), such determination is only binding on the other party if it is indeed equitable. If not, the court must determine the content of the obligation in its judgment. On appeal, the court's determination is only reviewed as to whether the court went beyond the confines of its discretion or misconceived of the notion of discretion.[109] Section 315 (3) BGB thus institutes a two-pronged test: the court first has to find that the party's determination is unequitable and can then, in a second step, impose its own equitable determination.[110] From a theoretical point of view, the court's discretion is only a place-holder for a gap in the contract or the unequitable exercise of discretion by one party and, consequently, has to be exercised in conformity with the contract and its purpose.[111] Compared to the abovementioned examples in English law, it is, at least in theory, a rather modest form of discretion as its source ultimately is the (presumed) will of the parties that dictates how the court should fill the contractual gap.[112]

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107 Oberlandesgericht München, Decision of 24 July 2015 – 10 U 3313/13, (2015) BeckRS no 13775; Oetker (n 105) para 37.

108 See for unilateral determinations by third parties, s 319 (1) BGB.

109 Bundesgerichtshof, Decision of 24 November 1995 - V ZR 174/94, (1996) Neue Juristische Wochenschrift 1054; Felix Netzer, '§ 315 BGB' in Beate Gsell, Wolfgang Krüger, Stephan Lorenz & Christoph Reymann (eds), *beck.online-Grosskommentar* (CH Beck 2021) para 89.

110 Markus Würdinger, '§ 315' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, CH Beck 2019) para 52.

111 Volker Rieble, '§ 315' in *Julius v. Staudinger Kommentar zum Bürgerlichen Gesetzbuch* (De Gruyter 2015) para 398; Würdinger (n 110) para 52.

112 Rieble (n 111) para 398 ff; Würdinger (n 110) para 5.

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A second form of judicial discretion consists in the judge's role in the adaptation of a contract. Two provisions come to mind. The first provision is s 313 (1) BGB, pursuant to which the judge may adapt the contract if the circumstances that were the basis of the transaction have significantly changed. The second provision is s 343 BGB, pursuant to which the judge may reduce a disproportionately high penalty to a reasonable amount. Like s 315 (3) BGB, these provisions allow to adapt a contract in situations in which the contractual stipulations of the parties are or have become unbearable for one of the parties. This judicial moderation of the contract is, however, to be exercised in light of the rationale of the respective rules. For the adaptation of the contract under s 313 (1) BGB, it is universally recognised that the judge should not interfere with the contractual risk allocation.[113] If such risk allocation is lacking, the court should limit itself to the interference strictly necessary to remedy the imbalance caused by the unforeseen change of circumstances and to restore the balance according to the hypothetical will of the parties.[114] In other words, the adaptation is not dependent on what the court thinks is appropriate in general but rather on the question how the bargain between the parties can be restored in light of the circumstances.[115] In a similar fashion, the reduction of the contractual penalty pursuant to s 343 BGB, although a discretionary decision of the court, should not reduce the penalty further than necessary, ie uphold the penalty as far as the parties could have stipulated it in the contract.[116]

At a high level of abstraction, the different examples of a judicial moderation of the contract pursuant to s 313 (1) and s 343 (1) BGB or of the determination of the content of the contract pursuant to s 315 (3) BGB have in common that the discretion is to be exercised in a fashion that is as consistent with the contractual stipulations as possible. At least in theory,

113 Thomas Finkenauer, '§ 313' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, CH Beck 2019) para 61; Sebastian A E Martens, '§ 313 BGB' in Beate Gsell, Wolfgang Krüger, Stephan Lorenz & Christoph Reymann (eds), *beck.online-Grosskommentar* (CH Beck 2021) para 61.

114 Lars Böttcher, '§ 313' in Barbara Grunewald, Georg Maier-Reimer & Harm Peter Westermann (eds), *Erman BGB, Kommentar* (16th edn, ottoschmidt 2020) para 41; Martens (n 113) para 139.

115 Böttcher (n 114) para 41.

116 Volker Rieble, '§ 343' in *Julius v. Staudinger Kommentar zum Bürgerlichen Gesetzbuch* (De Gruyter 2015) para 109; Bernhard Ulrici, '§ 343 BGB' in Beate Gsell, Wolfgang Krüger, Stephan Lorenz & Christoph Reymann (eds), *beck.online-Grosskommentar* (CH Beck 2021) para 85.

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they are narrow exceptions to the general principle of *pacta sunt servanda* in order to save one of the parties from the unbearable consequences of the contract without vesting the judges with any additional discretionary power. Of course, in practice, judges enjoy considerable freedom in the determination of what is equitable in a particular case as long as they tie their reasoning to the hypothetical will of the parties.

c. Good faith

In a discussion of judicial discretion in German private law, the obvious provision to analyse is s 242 BGB.[117] The principle of good faith and fair dealing enshrined in s 242 BGB pervades German private law and applies to the creation as well as to the exercise and the modification of rights.[118] Despite this broad scope, it does not justify individualised and discretionary decisions in specific cases. Rather, the court has to develop the principle in a way that it may be applied consistently to a multitude of cases.[119] Keeping this in mind, it is hardly surprising that s 242 BGB is now compartmentalised in specific groups of cases, such as abuse of rights or the prohibition of contradictory behaviour.[120] Within these groups of cases, the existing case law is quite differentiated and resembles a system of rules initially inspired by good faith that are applied by the courts.[121] Even if courts wished to go beyond the established jurisprudence, they would be expected to justify their decision as an abstract rule rather than as an exercise of its discretion in the particular circumstances of the case at hand.[122] The court engages in the construction and development of law by virtue of s 242 BGB as a general clause rather than exercising

117 Dedek (n 16) 106; Jan Peter Schmidt, 'Article 1:201' in Nils Jansen & Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (Oxford University Press 2018) para 27; see for French law, Sefton-Green (n 16) 282 ff.

118 Schmidt (n 117) para 29.

119 Claudia Schubert, '§ 242' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, CH Beck 2019) para 24.

120 Dirk Looschelders and Dirk Olzen, '§ 242' in *Julius v. Staudinger Kommentar zum Bürgerlichen Gesetzbuch* (De Gruyter 2019) para 122, 210; Schubert (n 119) para 139 ff.

121 Marietta Auer, 'Good Faith: A semiotic approach' (2002) European Review of Private Law 279, 296 f; Schmidt (n 117) para 28.

122 Schubert (n 119) para 24.

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discretion in individual cases.[123] Therefore, the principle of good faith does not seem to be an entry point for remedial discretion for the purposes of this paper. This does of course not mean that discretion plays no role in its application, although it is the discretion involved in the interpretation and development of the law rather than remedial discretion in individual cases.[124] From a functional perspective equitable principles and remedial discretion on one side and the principle of good faith on the other may fulfil similar tasks in a private law system, ie to provide second-order adjustments to strict rules of law that are potentially blind for nuances of exceptional cases.[125]

d. The quantification of damages

Another potential example for remedial discretion is s 287 of the German Code of Civil Procedure.[126] Pursuant to this provision, the court determines the quantum of a damages claim freely at its conviction. It has discretion to choose the evidence it deems necessary for this determination.[127] The emphasis on the free decision and discretion as to the relevant evidence may, however, be misleading regarding the scope of the court's discretion. The provision is part of the regulation of the standard of proof. It exempts the questions of the amount of damages and the causal link between the wrong and the damage from the stricter standard of s 286 ZPO.[128] Accordingly, the plaintiff does not need to prove the precise amount of damage but merely has to furnish the relevant facts that allow the judge to make an estimate.[129] The discretion of s 287 ZPO is thus more an alleviation of proof than a substantial discretion of the court.[130] Consequently, if the amount of damages is not in dispute or if the precise amount is proven, the court has no discretion but must award

123 But see Looschelders & Olzen (n 120) para 122.
124 Dedek (n 16) 107.
125 Dedek (n 16) 107.
126 Hofmann (n 15) 43; Stickelbrock (n 2) 377 ff.
127 Reinhard Greger, '§ 287' in Zöller (ed), *Zivilprozessordnung* (33rd edn, ottoschmidt 2020) para 6; Hanns Prütting, '§ 287' in Thomas Rauscher & Wolfgang Krüger (eds), *Münchener Kommentar zur ZPO* (6th edn, CH Beck 2020) para 23.
128 Greger (n 127) para 1; Prütting (n 127) para 1.
129 Prütting (n 127) para 28.
130 Greger (n 127) para 1; Prütting (n 127) para 4; Stickelbrock (n 2) 380.

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the amount.[131] The discretion is thus significantly weaker than substantial discretion in the choice and calibration of remedies because the question for the court is not which remedy is appropriate but one of factual estimation.[132] Similar provisions exist in other civil law jurisdictions. French law, for example, albeit its strict theoretical adherence to the principle of full compensation (*tout le dommage, rien que le dommage*),[133] allows the trier of facts to make a sovereign determination on quantum (*pouvoir souverain des juges du fond*).[134] The Swiss law of obligations not only contains a provision similar to s 287 ZPO but also allows judges to reduce damages if full liability would leave the obligor in a position of hardship.[135] Analogous forms of this discretionary reduction of damages have been discussed but not adopted in Germany.[136]

3. *Comparison*

The short overview of remedial discretion in English law and German law has shown that, despite the different taxonomies, English law seems generally more willing to vest judges with discretion to calibrate the consequences of liability. Even if the traditional equitable remedies have developed into rule-like remedies, judges enjoy considerable discretion in other remedial decisions. Despite the recent debate on the remedial constructive trust and the limits of judicial discretion, that is still too recent

131 Bundesverfassungsgericht, Beschluss vom 8.12.2009 - 1 BvR 3041/06 (2010) Neue Juristische Wochenschrift 1870 [13]; Prütting (n 127) paras 1, 3.

132 Greger (n 127) para 1.

133 Yvaine Buffelan-Lanore & Virginie Larribau-Teynere, *Droit civil, Les Obligations* (16th edn, Sirey 2018) para. 2518 ; see also Cass. Civ. 2e, 28 mai 2009, n° 08-16829.

134 Cass. Civ. 2ème, 11 sept. 2003, Bull. civ. II n° 249; Jacques Boré & Louis Boré, *La cassation en matière civile*, (5th edn., Dalloz 2015) para 67.158; *Viney/Jourdain/Carval*, Les conditions de la responsabilité, n° 248-1.

135 See Article 44 (2) Swiss Code of Obligations; see for the determination of damages, Article 42 (2) Swiss Code of Obligations.

136 See, for a discussion of a 1967 draft to introduce a clause allowing for the reduction of damages, Scholz (Fn 56) 326; see also Claus-Wilhelm Canaris, 'Verstöße gegen das verfassungsrechtliche Übermaßverbot im Recht der Geschäftsfähigkeit und im Schadensersatzrecht' (1987) 42 Juristenzeitung 993, 1001; see, on that discussion with further references, Hartmut Oetker, '§ 249' in Franz Jürgen Säcker, Roland Rixecker, Hartmut Oetker & Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (8th edn, CH Beck 2019) para 14, 15.

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for a comparative evaluation,[137] there seems to be no general reluctance to vest judges with remedial discretion. Rather, judicial discretion is regarded as an apt mechanism to achieve fairness between the parties.[138] Criticism mostly relates to the extent of discretion, its incoherent exercise or a lack of guidance on the relevant criteria but, for the most part, not to the general idea of remedial discretion.[139] The situation is different in German law. German private law only exceptionally grants judges the authority to vary or moderate the legal consequences of liability. Judges enjoy other hidden types of discretion in the administration of justice, particularly with respect to the application of rather open-textured standards. Beyond these value judgments, German private law appears to be rather reluctant to grant judges the authority to overtly exercise discretion in the choice and calibration of legal consequences. The examples of judicial moderation of legal consequences are recognised as exceptions and are mostly designed to concretise or adapt a contract that is or has become unbearable for one of the parties.

In the following part, this paper will therefore try to add some remarks on the merits of remedial discretion in order to discern whether civil law jurisdictions should allow for more judicial discretion in the choice and calibration of legal consequences of liability.

IV. Some Remarks on the Merits of Remedial Discretion

This part will begin by critically assessing some of the assumptions of remedial discretion (1.), before it will briefly address some of the rule of law concerns (2.).

137 Dedek (n 16) 88.

138 *Dart v Dart* [1996] 2 FLR 286 (294) (CA) (per Thorpe LJ).

139 See on the family provision, Oughton (n 57) 46. The most extensive form of criticism is expressed by Birks, which is however not exclusively directed against judicial discretion but rather against the prevailing understanding of the right-remedy-taxonomy, Birks (n 19) 19 ff.

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1. The uneasy case for remedial discretion

The main argument for remedial discretion is that the judge will be well-positioned to choose the appropriate remedy.[140] She can weigh the competing interests in the individual case and tailor the remedy accordingly. This idea of a more individualised (or substantive)[141] justice in the choice of the remedy is the essence of what has been labelled *discretionary remedialism*.[142] This promise of tailor-made discretionary remedial justice relies on two assumptions that shall be challenged here.

The first and perhaps most important assumption is that the fact-driven decision by the judge is more likely to produce a just outcome than an abstract determination of the appropriate remedy by the legislator or the highest court. This assumption relies on the judge's ability to gather the relevant facts and ignore the irrelevant ones. Despite differences in the fact-finding process in different jurisdictions, it seems generally fair to say that the judge will only obtain some of the relevant information, notably information that is provided by the parties. This information may be sufficient in purely commercial cases that turn on commercial interests of the parties. However, it may not be sufficient if the judge needs to make an ex post value judgment on a reasonable provision in light of the complex family relationships of a deceased testatrix.[143] In these cases, it will be difficult for courts to obtain all the relevant information, particularly since one of the protagonists is deceased and will not be able to contribute pertinent information.[144] More generally, it is doubtful whether courts can possess the requisite information about other cases. One of the prerequisites for a sound exercise of discretion seems to be the capacity to compare and contrast the case at hand to other cases in order to discern which cases are typical and which are extraordinary. In other words, the exercise of discretion involves locating the case's position on the spectrum of possible cases. Admittedly, most courts will have anecdotal knowledge of other cases and will certainly have an intuition as to whether a case is extraordinary or not. This intuition may however be misleading as it will be based on the peculiarities of the region the court is based in or simply on the personal

140 See, for an emphatic statement of this idea, *Dart v Dart* [1996] 2 FLR 286 (294) (CA) (per Thorpe LJ).
141 Evans (n 8) 463.
142 Birks (n 8) 1.
143 Trulsen (n 60) 164.
144 This does not mean that the judge of first instance is never in a better position to render a value judgment, see Waddams (n 24) 68.

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background of the judges and their socialisation.[145] The inferences drawn from other cases may also give a distorted view since they are largely a function of which cases proceed to trial.[146] In light of the limited information on the case at hand and on comparable cases, it therefore seems preferable to restrict the judge's freedom in the determination of remedies by the establishment of specific criteria or uniform tables, especially if the determination involves the evaluation of complex relationships, as is the case for the family provision.

The second assumption regarding remedial discretion is that judges can exercise their discretion, even in the absence of rule-like criteria, as neutral actors, unswayed by conscious or unconscious biases. In an ideal world, a judge is a disinterested arbiter. In practice, although data are scarce and very jurisdiction-specific, it seems reasonable to assume that judges are influenced by cognitive biases, personal sympathies, political preferences, socialisation, and other cultural affiliations.[147] While this is true not only for the exercise of remedial discretion but generally for the interpretation, application, and development of the law, the exercise of discretion is a particularly delicate issue since important checks on personal preferences can be absent or limited in discretionary decisions on remedies, most

145 See, for instance, Gilian Douglas, 'Family Provision and Family Practices – The Discretionary Regime of the Inheritance Act of England and Wales' (2014) 4 (2) Oñati Socio-legal Series 222, 241: 'judges (…) are using their own experiences of family practices and norms'.

146 See on the tendency that family provisions are only applied for in cases of large estates, Röthel (n 54) 153; see on potential compromise and contrast biases in judicial decision-making Doron Teichmann & Eyal Zamir, 'Judicial Decision-Making: A Behavioral Perspective' in Eyal Zamir & Doron Teichmann (eds), *The Oxford Handbook of Behavioral Economics and the Law* (Oxford University Press 2014) 665, 670.

147 See, for an overview on judicial preferences in common law decision-making, Ben Depoorter and Paul H. Rubin, 'Judge-Made Law and the Common Law Process', in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 3: Public Law and Legal Institutions* (Oxford University Press 2017) 130, 132; see, for the sympathy effect, Andrew J Wistrich, Jeffrey J Rachlinski and Chris Guthrie, 'Heart versus Head: Do Judges Follow the Law of Follow Their Feelings' (2015) 93 Tex L Rev 855, 898 ff; Holger Spamann and Lars Klöhn, 'Justice Is Less Blind, and Less Legalistic, than We Thought: Evidence from an Experiment with Real Judges' (2016) 45 Journal of Legal Studies 255, 277; no sympathy effect was observed in: Daniel Klerman and Holger Spamann, 'Law matters – Less than we thought', Discussion Paper No 1015, 01/2021, https://ssrn.com/abstract=3439526 (4 August 2021).

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notably the effect of feeling bound by a strict rule and the review and potential reversal by an appellate court.[148]

2. *Unfettered power? Remedial discretion and the rule of law*

Judicial discretion is always, at least potentially, in conflict with the rule of law. The basic premise of the rule of law is that the judge is bound by the law and applies it indiscriminately. More specifically, clarity of the law and predictability of decisions also form part of the concept of rule of law.[149] Similar concerns have also been voiced in the English debate lately, despite the long history of remedial discretion in equity.[150] As a general matter, there seems to be nothing fundamentally wrong with judicial discretion in adjudication. It is universally recognised that legal systems will work with open or vague terms whose application in specific cases may be uncertain. It is the institutional role of the judge to apply the law and within its boundaries exercise discretion. The rule of law problem is thus not one of principle but one of degree.[151] From a rule of law perspective, however, judicial discretion needs to be, at least to some extent, fettered by statutory rationales and criteria and must not be arbitrary. Despite its considerable tolerance for indeterminacy, the concept of rule of law is therefore not compatible with a decision that is justified by a recourse to the judge's conscience or notion of fairness. It lies in the nature of both the notion of discretion as well as the concept of rule of law that this is not a bright line test. Hence, on the spectrum of remedial discretion, only those remedial decisions are problematic that are not guided by sufficient criteria or that are guided by too many contradictory criteria that potentially allow judges to justify any decision of their liking. An initial lack of criteria may be compensated by a general framework for the exercise of the discretion that allows judges to work out the criteria over time and build up case law in a 'system-oriented' manner.[152] Accordingly, an initially wholly indeterminate remedy may develop into a remedy based on differentiated

148 See, for the observation of a weak effect of a strict rule, Klerman & Spamann (n 147) 23.

149 See, eg for Article 20 of the *Grundgesetz*, Grzeszick, 'Article 20' in Maunz/Dürig (eds), Grundgesetz, Kommentar (90th suppl, CH Beck 2020) para 58; see also Berger (n 100) 735 f.

150 Birks (n 8) 15, contra Harding (n 13) 278.

151 Stickelbrock (n 2) 246 f.

152 See on the role of system-oriented decision-making, Harding (n 13) 293.

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case law that offers sufficient guidance and predictability, as has been the case for the equitable remedies. It is, however, equally possible that the jurisprudence is not system-oriented, but erratic or even contradictory, so that parties may not be able to predict whether the remedy will be granted and, if so, to what extent. The English family provision seems to be developing in that direction, as there is a plethora of criteria that judges can rely on, but their scope and variety is so broad that it is difficult to see how they meaningfully curtail the judge's discretion in a specific case.[153] This is especially problematic if discretionary decisions that are not system-oriented concern significant matters of societal and distributional importance. If such decisions, as the highly political question of mandatory family protection in succession law, are left to the individual discretion of judges with a high level of indeterminacy and limited review, the right to participate in the family estate will depend on the luck of the (judicial) draw. The point here is not necessarily an institutional one, ie that it should be Parliament who enacts hard and fast statutory rules in these matters.[154] The point is rather that, from a rule of law perspective as well as in conformity with the principle to treat like cases alike, a legal system has to be consistent and predictable in its fundamental distributive decisions. At least for the participation of family members in the inheritance this implies a basic and reliable decision of who should participate in the inheritance and why. As the development of the family provision has shown, wide judicial discretion does not seem to be the instrument of choice in such morally and politically fraught matters.

V. Conclusion

Remedial discretion is merely one of many examples of the inevitable balancing exercise between legal certainty and predictability on the one side and equitable outcomes in individual cases on the other. On the spectrum of remedial discretion, different jurisdictions may find themselves at different points between strict enforcement of remedies as a matter of right and wide discretion for judges in the choice and moderation of the remedies. The analysis has shown that there are different types of

153 *Ilott v The Blue Cross* [2017] UKSC 17 [65] (Lady Hale).

154 Trulsen (Fn 60) 167; see also Patrick S Atiyah, *Rise and Fall of Freedom of Contract* (Oxford University Press 1979) 679; see for this discussion in this volume, Victor Jouannaud, 'The Essential-Matters Doctrine (*Wesentlichkeitsdoktrin*) in Private Law: A Constitutional Limit to Judicial Development of the Law?' (§ 7).

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remedial discretion. If remedial discretion is exercised in a system-oriented manner, courts will incrementally develop a set of rule-like criteria and ensure legal certainty over time. Such a systemisation can be observed for the traditional equitable remedies or, as civilian analogue, for the jurisprudence on s 242 BGB. The remaining pockets of discretion can be used as a second-order corrective device for exceptional cases without sacrificing much predictability in most cases. The system-oriented exercise of remedial discretion may, however, fail. The prime example of such failure in this paper has been the English family provision. The absence of systemisation will lead to unpredictable outcomes for parties. More importantly, a legal system should not delegate questions of paramount societal importance to the individual assessment of judges. For instance, the mandatory participation of family members in the familial inheritance, as a question of distributive justice and societal importance, should not depend on the luck of the judicial draw.

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§ 7 The Essential-Matters Doctrine (*Wesentlichkeitsdoktrin*) in Private Law: A Constitutional Limit to Judicial Development of the Law?

Victor Jouannaud[*]

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The boundaries of judicial development of the law[1] (*Richterliche Rechtsfortbildung*) in private law represent a classical field of discussion in legal scholarship and practice. The focus is mainly on methodological aspects,[2] especially on how to provide courts with clear criteria for the interpretation of existing statutes and techniques to detect and fill legislative gaps.[3] This article approaches the problem from a slightly different angle by observing the relationship between legislature and judiciary primarily as a matter of competencies. A crucial question here is whether there are specific areas in which decision-making is reserved exclusively for the legislature. In these areas, other actors than the legislature would only be authorized to make decisions on an explicit statutory basis or not at all. With regard to the executive, there is a wide consensus that it needs statutory empowerments to act in certain areas, reserved for the legislature. However, with regard to the judiciary, which is traditionally perceived as the 'least dangerous'[4] branch of government,[5] the question

1 In this article, the term 'judicial (further) development of the law' is used in a broad sense to describe the scope of judicial decision-making going beyond statutory law's wording or/and intention. In common law systems the terms 'judicial law-making' (action-oriented) or 'judge-made law' (result-oriented), which emphasize the quality as an independent source of law are more frequently used. For a common law perspective on judicial law-making, see Patrick Hodge, 'The Scope of Judicial Law-Making in the Common Law Tradition' (2020) 84 RabelsZ 211.

2 For methodological approaches, see eg Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgrundlagen richterlicher Entscheidungspraxis* (Athenäum 1972) 177 ff; Claus-Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz: Eine methodologische Studie über Voraussetzungen und Grenzen der richterlichen Rechtsfortbildung praeter legem* (2nd edn, Duncker & Humblot 1983) 172 ff; Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer 1991) chap 5; Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd edn, Springer 2011) 472 ff.

3 A gap is usually defined as an unintended incompleteness in an individual provision, in a statute or in the whole legislation, cf BGH, NJW 2009, 427, 429. For details, see Canaris, *Feststellung* (n 2) 15 ff; Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (3rd edn, Springer 1995) 191 ff.

4 Alexander Hamilton, 'Federalist No. 78' [1788]: 'Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them'.

5 cf Georg Hermes, 'Verfassungsrecht und einfaches Recht - Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2002) 61 VVDStRL 119, 136. For a detailed analysis of the role of judges in the 19th century, see Regina Ogorek, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert* (Klostermann 1986).

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was hardly raised for a long time. Particularly in the field of private law, the limits of judicial interpretation and development of the law are frequently drawn generously without considering whether there is an encroachment into the legislature's sphere of competence. The Federal Constitutional Court's (*Bundesverfassungsgericht*)[6] essential-matters doctrine (*Wesentlichkeitsdoktrin*), which states that essential decisions, especially those concerning the realization of fundamental rights (*Grundrechte*), must be taken by the legislature itself, was not considered relevant here for a long time. More recently, however, the position of the Court has become vague and an extension of the essential-matters doctrine to the judiciary is increasingly being discussed by scholars. This article endeavors to contribute to the research discussion by focusing on specific aspects of private law. After some introductory remarks on the role of judicial development of the law in Germany (I.), the essential-matters doctrine will be presented and its extension to the judiciary in general will be discussed (II.). On this basis we will examine the doctrine's application to private law adjudication and elaborate a differentiating approach (III.).

I. Judicial Development of the Law as a Constitutional Problem – General Aspects

The current field of judicial action in civil law systems is far removed from the traditional picture of the judge as the 'mouth of the law'[7] that *Montesquieu* once depicted in his theory of separation of powers.[8] Nowadays, civil law judges aren't merely faithful servants of the legislature,[9] deprived

6 Cited below as 'Federal Constitutional Court' or 'Court'. Decisions are mainly quoted from the anthology of Federal Constitutional Court decisions, 'BVerfGE'.

7 Montesquieu, Charles Louis de Secondat, *De L'Esprit des Loix* (Barrillot & Fils 1748) book 11, ch 6, 256: 'Mais les Juges de la Nation ne sont (…) que la bouche qui prononce les parôles de la Loi (…)'. For a similar description as 'viva vox legis', see Paul Laband, *Das Staatsrecht des Deutschen Reiches* (vol 2, 5th edn, J. C. B. Mohr 1911) 178.

8 For details regarding the role and development of the judiciary under the German Basic Law, see Andreas Voßkuhle, *Rechtsschutz gegen den Richter: Zur Integration der Dritten Gewalt in das verfassungsrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 Abs. 4 GG* (Beck 1993) 50 ff.

9 An example for a quite restrictive understanding of the judiciary's role can also be found in §§ 46-54 of the Introduction to the Prussian Civil Code of 1794 (*Einleitung zum Allgemeinen Preußisches Landrecht von 1794*). Here, the focus was on concentrating legislative power in the hands of the ruling monarch. To this end,

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of discretional and political power,[10] but they actively participate in the process of shaping the law. Nevertheless, a large difference to common law systems remains, in which judge-made law is an independent source of law.[11] Civil law judges interpret codified legislation to develop the law whereas common law judges mainly develop the law which their predecessors have made.[12] For the former, statutes represent the necessary material basis for democratically legitimizing the exercise of state power.[13] The statutory form is also meant to protect those subject to the law from arbitrary and unpredictable adjudication and thus realizes the principle of the rule of law.[14] Therefore, the German Basic Law (*Grundgesetz* – GG)[15] provides that the judiciary is 'bound by legislation and law' (art. 20 sec. 3 GG)[16] and 'subject to legislation' (art. 97 sec. 1 GG)[17]. A closer look at these provisions reveals that they don't clearly set the methods nor the scope and outer limits of statutory interpretation and judicial development

courts had to consult with a legislative commission in case of doubt about the interpretation of a legal provision. For further details, see Andreas Schwennicke, *Die Entstehung der Einleitung des Preußischen Allgemeinen Landrechts von 1794* (Klostermann 1993) 294–295. Reinhard Zimmermann, 'Statuta Sunt Stricte Interpretanda – Statutes and the Common Law: A Continental Perspective' (1997) 56 Cambridge LJ 315, 325 describes the Prussian Code as the 'last great attempt of legislation designed to provide an exhaustive regulation, down to the most intimate detail and the finest differentiation' in Germany.

10 cf Montesquieu (n 7) book 11, ch 6, 251: 'Des trois puissance dont nous avons parlé, celle de juger est en quelque façon nulle.'

11 cf Hodge (n 1) 211. For a comparative view on judicial law-making in Germany and England, see Martin Brenncke, *Judicial law-making in English and German courts: Techniques and limits of statutory interpretation* (Intersentia 2018).

12 Hodge (n 1) 211.

13 cf BVerfGE 49, 304, 318; Andreas Voßkuhle and Gernot Sydow, 'Die demokratische Legitimation des Richters' (2002) 57 JZ 673, 678–679; Christian Hillgruber in Dürig/Herzog/Scholz (eds), Grundgesetz-Kommentar (95 suppl, CH Beck 2021) Art. 97 GG paras 27–30.

14 cf BVerfGE 49, 304, 318; Hillgruber (n 13), Art. 97 GG para 27.

15 Cited below as 'GG'.

16 The interpretation of the term 'law' in art 20 sec 3 GG is highly controversial. For an overview of the discussion, see Bernd Grzeszick in Dürig/Herzog/Scholz (eds), Grundgesetz-Kommentar (95 suppl, CH Beck 2021) Art. 20 GG VI paras 63 ff.

17 Regarding the genesis of art 97 sec 3 GG, it is an interesting fact that the constitutional legislator deliberately refused a formulation binding judges not only to the law but also to their conscience, cf Christian Hillgruber, '"Neue Methodik" – Ein Beitrag zur Geschichte der richterlichen Rechtsfortbildung in Deutschland' (2008) 63 JZ 745, 746.

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of the law.[18] Yet, judicial law-making is an indispensable part of legal practice in Germany, recognized in the constitutional case law[19] and referred to in several statutory provisions.[20] The relationship between legislature and judiciary, however, is constantly disputed in legal scholarship and practice. In general, it can be observed that constitutional arguments have gained in importance in the discussion, which focused on methodological aspects for a long time.[21]

II. Constitutional Principles Preserving the Primacy of the Legislature – Focus on the Essential-Matters Doctrine (Wesentlichkeitsdoktrin)

Two basic principles governing the relationship between the legislature and other branches of state power can be distinguished.[22] The principle of priority of a statutory provision (*Vorrang des Gesetzes*) primarily determines a hierarchy of norms, placing statutory provisions above rules created by the judiciary or executive.[23] It prohibits the executive and judiciary from acting against existing statutes (*contra legem*).[24] Since that rule only applies if statutes actually exist, a further question is whether there are constellations in which statutes are an indispensable basis for state authorities

18 cf Hans-Peter Schneider, *Richterrecht, Gesetzesrecht und Verfassungsrecht: Bemerkungen zum Beruf der Rechtsprechung im demokratischen Gemeinwesen* (Klostermann 1969) 30 f; Brenncke (n 11) 71. The line between 'interpretation' and 'judicial development of the law' cannot be clearly drawn, as both are only different scales in the same process of reasoning (cf Larenz and Canaris (n 3) 187).

19 See eg BVerfGE 34, 269, 286 f; 49, 304, 318; 65, 182, 190; 132, 99, 127. For criticism, see Hillgruber (n 17) 746–748.

20 cf §§ 511 sec 4(1) nr 1, 543 sec 2(1) nr 2 ZPO, § 132 sec 4 GVG for private law judiciary.

21 For specifically constitutional approaches, see eg Jörn Ipsen, *Richterrecht und Verfassung* (Duncker & Humblot 1975); Rolf Wank, *Grenzen richterlicher Rechtsfortbildung* (Duncker & Humblot 1978); Christian Starck, 'Die Bindung des Richters an Gesetz und Verfassung' (1976) 34 VVDStRL 43, 64–88; Christian Hillgruber, 'Richterliche Rechtsfortbildung als Verfassungsproblem' (1996) 51 JZ 118.

22 The distinction between priority (*Vorrang*) and reservation (*Vorbehalt*) of the law was already emphasized by Otto Mayer, *Deutsches Verwaltungsrecht* (vol 1, Duncker & Humboldt 1895) 72–76, who coined the term '*Vorbehalt des Gesetzes*'. See also, Andreas Voßkuhle, 'Grundwissen - Öffentliches Recht: Der Grundsatz des Vorbehalts des Gesetzes' JuS 2007, 118.

23 cf Mayer (n 22) 72; Jost Pietzcker, 'Vorrang und Vorbehalt des Gesetzes' JuS 1979, 710.

24 cf Grzeszick (n 16), Art. 20 GG VI para 73.

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to act. This question is governed by the constitutional requirement of a statutory provision (*Vorbehalt des Gesetzes*).[25] From this long-established constitutional figure, the Federal Constitutional Court has derived its essential-matters doctrine (*Wesentlichkeitsdoktrin*). After a short look at the development of the constitutional requirement of a statutory bases (1.), we will examine the constitutional basis and characteristics of the principle as developed under the essential-matters doctrine (2./3.). We then turn to the problem of extending the doctrine to the judiciary (4.).

1. *Development of the requirement of a statutory provision* (Vorbehalt des Gesetzes)

The origins of the constitutional requirement of a statutory provision (*Vorbehalt des Gesetzes*) go back to the power struggles between parliaments and monarchs that arose in the period of German constitutionalism at the beginning of the 19th century.[26] At that time, the notion of statutory law described an area of state decision-making, which was open to civic participation and removed from the monarch's sole authority.[27] It limited the extent of the monarch's power by requiring parliamentary participation for specific decisions.[28] The requirement of a statutory provision aimed primarily at protecting citizens from state (i.e. monarchic) interference in their sphere of freedom and property (*Freiheits- und Eigentumsformel*).[29] It also had

25 cf Mayer (n 22) 74; Grzeszick (n 16), Art. 20 GG VI para 75. Other translations are also common, eg 'provisio of legality', 'legal reservation' or 'requirement of an explicit legal basis'.

26 cf Fritz Ossenbühl, '§ 101', *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (vol 5, 3rd edn Müller 2007) para 18. For historical details, see Dietrich Jesch, *Gesetz und Verwaltung: Eine Problemstudie zum Wandel des Gesetzmäßigkeitsprinzipes* (2nd edn, Mohr 1968) 102–170; Peter Selmer, 'Der Vorbehalt des Gesetzes' JuS 1968, 489.

27 cf Ossenbühl (n 26) para 18. For a detailed historical analysis of the concept of statutory law and legislature, see Ernst-Wolfgang Böckenförde, *Gesetz und gesetzgebende Gewalt: Von den Anfängen der deutschen Staatsrechtslehre bis zur Höhe des staatsrechtlichen Positivismus* (2nd edn, Duncker & Humblot 1981).

28 cf Ossenbühl (n 26) para 18.

29 Jesch (n 26) 111 f; Böckenförde (n 27) 75 f. The philosophical basis of the idea that the preservation of freedom and property must be secured by the state goes back to John Locke, *Two Treatises of government* (Black Swan 1689 [1689]) book 2, chap 9, nr 124, 261: 'The great and chief end, therefore, of Mens uniting into Commonwealths, and putting themselves under Governments, is the Preservation of their Property.'; Locke (n 29) book 2, chap 11, nr 138, 273: 'The Supream Power

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a democratic-political dimension,[30] since the battle for further civic participation in important societal questions was at stake. The call was for the parliament, as the organ of civic representation, to be involved in important issues. In the era of late constitutionalism, this democratic aspect was to some extent displaced by a rule of law component, aiming at the protection of individual rights from arbitrary state interference.[31]

Under the Basic Law, the dualism between state and civil society, which prevailed under the era of constitutionalism and stood at the origin of the requirement of a statutory provision, no longer exists.[32] It gives way to a self-organization of society.[33] Parliament has a clear primacy in the new order, which is manifested in the fact that the other powers are bound by the statutes it passes (cf. art. 20 sec. 3 GG).[34] This has led some scholars to the assumption that an encompassing requirement of a statutory provision (*'Totalvorbehalt'*) is necessary, which applies not only to executive interventions in citizens' individual sphere, but to all state action.[35] However, the Federal Constitutional Court has rejected a 'comprehensive requirement

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cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society (…).'

30 cf Jürgen Staupe, *Parlamentsvorbehalt und Delegationsbefugnis: Zur "Wesentlichkeitstheorie" und zur Reichweite legislativer Regelungskompetenz, insbesondere im Schulrecht* (Duncker & Humblot 1986) 46; Ossenbühl (n 26) para 43.

31 cf Ossenbühl (n 26) para 43; Philipp Lassahn, *Rechtsprechung und Parlamentsgesetz: Überlegungen zu Anliegen und Reichweite eines allgemeinen Vorbehalts des Gesetzes* (Mohr Siebeck 2017) 61–67.

32 cf Jesch (n 26) 173; Walter Krebs, 'Zum aktuellen Stand der Lehre vom Vorbehalt des Gesetzes' Jura 1979, 304, 307. Among many important constitutional changes affecting the role of the requirement of a statutory provision only a few can be mentioned here. For an overview, see Selmer (n 26), 490–469; Krebs (n 32) 304–308; Ossenbühl (n 26) paras 20 ff.

33 cf Christoph Gusy, 'Der Vorrang des Gesetzes' JuS 1983, 189, 190; Böckenförde (n 27) 400 f. For a different concept of dualism in the modern industrialized societies, see Ernst Forsthoff, *Der Staat der Industriegesellschaft: Dargestellt am Beispiel der Bundesrepublik Deutschland* (Keip 1995) 21–29.

34 cf Jesch (n 26) 172.

35 cf ibid 171 ff. For criticism, see Ossenbühl (n 26) paras 23–28. In a similar way, a broader concept of liberty and fundamental rights protection led to the question whether *all* state activity affecting the realization of fundamental rights requires a legal basis. For such a comprehensive requirement of a statutory provision including 'positive' state actions with regard to fundamental rights, see Hans H Rupp, *Grundfragen der heutigen Verwaltungsrechtslehre: Verwaltungsnorm und Verwaltungsrechtsverhältnis* (Mohr 1965) 142 f; Peter Häberle, 'Grundrechte im Leistungsstaat' (1972) 30 VVDStRL 43, 81.

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of a statutory provision' and held that the democratic principle is not to be understood as a monopoly of power and decision-making in favour of parliament.[36] It emphasized that the executive and judicial power, too, derive their institutional and functional legitimacy from a constitutional mandate (cf. art. 20 sec. 2(2) GG).[37]

2. *Constitutional basis of the requirement of a statutory provision as developed under the Federal Constitutional Court's essential-matters doctrine*

The general constitutional requirement of a statutory provision (*allgemeiner Vorbehalt des Gesetzes*) is not explicitly mentioned in the Basic Law, but several manifestations of it can be found in specific provisions, namely in the fundamental rights provisions.[38] The Federal Constitutional Court bases the principle and the essential-matters doctrine on two pillars: the principle of democracy and the rule of law.[39] The rule of law component requires transparency and predictability of state activity and focuses on the protection of fundamental rights.[40] State power shall be bound in all its manifestations by a clear separation of competences and functions, in order to prevent abuse of power and preserve individual freedom.[41] The democratic aspect emphasizes the decision-making power and responsibility of the legislature, which is directly legitimized by the people through elections and therefore considered to be the most appropriate body to

36 BVerfGE 49, 89, 124 f; 68, 1, 87 f.

37 BVerfGE 49, 89, 125.

38 See eg art 2 sec 2(3), art 5 sec 2, art 8 sec 2, art 12 sec 1(2) 2, art 14 sec 1(2) GG. For an overview of the explicit requirements of a statutory provision, see Grzeszick (n 16), Art. 20 GG VI paras 91 ff. For details regarding the relationship between the general and specific requirements of a statutory provision in the fundamental rights articles of the Basic Law, see Christian Bumke, *Der Grundrechtsvorbehalt: Untersuchungen über die Begrenzung und Ausgestaltung der Grundrechte* (Nomos 1998) 200–204; Ossenbühl (n 26) para 21.

39 cf BVerfGE 33, 125, 158; 41, 251, 259 f; 47, 46, 78 f; 49, 89, 126; 108, 282, 311 f; 134, 141, 184 (settled case-law). In some cases, the Federal Constitutional Court also refers to the principle of separation of powers (cf BVerfGE 34, 52, 59 f) and the social state principle (cf BVerfGE 45, 400, 418). See also Grzeszick (n 16), Art. 20 GG VI paras 97 ff; Ossenbühl (n 26) para 41. For criticism, see Staupe (n 30) 162–182.

40 BVerfGE 33, 125, 158; 49, 89, 126.

41 BVerfGE 33, 125, 158.

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take essential decisions.[42] In particular, it shall identify public interests to which individual liberties must give way to a certain extent.[43] Further, the legislative process guarantees public participation and debate, which is indispensable for deciding upon questions that greatly impact society.[44]

3. *Characteristics of the Federal Constitutional Court's essential-matters doctrine*

The Federal Constitutional Court's essential-matters doctrine extends the traditional requirement of a statutory provision. The Court distances itself from the conception that a statutory basis is only necessary in cases of executive interventions in the individual sphere of liberty and property.[45] It states, more generally, that 'all essential decisions which directly affect citizens' shall be subject to legislative decision-making.[46] That includes provisions which are essential for the realization of fundamental rights.[47] From a fundamental rights dogmatic perspective, this means that not merely the defensive (*Abwehrfunktion*), but also positive, or more broadly, entitlement functions (*Anspruchs- bzw. Ausgestaltungsfunktion*) of such rights, can trigger the requirement of a statutory provision.[48]

With regard to matters of competence, the essential-matters doctrine has two features: on the one hand, it states that no one other than the

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42 BVerfGE 33, 125, 159. This decision is considered as the birth of the Federal Constitutional Court's essential-matters doctrine (cf Lassahn (n 31) 79).

43 cf BVerfGE 33, 125, 159; 41, 251, 263 f.

44 cf BVerfGE 33, 125, 158 f; 40, 237, 249; 41, 251, 263 f; 85, 386, 403 f; 108, 282, 312.

45 BVerfGE 40, 237, 249; 47, 46, 79.

46 BVerfGE 40, 237, 249.

47 The Court emphasizes that the concept of liberty has changed and that this affects the role of the state. See BVerfGE 33, 303, 331: 'the liberty right would be valueless without the factual preconditions for taking advantage of it'.

48 cf BVerfGE 40, 237, 248 f; 47, 46, 79; Böckenförde (n 27) 391 f. For details regarding the different functions of fundamental rights, especially their 'entitlement' function, see Robert Alexy, *Theorie der Grundrechte* (Suhrkamp 2006) 395 ff (for an English translation, see Robert Alexy and Julian Rivers, *A theory of constitutional rights* (Oxford Univ. Press 2004). Alexy gives the following short summary of the basic terms: 'Defensive rights of the citizen against the state are rights to *negative* actions (omissions) on the part of the state. They belong to the citizen's negative status in its wide sense. Their counterparts are rights to positive state action, which belong to the positive status in its narrow sense. If one adopts a wide understanding of the notion of entitlement, all rights to positive state action can be called entitlements in the wide sense.' (Alexy and Rivers (n 48) 288).

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legislature shall make essential decisions, on the other hand, it obliges the legislature to make these decisions by *itself* and not delegate them to other actors, e.g. in the form of broad empowerments, general clauses or blanket norms.[49] The degree of necessary precision of a statute depends primarily on its impact on fundamental rights, but important implications for the community are also taken into account.[50]

The essential-matters doctrine is vague and leaves room for interpretation, which has been abundantly criticized in the literature.[51] However, a certain flexibility of the theory seems to be precisely what the Federal Constitutional Court intends.[52] It enables the Court to argue teleologically in certain areas as to how detailed statutory regulation should be.[53] With regard to the democratic component of the doctrine, which stood at the origin of the requirement of a statutory provision, a certain openness seems inevitable anyway. For what is considered (politically) important or essential in a democratic society is subject to constant change. Despite these uncertainties, it should be noted here that the starting point for concretizing the criterion of essentiality is the relevance of a question for fundamental rights.[54] The *defensive* function of fundamental rights continues to play a predominant role: a limitation of fundamental rights by the state requires an explicit legal basis. If, in contrast, the *entitlement* function of fundamental rights is affected, the requirement of a statutory basis is only triggered in certain cases.[55] As was already mentioned, the Court rejects a 'comprehensive' requirement of a legal provision. It also holds that 'the mere fact that a provision is politically controversial' does not necessarily make it essential.[56]

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49 cf Lassahn (n 31) 82 f. The latter aspect is often referred to as 'parliamentary reservation' (*Parlamentsvorbehalt*). See BVerfGE 57, 295, 321; Ossenbühl (n 26) para 24.

50 See BVerfGE 108, 282, 312; Voßkuhle (n 22) 119.

51 cf Gunter Kisker, 'Neue Aspekte im Streit um den Vorbehalt des Gesetzes' NJW 1977, 1313, 1317–1320; Krebs (n 32) 308 f; Böckenförde (n 27) 391–401; Ossenbühl (n 26) paras 56–58.

52 For a practically orientated, flexible and teleological use of the essential-matters doctrine, see eg BVerfGE 49, 89, 127; 98, 218, 251; 105, 279, 304 f. For criticism, see Jan H Klement, 'Der Vorbehalt für das Unvorhersehbare: Argumente gegen zu viel Rücksicht auf den Gesetzgeber' DÖV 2005, 507; Lassahn (n 31) 87 f.

53 For criticism, see Lassahn (n 31) 87 f.

54 cf BVerfGE 108, 282, 311.

55 In particular, statutory provisions are required with regard to the granting and selective distribution of state services that constitute a necessary condition for the realization of fundamental rights. See BVerfGE 33, 303, 336 f.

56 See BVerfGE 98, 218, 251; 108, 282, 312.

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4. Institutional extension of the essential-matters doctrine – application to the judiciary

As we have seen, the essential-matters doctrine derives from the constitutional requirement of a statutory provision and classically addresses the relationship between legislature and executive. With time, however, an application of the doctrine to the judiciary came to be intensively discussed.[57] The reasoning refers to the two pillars of the essential-matters doctrine (principle of democracy and rule of law). First, courts exercise state power (art. 20 sec. 2(2) GG) and thus are bound by the fundamental rights as directly applicable law (art. 1 sec. 3 GG); they therefore need a statutory basis to make *essential* decisions, which have an impact on fundamental rights.[58] Second, the judiciary's democratic legitimization is considered rather weak and not sufficient to create essential provisions relevant for fundamental rights by further developing the law.[59]

Consequently, judicial development of the law, which creates an autonomous (i.e. dissociated from concrete statutory provisions) basis for intervention in fundamental rights, violates the requirement of a statutory provision and thus is unconstitutional. As regards criminal jurisdiction, a strict requirement of a statutory provision is enshrined in article 103 sec. 2 GG (*nullum crimen, nulla poena sine lege scripta*).[60] Administrative court decisions are also regularly reviewed by the Federal Constitutional Court

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57 See eg Hillgruber (n 21) 123 f; Ralf Poscher, Grundrechte als Abwehrrechte: Reflexive Regelung rechtlich geordneter Freiheit (Mohr Siebeck 2003) 215, 322–325; Ossenbühl (n 26) para 60. Critical towards an extension, eg Bumke, *Grundrechtsvorbehalt* (n 38) 204–207; Ulrich R Haltern, Franz C Mayer and Christoph R Möllers, 'Wesentlichkeitstheorie und Gerichtsbarkeit: Zur institutionellen Kritik des Gesetzesvorbehalts' (1997) 30 DV 51. Both the discussion and this article focus on the jurisdiction of the specialized courts. With regard to the relationship between the legislature and the Federal Constitutional Court, see eg Rainer Wahl, 'Der Vorrang der Verfassung und die Selbstständigkeit des Gesetzesrechts' NVwZ 1984, 401; Gerd Morgenthaler, *Freiheit durch Gesetz: Der parlamentarische Gesetzgeber als Erstadressat der Freiheitsgrundrechte* (Mohr Siebeck 1999) 2–39.

58 cf Hillgruber (n 21) 123. For details on the intervening character of court decisions, see Rolf Eckhoff, *Der Grundrechtseingriff* (Heymann 1992) 126 f; Poscher (n 57) 215.

59 Claus D Classen, 'Gesetzesvorbehalt und Dritte Gewalt' (2003) 58 JZ 693, 695. For details regarding the democratic legitimation of judges, see Voßkuhle and Sydow (n 13).

60 cf BVerfGE 130, 1, 44 for details regarding the competence aspect of this provision. See also BVerfGE 122, 248, 282 – *Rügeverkümmerung* (dissenting opinion of the judges *Voßkuhle, Osterloh, Di Fabio*), arguing for stricter limits to judicial

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on the basis of the requirement of a statutory provision if they confirm or permit executive restrictions of individual rights by further developing the law.[61] The boundaries of judicial development of the law are surpassed if a court itself creates an empowerment to interfere with fundamental rights.[62] Such actions exceeding courts' competencies can be contested by the disadvantaged party to the dispute by means of a constitutional complaint based on art. 2 sec. 1 GG in conjunction with the of rule of law (art. 20 sec. 3 GG).[63]

III. Applicability of the Essential-Matters Doctrine to Private Law Adjudication?

There is more reluctance to apply the essential-matters doctrine in private law.[64] Here, the judiciary, vested with state power, is the only potential addressee of the doctrine.[65] A strict application of the doctrine could severely restrict the civil courts' practice of further development of the law. For the judicial establishment of legal rules with fundamental rights relevance is quite common practice here. Think, for example, of various judge-made extensions of liability meant to compensate for the 'deficiencies' of German tort law which affect at least the right to property (art. 14 sec. 1 GG) and the general freedom of action (art. 2 sec. 1 GG).[66] In corporate law,

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development of the law when individual rights are limited in the context of criminal procedure.

61 See eg BVerfGE 34, 293, 299–302; 98, 49, 69 ff; 111, 147, 158 f. In tax law, the requirement of a statutory provision is also quite strictly applied to the judiciary (cf BVerfGE 13, 318 328; 19, 38, 49). See also, Poscher (n 57) 215 f; Frauke Kruse, *Die verfassungsrechtlichen Grenzen richterlicher Rechtsfortbildung: Zur Gesetzmäßigkeit der Rechtsprechung unter dem Grundgesetz* (Mohr Siebeck 2019) 162 f.

62 cf BVerfGE 34, 293, 301 f; 111, 146, 158 f.

63 cf BVerfGE 87, 273, 279; 128, 193, 209; 138, 377, 390 (settled case-law).

64 See eg Hans C Grigoleit, 'Anforderungen des Privatrechts an die Rechtstheorie' in Matthias Jestaedt (ed), *Rechtswissenschaftstheorie* (Mohr Siebeck 2008) 52, 72 f; Jörg Neuner, 'Die Kontrolle zivilrechtlicher Entscheidungen durch das Bundesverfassungsgericht' (2016) 71 JZ 435, 436–438; Thomas M J Möllers, *Juristische Methodenlehre* (CH Beck 2017) 437.

65 However, the requirement of a statutory provision is also discussed in the context of private rule-making. See Wolfgang Hoffmann-Riehm, 'Gesetz und Gesetzesvorbehalt im Umbruch: Zur Qualitätsgewährleistung durch Normen' (2005) 130 AöR 5, 44 f.

66 Eg the extension of contractual protection to third parties (*Vertrag mit Schutzwirkung zugunsten Dritter)* (cf BGH NJW 1968, 885), the shifting of the

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a general duty of legality (*Legalitätspflicht*) for the board of management towards the company has been developed by courts, which also entails important liability consequences.[67] The scope and permissibility of actions in industrial disputes (*Arbeitskampf*) are also mainly based on judge-made law, affecting the freedom of association (art. 9 sec. 3 GG).[68] There is also judge-made law creating or shaping institutions relevant to fundamental rights: for example, important forms of property such as equitable lien (*Sicherungseigentum*) and expectancy rights (*Anwartschaftsrecht*),[69] or legal entities like the German civil law partnership (*GbR-Außengesellschaft*)[70]. It is therefore not surprising that the question of applying the doctrine in private law poses particular difficulties. The Federal Constitutional Court's position on this issue is rather ambiguous (1.). In legal scholarship, the applicability is often generally rejected (2.). However, a differentiating approach seems more appropriate (3.).

1. Ambiguous position of the Federal Constitutional Court

The Federal Constitutional Court's handling of the essential-matters doctrine in private law is vague. For a while, the Court seemed to apply the doctrine only in *bipolar* (state versus individual) constellations, but a recent decision deviates from this approach.

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burden of proof in product liability cases (*Beweislastumkehr im Rahmen der Produzentenhaftung*) (cf BGH NJW 1969, 269) or damages for violations of the right of personality (*Schmerzensgeld für Verletzungen des Allgemeinen Persönlichkeitsrechts* (cf BGHZ 26, 349; BVerfGE 34, 269 – *Soraya*).

67 See eg BGH NJW 2012, 3439, 3440. In this context, the essential-matters doctrine was recently mentioned by Hans C Grigoleit, 'Begründungslinien der Legalitätsverantwortung im Kapitalgesellschaftrecht' in Katharina Boele-Woelki, Karsten Schmidt and Florian Faust (eds), *Festschrift für Karsten Schmidt zum 80. Geburtstag* (2019) 367, 374.

68 For details regarding the role of the essential-matters doctrine in this context, see eg Christian Ehrich, 'Die Bedeutung der Wesentlichkeitstheorie im Arbeitskampfrecht' DB 1993, 1237; Roland Schwarze, 'Die verfassungsrechtliche Garantie des Arbeitskampfes - BVerfGE 84, 212' JuS 1994, 653, 659.

69 cf Larenz (n 2) 414 ff who classifies these cases as judicial development of the law *praeter legem*.

70 The *GbR* is a form of partnership which is partly regulated in the German Civil Code, cf §§ 705 ff BGB. For details, see Alexander Bruns, 'Zivilrichterliche Rechtsschöpfung und Gewaltenteilung' (2014) 69 JZ 162, 167 f; Karsten Schmidt, 'Gesetzgebung und Rechtsfortbildung im Recht der GmbH und der Personengesellschaften' (2009) 64 JZ 10, 13 f.

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a. Differentiation based on the parties to the dispute

In two decisions from the 90's regarding industrial disputes, the Court tried to differentiate based on who was involved in the litigation.[71] In the first decision, it held that the essential-matters doctrine only applied as a boundary for judicial development of the law when the case concerns a 'state versus individual'-relationship, but not when a dispute between two private individuals as 'equal fundamental right-holders' is at stake.[72] The Court emphasized that in the latter constellation, judges must supplement the substantive law if statutory provisions are insufficient, in order to fulfil their constitutional duty to decide each legal dispute brought before them in an adequate manner.[73] It should be noted that such supplementation has a dual effect on the parties involved: further protection on the one side necessarily goes hand in hand with an impairment on the other side.[74]

In the second decision, however, it came to the conclusion that the German Federal Labor Court's (*Bundesarbeitsgericht*) interference with the claimant's fundamental right of association (art. 9 sec. 3(1) GG) was not covered by a statutory basis and therefore unconstitutional.[75] Again, the Court examined who was involved in the concrete dispute.[76] Since on the employer's side, civil servants had been deployed as strikebreakers, it considered that the dispute was – 'at least also – about the relationship between the state and private legal entities'.[77]

These decisions have been criticized in legal scholarship as inconsequent and result-orientated, for both constellations were equally *essential* and therefore in the same way either exclusively reserved to the legislator or not.[78] In fact, it is unfortunate that the Court emphasized in both decisions the legislature's responsibility for shaping the fundamental right of freedom of association,[79] but then left it to the court in one decision. Nevertheless, the distinction between bipolar (state versus individual) and multipolar (individual-state-individual) constellations seems to be useful,

71 cf BVerfGE 84, 212 – *Aussperrung*; BVerfGE 88, 103 – *Streikeinsatz von Beamten*.
72 BVerfGE 84, 212, 226 – *Aussperrung*.
73 BVerfGE 84, 212, 226 f – *Aussperrung*.
74 See eg BVerfGE 138, 377, 392 f.
75 BVerfGE 88, 212, 113-116 – *Streikeinsatz von Beamten*.
76 The dispute opposed the Federal Postal Union (*Deutsche Postgewerkschaft*) and the German Federal Post Office (*Deutsche Bundespost*).
77 BVerfGE 88, 103, 116 – *Streikeinsatz von Beamten*.
78 For further details and criticism, see Ehrlich (n 68); Schwarze (n 68).
79 cf BVerfGE 84, 212, 226 – *Aussperrung*; BVerfGE 88, 103, 116 – *Streikeinsatz von Beamten*.

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as will be discussed further below, albeit with a slightly different approach focusing not primarily on *who* is involved in the dispute, but on the *function of law* pursued by the court in deciding the dispute.

b. Change of position? – Application to constellations opposing private individuals

In a more recent decision concerning family law, the Federal Constitutional Court seems to apply a more encompassing understanding of the requirement of a statutory provision in private law, albeit without expressly mentioning the essential-matters doctrine. In the civil dispute, a so-called apparent father[80] (*Scheinvater*) claimed disclosure of intimate information from the mother, to identify the biological father of the child in order to enforce his right to compensation.[81] The civil court derived that information right from a general clause, § 242 of the German Civil Code (BGB). The Federal Constitutional Court, however, reversed the civil court's order, holding that 'a court ruling ordering the mother to disclose information on the identity of the child's presumptive father to facilitate enforcement of the apparent father's claim to compensation (§ 1607 sec. 3 BGB) exceeds the constitutional boundaries of judicial development of the law, *since such a development has no adequately specific basis in statutory law*'.[82] The Court stressed that 'Action on the part of the legislature would be required to reinforce the apparent father's claim to compensation'.[83] In that decision, the Court also tries to provide general guidance for courts on how to handle judicial development of the law when they are to balance competing interests in civil disputes: 'the more severe the impairment under constitutional law and the weaker the constitutional content of the conflicting position thus asserting itself, the narrower the limits for judi-

80 That is a former legal father who has successfully challenged the paternity. As a result, the support claims of the child retroactively extinguish. To the extent that the apparent father has already made child-support payments, the child's support claims against the biological father are transferred to the apparent father (cf § 1607 sec 3 BGB).

81 The right to compensation itself is explicitly provided in § 1607 sec 3 BGB. Meanwhile, a statutory provision on the right to information of the apparent father was planned by the legislature, but it has not yet been implemented.

82 BVerfGE 138, 377, 390 para 35 – *Scheinvater* (emphasis added).

83 BVerfGE 138, 377, 396 para 52 – *Scheinvater*.

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cial development of the law and the stricter the civil courts must adhere to the limits set by statutory law.'[84]

Yet, these requirements are unclear and confront civil courts with great difficulties.[85] They are required to ascertain an *abstract* hierarchy of the colliding legal positions of private actors in order to determine whether the one legal position can be enforced under the impairment of the other by judicial development of the law. Thus, a more detailed balancing of the concerned positions in individual cases is cut off.[86] It also remains uncertain what the Federal Constitutional Court's requirement of a 'specific basis in statutory law' exactly means. It is only clear that it demands more than a methodologically correct interpretation of statutes.[87]

2. *Reservations regarding an application of the doctrine in private law in legal scholarship*

Besides the practical argument that judicial development of the law is indispensable in private law for adapting the legal system to rapidly changing circumstances of society and to avoid overloading the legislator, two more substantive arguments will be closer observed here.

a. *Judges duty to adjudicate in civil disputes*

Art. 92 GG stipulates that the judicial power shall be vested in the judges. A basic function of private law adjudication is its task of peacemaking.[88]

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84 BVerfGE 138, 377, 393 para 42 – *Scheinvater*. cf also BVerfGE 122, 248, 301 – *Rügeverkümmerung* (dissenting opinion of the judges *Voßkuhle*, *Osterloh* and *Di Fabio*).

85 For criticism, see Philipp Reuß, 'Anmerkung zu BVerfG: Auskunftsanspruch des Scheinvaters gegen Mutter über sexuelle Beziehungen' NJW 2015, 1506, 1509–1510; Neuner (n 64).

86 cf Neuner (n 64) 438.

87 That is illustrated by the fact that the derivation of a right to information from a general clause like § 242 BGB to enable the enforcement of a material claim is a particularly typical methodical approach in private law. See Neuner (n 64) 438.

88 The peace-making function of the judiciary and its duty to adjudicate are necessary counterparts to the state monopoly on the use of force. For further details, see Christian Hillgruber in Dürig/Herzog/Scholz (eds), Grundgesetz-Kommentar (95 suppl, CH Beck 2021) Art. 92 GG paras 8 ff. See also, Locke, (29) book 2, chap 9, nr 124, 261: 'The great and chief end therefore, of Mens uniting into Common-

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This function could be endangered if courts were hindered to further develop the law when it is necessary to decide a dispute fairly, albeit not on a concrete statutory basis. The constitutional duty to adjudicate[89] and the prohibition of denial of justice[90] thus conflict with a comprehensive requirement of a statutory provision applied to the judiciary.[91] This argument is particularly justified in *multipolar* (individual-state-individual) constellations in which at least two legal positions of individuals must be balanced. In this respect, private law disputes often differ from administrative law disputes.[92] In classical *bipolar* (state-individual) administrative disputes, courts can annul an administrative action if it has no legal basis and interferes with the claimant's rights.[93] Thus, there is no collision with the court's duty to decide or the legal protection guarantee enshrined in art. 19 sec. 4 GG. By contrast, in multipolar constellations, courts are concerned with at least two conflicting legal positions of individuals. That is characteristic for civil disputes,[94] but can also occur in administrative disputes, e.g. in public neighbour law (*öffentliches Nachbarrecht*) or third-party constellations in public construction law (*öffentliches Baurecht*).[95] In multipolar constellations, the strengthening of a legal position on one side regularly collides with the impairment of a legal position on the other.[96] If statutory provisions governing the balancing of interests are lacking, the court may need to further develop the law in order to avoid an arbitrary decision to the detriment of the party to the dispute whose legal position or claim has not yet been considered by the legislature.[97] One could argue, of course,

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wealths, and putting themselves under Government, is the Preservation of their Property. To which in the state of Nature there are many things wanting'.

89 The constitutional duty to adjudicate derives from the rule of law in conjunction with the fundamental rights. See BVerfGE 107, 395, 401, 406 f.

90 For details regarding the basis of this principle and the objectives of private law adjudication, see Curt W Hergenröder, *Zivilprozessuale Grundlagen richterlicher Rechtsfortbildung* (Mohr 1995) 167 ff.

91 That is the main criticism against an application of the doctrine to private law adjudication. See BVerfGE 84, 212, 226 f; Alfred Söllner, 'Der Richter als Ersatzgesetzgeber' (1995) 10 ZG 1, 7 f; Grigoleit (n 64) 72 f; Neuner (n 64) 437; Möllers (n 64) 437.

92 cf Starck (n 21), 86 f. See also, Classen (n 59), 696 f.

93 cf Starck (n 21), 83.

94 cf BVerfGE 138, 377, 390.

95 cf Alexander Hellgardt, *Regulierung und Privatrecht: Staatliche Verhaltenssteuerung mittels Privatrecht und ihre Bedeutung für Rechtswissenschaft Gesetzgebung und Rechtsanwendung* (Mohr Siebeck 2016) 279.

96 cf BVerfGE 138, 377, 392 f.

97 cf Grigoleit (n 64) 72 f; Neuner (n 64) 437; Möllers (n 64) 437.

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that the dismissal of a claim for lack of statutory basis is what the legislature intends by leaving a specific question undecided.[98] The legislature's omission could then only be challenged as unconstitutional in certain cases.[99] We know, however, that legislative 'gaps' are often not consciously set by the legislature, but are due to practical problems, namely the inertia of the legislative process and rapid changes of society. The judiciary then has the important task of creating interim rules that are necessary for the appropriate resolution of disputes.

b. The conciliatory character of private law

In contrast to administrative and criminal courts, the function of the civil courts is commonly understood as objective decision-making, serving private parties, rather than 'sanctioning' in the public interest.[100] Consequently, there should be more leeway for judicial further development of the law than in administrative or criminal law.[101] The argument can be positioned with respect to both lines of reasoning of the essential-matters doctrine. First, the doctrine's function to protect fundamental rights from state interference would be less justified if civil court decisions did not have an intervening character, affecting the defensive dimension of fundamental rights. Second, it could be argued that court decisions that are not intended to implement political goals, but to balance private interests

98 cf Hillgruber, (n 21) 120; Bruns (n 70), 164.

99 cf Hillgruber, (n 21) 122. See also, Claus-Wilhelm Canaris, *Grundrechte und Privatrecht: Eine Zwischenbilanz* (De Gruyter 1999) 70. In this regard, two main options seem possible. First, the court could have the 'incomplete legislation' reviewed by the Federal Constitutional Court by means of a concrete judicial review (art 100 sec 1 GG). Yet, it is highly controversial whether and under which conditions legislative omission can be a subject of this procedure. Second, the party disadvantaged by a legislative omission could file a constitutional complaint against the legislature (art 93 sec 1 nr 4a GG). One could also think of state liability claims if a party suffers damages as a result of legislative omission. However, all these options are subject to uncertainties and do not lead to rapid satisfaction of the parties to the dispute.

100 cf Schneider (n 18) 36; Wolfgang Roth, *Faktische Eingriffe in Freiheit und Eigentum: Struktur und Dogmatik des Grundrechtstatbestandes und der Eingriffsrechtfertigung* (Duncker & Humblot 1994) 516. For criticism, see Matthias Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts: Eine verfassungsrechtliche Untersuchung zur Privatrechtsentwicklung des Grundgesetzes* (Mohr Siebeck 2001) 131 f, 229.

101 cf Schneider (n 18) 36.

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are less *essential* in the meaning of the doctrine and thus require a lower degree of democratic legitimacy. Yet, the argument is only convincing if private interests actually take precedence over public interests in private law litigation. It might be different if civil courts assume the task of pursuing public interests beyond the interests of the parties to the dispute.

3. *Differentiating approach based on distinct functions of private law*

In view of the important constitutional implications and skepticism towards an application of the essential-matter doctrine in private law, a cautious approach is imperative. Otherwise, it runs the risk of being discarded as an imprecise, all-pervading and practically useless doctrine in this context.[102] The following differentiation might indicate a viable approach, albeit not yet precise in detail. Its main concern is to consider both the basic functions of the essential-matters doctrine and the functions of private law and private law judiciary.[103]

a. *Different functions of private law*

In the following, three main functions of private law will be addressed:[104] first, the regulatory function of private law (*Regulierungsfunktion*) will be examined, then the functions of balancing private interests (*Interessenausgleichsfunktion*) and providing infrastructure (*Infrastrukturfunktion*) will be observed.[105] The objective of this approach is to find out which function of private law is most likely to trigger the limiting role of the essential-matters doctrine, bearing in mind its democratic-political aspect as well as its rule of law component.

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102 cf Haltern, Mayer and Möllers (n 57), who introduce their criticism regarding an application of the essential-matters doctrine to the judiciary with the following quote from Abraham Kaplan: 'If the only tool in one's possession is a hammer, everything in sight begins to resemble a nail.'

103 For details regarding the concept of functions of law, see Hellgardt, (n 95) 48–50.

104 cf ibid 50–64. See also Alexander Hellgardt, 'Regelungsziele im Privatrecht' in Florian Möslein (ed), *Regelsetzung im Privatrecht* (Mohr Siebeck 2019) 121, 124–130.

105 This is not intended to be an exhaustive enumeration of the functions of private law. Also, intersections of these three functions are frequent. However, it seems possible to distinguish the functions based on the primary focus of a legal rule.

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b. Regulatory use of private law

For the purpose of this article, regulation shall be understood as the state's use of law as an instrument of behavioural steering designed to implement political goals of common interest.[106] From a regulatory perspective, the different subsystems of law (i.e. public, private and criminal law) are only different means for the state to pursue its regulatory purposes.[107] The same regulatory objective can also be pursued simultaneously by different means. For instance, the aim of combatting undeclared work (*Schwarzarbeit*) is not only pursued by means of regulatory offences law (*Ordnungswidrigkeitenrecht*)[108] but also by cutting off claims of the undeclared worker on account of unjust enrichment in civil disputes.[109] The German Federal Court of Justice (*BGH*) explicitly justified a change of its case-law in this context with the objective of general deterrence, aiming to contribute to the legislature's intention to fight undeclared work effectively.[110] Several examples for regulatory purposes can also be found in the law of tenancy. For instance, a provision limiting the rent increase[111]

106 cf Hellgardt (n 95) 50: 'Die Regulierungsfunktion, (…) bezeichnet den Einsatz von Recht als staatliches Instrument mit einer über den Einzelfall hinausreichenden Steuerungsintention, die auf die Implementierung politischer Allgemeinwohlziele gerichtet ist.' For details regarding the features of that definition, see Hellgardt, (n 95) 50–55. Several examples of how private law is used as a means of prevention and behavioural steering in German law are given by Gerhard Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe' (2006) 206 AcP 352. For other understandings of regulation, see eg Robert Baldwin, Martin Cave and Martin Lodge, *Understanding regulation: Theory, strategy, and practice* (2nd edn, Oxford University Press 2012) 2 f.

107 cf Hellgardt (n 104) 131. For a broader understanding of regulation that includes other regulatory means and non-governmental regulatory actors, see Julia Black, 'Constitutionalising Regulatory Governance Systems' [2021] LSE Law, Society and Economy Working Papers 1, 4: 'Regulation (…) is understood here as a series of intentional, sustained and focused attempts to change the behavior of others in order to pursue a collective purpose, using a range of techniques which often, but not always, include a combination of rules or norms and some means for their implementation and enforcement.'

108 See § 8 of the Act on combatting undeclared work (Schwarzarbeiterbekämpfungsgesetz - SchwarzArbG).

109 cf BGH NJW 2014, 1805.

110 cf BGH NJW 2014, 1805, 1806 para 25. The BGH refers to the legislature's intentions expressed in § 1 sec 1 SchwarzArbG and legislative materials regarding the SchwarzArbG. See also Wagner (n 106), 442–445.

111 cf § 556d sec 1 BGB.

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is intended to prevent gentrification;[112] a tenant's right to reduce rent on account of ongoing construction is excluded for a certain period of time if it takes place because of measures taken by the landlord, which serve the purpose of energy efficiency modernization.[113] In such situations, state rule-making is not primarily aimed at establishing a fair balance of interests between private individuals. The weakening or strengthening of a private legal position is rather merely a reflex of the pursuit of an overarching regulatory goal.[114]

aa. Regulation and fundamental rights

From a fundamental rights perspective, regulation is realized in a *bipolar* (state versus citizen) relationship.[115] Here, the *defensive* function of basic rights applies, which consists in securing individual liberty from state interference for the purpose of pursuing common interests, regardless of the regulatory technique (private or public law).[116] By regulating, the state intervenes in individual positions protected by fundamental rights to realize public interests.[117] For such interventions, however, a statutory empowerment is necessary. That is the case both under the traditional requirement of a statutory provision (limited to encroachments on freedom and property) and under the essential-matters doctrine.[118] Consequently, it has to apply also to private law judiciary if it pursues regulatory objectives.[119] Regulation by civil courts can occur, for example, by specifying regulatory objectives defined by the legislature, by expanding or changing legal regulatory requirements or by developing own regulatory norms. Now, the application of the essential-matters doctrine must not be under-

112 cf Begr. RegE, BT-Drucksache 18/3121, 11. See also Hellgardt (n 95) 158.
113 cf § 536 sec 1a BGB.
114 cf Hellgardt (n 95) 54, 280.
115 cf Hellgardt (n 95) 287; Hellgardt, 'Wer hat Angst vor der unmittelbaren Drittwirkung?' (2018) 73 JZ 901, 904.
116 cf Hellgardt (n 95) 286–288; Hellgardt, (n 115) 904.
117 cf Hellgardt (n 95) 286.
118 With regard to the private law legislature, this means that wide delegations of regulatory decisions to the courts, eg by way of broad general clauses, are not permitted. The legislature must take these decisions by itself. See Anne Röthel, *Normkonkretisierung im Privatrecht* (Mohr Siebeck 2004) 64–69.
119 For details about regulatory action of civil courts and resulting constitutional constraints, see Hellgardt (n 95) 674 ff. See also Wagner (n 107) 364 ff with several examples of regulatory action of civil courts.

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stood in a way to generally ban all regulatory action of civil courts and strictly prohibit judicial development of the law in this field.[120] The idea is rather to sensitize courts for the fact that they are, in principle, not entitled to pursue own regulatory purposes by the means of private law. Yet, the methodological requirements arising from this cannot be explained further in this article.[121]

bb. Regulation and democratic legitimacy – who defines the common good?

The approach just described also finds support in the democratic-political foundation of the essential-matters doctrine, emphasizing that important decisions must be taken by the legislature. The definition of regulation used here includes the pursuit of political goals of common interest.[122] It can hardly be denied that the determination of the common good is an *essential* question in terms of the doctrine.[123] In pluralistic societies, the concept of common good has an open, mutable character.[124] It has changed from a 'question of truth' to a 'political question', which is

120 For similar approaches, see Giovanni Biaggini, *Verfassung und Richterrecht: Verfassungsrechtliche Grenzen der Rechtsfortbildung im Wege der bundesgerichtlichen Rechtsprechung* (Helbing & Lichtenhahn 1991) 463; Kruse (n 61) 183. See also Larenz and Canaris (n 3) 246 f, asserting a 'weak' application of the requirement of a statutory provision.

121 Given the need to trace back the legislative intentions of regulation as precisely as possible, a subjective-historical method of interpretation might have priority over an objective-teleological one. On the merits of historical interpretation see Franz Bauer 'Historical Arguments, Dynamic Interpretation, and Objectivity: Reconciling Three Conflicting Concepts in Legal Reasoning (§ 3). For details regarding the interplay between the requirement of a statutory provision (*Vorbehalt des Gesetzes*) and the principle of priority of a statutory provision (*Vorrang des Gesetzes*), see Biaggini (n 120) 333–338; Larenz and Canaris (n 3) 246 f.

122 For details regarding that criterion of the definition, see Hellgardt (n 95) 53–55.

123 Similarly Robert Uerpmann-Wittzack, *Das öffentliche Interesse: Seine Bedeutung als Tatbestandsmerkmal und als dogmatischer Begriff* (Mohr Siebeck 1999) 182. For details regarding the determination of the 'common good' or 'public interest', see Hellgardt (n 95) 239–246.

124 By contrast, in absolutistic systems of the 17th century a closed *a priori* concept of *salus publica* was predominant, cf Gunnar F Schuppert, 'Gemeinwohl, das' in Gunnar F Schuppert and Friedhelm Neidhardt (eds), *Gemeinwohl - Auf der Suche nach Substanz* (Sigma 2002) 19, 23. For further details, see Christoph Engel, 'Offene Gemeinwohldefinitionen' (2001) 32 RTh 23, 25–33; Hellgardt (n 95) 241 f.

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primarily answered through the democratic process.[125] The question of identifying and determining aspects of the common good thus has become a matter of procedure and competence.[126] Under the democratic constitution, it is primarily the legislature's competence and responsibility to define public interests[127] and weight them against particular interests.[128] Parliament has the most democratic legitimacy for these decisions, and its pluralistic composition and open legislative procedure make it particularly well suited for taking them.[129] Statutory law is thus to a certain extent an expression of society's 'self-regulation'.[130]

Thus, a link between the concept of regulation and the requirement of a statutory basis can be made also on the democratic-political foundation of the principle.[131] Defining regulatory goals (i.e. political goals of common good) is an *essential* matter and therefore, in principal, reserved for the legislature.[132] Equally, the question of *how* to regulate (i.e. by means of private law or public law) is at the discretion of the legislature. Hence, private law courts lack the competence for these issues; they can only concretize regulatory goals provided by the legislature but cannot set their own.[133]

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125 cf Engel (n 124) 33, comparing closed and open concepts of common good.

126 cf Peter Häberle, *Öffentliches Interesse als juristisches Problem* (Athenäum 1970) 468–470; Schuppert (n 124) 25–27; Hellgardt (n 95) 242.

127 cf Wolfgang Martens, *Öffentlich als Rechtsbegriff* (Gehlen 1969) 186 f; Häberle (n 126) 469 f: 'So bedeutet Gestaltungsfreiheit des Gesetzgebers, öff. Interessen zu solchen zu machen („normativieren") zu können – freilich im Rahmen des GG.' See also Schneider (n 18) 32.

128 cf BVerfGE 33, 125, 159; 40, 237, 249; 41, 251, 263 f; Schuppert (n 124) 49.

129 cf BVerfGE 33, 125, 159; 40, 237, 249; 41, 251, 263 f. Yet, the concretization of regulatory objectives will to a certain extent necessarily be left to the executive and judiciary, cf Schuppert (n 124) 49 f.

130 cf Jesch (n 26) 26 f, with details regarding a 'democratic concept' of legislation and its philosophical foundations.

131 The democratic legitimacy is also considered a criterion of 'good regulation' in broader definitions of regulation than the one used here. See eg Baldwin, Cave and Lodge (n 106) 25–31, who describe five criteria for good regulation: 'Is the action or regime supported by legislative authority? Is there an appropriate scheme of accountability? Are procedures fair, accessible, and open? Is the regulator acting with sufficient expertise? Is the action or regime efficient?'

132 Similarly Hellgardt (n 95) 242 f.

133 cf Schneider (n 18) 32 f.

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c. The functions of balancing interests and of providing infrastructure

When it comes to the functions of balancing interests and providing infrastructure, not the *defensive* dimension of fundamental rights is affected, but their character as entitlements in a wide sense (*Grundrechtsausgestaltung im weiten Sinn*), granting rights to positive action by the state.[134] That is particularly plausible with regard to private law providing infrastructure, which corresponds to the fundamental rights entitlement function in a narrow sense (*Grundrechtsausgestaltung im engen Sinn)*. Here, private law enables or expands certain forms of private activity, for example by shaping social institutions (e.g. marriage, property or legal entities) or providing optional sets of rules.[135] Thus, state action does not interfere with fundamental rights positions. A comprehensive requirement of statutory provisions for state actions enabling and shaping fundamental rights (*Ausgestaltungsvorbehalt*) is mostly rejected.[136] Yet, once private law institutions enabling or extending fundamental rights have been established, subsequent limitation by the state, including the judiciary, might be considered as interventions and consequently require a statutory basis.[137]

The function of balancing private interests is traditionally considered as the main task of private law.[138] It is a feature of most private law constellations that the positions of at least two individuals, protected by fundamental rights, compete.[139] As mentioned above, one can describe such situations as *multipolar* (citizen-state-citizen) in contrast to *bipolar*

134 For details regarding the function of fundamental rights as entitlements in a wide sense, see Alexy (n 48) 395 ff. The notion of *shaping* fundamental rights (*Grundrechtsausgestaltung*) is highly discussed. For details, see Christian Bumke, *Ausgestaltung von Grundrechten: Grundlagen und Grundzüge einer Dogmatik der Grundrechtsgestaltung unter besonderer Berücksichtigung der Vertragsfreiheit* (Mohr Siebeck 2009); Hellgardt (n 95) 274–277, 282–286.

135 cf Hellgardt (n 95) 124 f.

136 cf Bumke (n 38) 207; Bumke (n 134) 49 f. In the Basic Law, only a few provisions explicitly require the legislature to shape fundamental right entitlements (cf art 4 sec 3(2) GG, art 14 sec 1(2) GG).

137 One could interpret the decision BVerfGE 128, 193 – *Dreiteilungsmethode* in this way. It concerned a new method of calculating the level of maintenance of a divorced spouse developed by the Federal Court of Justice (BGH). That decision illustrates stricter limits of judicial interpretation of private law statutes (cf Brenncke (n 11) 96 f).

138 cf Hellgardt (n 104) 126.

139 cf BVerfGE 138, 377, 390; Hellgardt (n 115) 906.

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(state-citizen) constellations.[140] The state is confronted with at least two private individuals whose 'conflicting fundamental rights positions (...) are to be balanced in such a way that they are realized as effectively as possible for all concerned'.[141] Here, the state – the legislature as well as courts – acts primarily as an 'arbitrator'[142] and has wide discretion in weighing the colliding interests.[143] It does not pursue public interests overriding the private interests involved.[144]

The resolution of such *multipolar* conflicts by state actors surely affects the fundamental rights positions at stake – however, not in the form of an intervention.[145] Private individuals are *entitled* to an objective conflict-resolving state action; it results from the state monopoly on use of force.[146] Consistently, a court's further development of the law aiming at objectively balancing the legal positions concerned does not trigger the *defensive* dimension of fundamental rights. If, in such multipolar constellations, statutory provisions specifying the balancing of interests are lacking, civil courts are both empowered and obliged to find a just balance themselves.[147]

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140 In BVerfGE 115, 205, 253 the Federal Constitutional Court emphasizes that the constitutional requirements applying to bipolar (state versus individual) situations are not identical with those applying to multipolar constellations. For criticism regarding this concept of differentiation, see Alexy (n 48) 424 f.

141 BVerfGE 134, 204, 223.

142 BVerfGE 31, 194, 210.

143 cf BVerfGE 97, 169, 176; 134, 204, 223 f. Civil courts confronted with the task to balance colliding fundamental rights must use that discretion and not give priority to one position from the outset (cf BVerfGE 96, 59, 62–65).

144 cf Hellgardt (n 95) 280.

145 cf BVerfGE 134, 204, 223; Martin Gellermann, *Grundrechte in einfachgesetzlichem Gewande: Untersuchung zur normativen Ausgestaltung der Freiheitsrechte* (Mohr Siebeck 2000) 217–219; Hellgardt (n 95) 282 f. Note that in fundamental rights theory the balancing of two colliding positions by a civil court is frequently, unlike here, subdivided in two acts: an intervention in one party's rights and the fulfillment of an obligation to protect (*Schutzpflicht*) towards the other party. See eg BVerfGE 81, 242, 255 f; 96, 59, 64 f; Canaris, Grundrechte (n 99) 37–51. For an overview of the controversial discussion about how fundamental rights apply to private law, see Hellgardt (n 95) 265–277.

146 Hellgardt (n 115) 907. See also, Alexy, (n 48) 414 f, in the context of protective rights.

147 cf Hellgardt (n 115) 908. However, the Federal Constitutional Court held, for example in BVerfGE 108, 282, 311 – *Kopftuch*, that the legislature does have 'an obligation (to determine itself the guidelines) if conflicting fundamental civil rights collide with each other and the limits of each are fluid and can be determined only with difficulty' (content in brackets added). Yet, it seems that

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Furthermore, the democratic-political dimension of the essential-matters doctrine appears to have less validity here. Court decisions designed to balance individual interests on a case-by-case basis are made within a sort of framework delimited by the 'core contents' of the colliding fundamental rights positions, which are absolutely protected under the Basic Law (cf. art. 19 sec. 2 GG).[148] In the absence of statutory provisions, it is the court's task to carefully trace the contours and boundary lines of the conflicting fundamental rights positions in question and, as far as possible, to seek to optimize both positions.[149] Thus, when balancing individual interests, judicial decision-making and further development of the law is a priori less undetermined and requires less strict legislative guiding than when it comes to concretizing the open concept of common good by defining regulatory goals.[150]

IV. Conclusion

We have shown that a differentiation by functions of private law can be useful in determining the scope of application of the essential-matters doctrine. Regulatory use of private law is likely to trigger the main functions of the doctrine, i.e. to attribute important questions to the democratic

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such cases are exceptional. They are politically controversial, get great public attention and often also involve public interests. Also, the Court's requirement of 'guidelines' might be less restrictive than the one of a 'concrete statutory basis'.

148 For details regarding art 19 sec 2 GG, see eg Barbara Remmert in Dürig/Herzog/Scholz (eds), Grundgesetz-Kommentar (95 suppl, CH Beck 2021) Art. 19 Abs. 2 GG paras 36 ff. If courts disregard basic principles and limits of the weighing process, their decisions can be challenged as unconstitutional. For details regarding the specific constitutional requirements for the process of balancing colliding interests, see Hellgardt, (n 95) 282–286.

149 For a similar approach, see eg BVerfGE 134, 204, 224; 141, 74, 101. See also Gellermann (n 145) 212–226, with a concept of 'normative contouring' in constellations of colliding fundamental rights positions. For details regarding the understanding of fundamental rights as principles in a sense of optimization requirements, see Alexy (n 48) 71 ff.

150 This is not meant to hide the fact that determining the *right* balance between colliding private interests might be politically controversial and have important societal effects. In certain controversial constellations which get great public attention and might involve public interests parallel to the reconciliation of interest, the legislature will be well advised to provide the courts with clear statutory guidelines.

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legislature, particularly such interfering with fundamental rights. Here, the requirement of a statutory basis seems justified. Furthermore, courts do not come into conflict with their duty to adjudicate if they refrain from pursuing own regulatory objectives, for the pursuit of public interests is regularly not indispensable to decide a private dispute objectively.

By contrast, if private law adjudication aims primarily at balancing colliding individual interests, the application of the doctrine seems less justified. The need for a high level of democratic legitimacy and the protection of fundamental rights through statutory provisions is of minor relevance here. Courts need wider discretion to find a just balance of private interests, if necessary, by further developing the law; broader legislative guidelines are sufficient. This discretion is also necessary in order to enable judges to comply with their duty to adjudicate if concrete provisions are lacking. However, in the above-mentioned *Scheinvater* decision,[151] the Federal Constitutional Court seems to apply the essential-matters doctrine precisely to a constellation of balancing interests, namely the apparent father's right to compensation and the mother's general personality right. In granting the apparent father an information right against the mother on the basis of a general clause (§ 242 BGB), the civil court dealing with the dispute supplemented the legislative guidelines provided for the balancing of interests between the individuals concerned. It did not aim to achieve regulatory objectives beyond the 'framework' set by the colliding interests. Thus, the Federal Constitutional Court should have refrained from a general restriction of the civil court's competence to further develop the law. The review of the judicial weighing procedure itself would have been adequate and sufficient.[152]

151 BVerfGE 138, 377 – *Scheinvater*.

152 In the first part of the decision (BVerfGE 138, 377 paras 26 ff), the Court reviews the civil court's balancing of interests and concludes that 'the court incorrectly assessed the importance attached to the complainant's general right of personality'. In the second part of the decision (BVerfGE 138, 377 paras 35 ff), however, the Court considers it necessary to emphasize that judicial development of the law in such constellations in principle exceeds the constitutional boundaries if a specific basis in statutory law is lacking.

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§ 8 Private International Law between Objectivity and Power

Andreas Engel

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Opposite forces seem to be at work in private international law in the US and the European Union. While the US no longer acts as a human rights watchdog for the world, in Europe, the sense of responsibility seems to be increasing: Particularly with regard to global supply chains, legislators have earnestly considered extending the reach of their laws.

This contribution seeks to analyse the underlying developments in private international law specifically from the vantage point of the tension between objectivity and power, and with a particular focus on recent jurisprudence of the European Court of Justice (ECJ) and the US Supreme Court as well as the Draft Restatement (Third) of Conflict of Laws.

The first part will outline the underlying understanding of the role of objectivity and power in private international law (I.). With that in mind, the second part will sketch the specific approaches of European and US private international law to international cases (II.). The following parts will retrace how these approaches are in flux, first for European private international law (III.), then for US private international law, with a view to both federal law and state law (IV.). A final part will compare the findings (V.).

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I. Introduction: Private International Law, Objectivity, and Power

Broadly conceived, private international law is concerned with international disputes between persons and entities other than states as such.[1] It deals with what law applies to a case, what court has jurisdiction to entertain a lawsuit and whether a judgment will be recognized and enforced abroad. This contribution's main focus will be on the applicable law, while related questions will be discussed as needed.

By this definition of private international law, states as such are not involved as parties in the relevant disputes. If we consider power to be at play when a state tries to further its interests, the relevance of power in private international law is not immediately apparent. One could even understand private international law as an entirely objective system[2], aiming for justice only on a meta-level. Such private international law justice could be understood to be attained when the 'right' applicable law and the 'right' forum are designated, irrespective of state interests. However, as the following parts will explore, power has its place even on the level of private international law, and its influence is becoming more explicit.

II. A Sketch of the European and US Approaches to International Cases

To have a backdrop for current developments in the later parts, this part will outline European (1.) and US approaches to international cases (2.).

1 cf Peter Hay, Patrick J Borchers, Symeon C Symeonides, *Conflict of Laws* (6th edn, West 2018) § 1.1, 1. Thus understood, the term private international law would be equivalent to the US term 'conflict of laws'. 'Choice of law', by contrast, is mostly understood as only referring to questions of applicable law, cf ibid § 1.2, 3.

2 For 'objectivity', see Philip M Bender, 'Ways of Thinking about Objectivity' (§ 1), text to n 1–3.

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1. European private international law

a. European Union private international law[3] in the tradition of *Savigny*[4] follows a multilateral approach and seeks to assign a legal relationship to the state where it has its seat – or in whose legislative jurisdiction it belongs. This approach starts its analysis from the relationship between individuals, not from state interests. This concept seems to be a particularly good fit in the European Union: Regulating private law remains mostly within the competences of the Member States – unlike private international law, which in large part is set by the European legislator.[5] Somewhat relatedly, the supranational European private international law legislator cannot refer to a specific (national) lex fori, unlike national legislators.[6] Hence, if we equate the absence of state interests with objectivity, European Union private international law would seem relatively objective. Specifically, the pertinent regulations aim for predictability and legal certainty,[7] which arguably can best be achieved in an objective framework that does not take into consideration aspects of power, as these might require intricate balancing exercises, eg between the interests of two different states whose laws might apply. Moreover, one could also refer to the concept of mutual trust between the legal orders of the Member States,

3 European Union private international law currently governs the areas of contract (Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6), non-contractual obligations (Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40), divorce (Council Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10, Rome III) and succession (Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107, Succession Regulation).

4 See Friedrich Carl von Savigny, *System des heutigen Römischen Rechts vol VIII* (Veit 1849).

5 Sophia Schwemmer, *Anknüpfungsprinzipien im Europäischen Kollisionsrecht* (Mohr Siebeck 2018) 187; Jürgen Basedow, 'Der Raum des Rechts und das Internationale Privatrecht' (2012) 62 Zbornik PFZ 23, 27 (= Liber Amicorum Krešimir Sajko).

6 Schwemmer (n 5) 187, but also note the qualification at 206.

7 Recitals 6, 16 Rome I Regulation; recitals 6, 14 Rome II Regulation; recitals 9, 15 Rome III Regulation; recitals 37, 48 Succession Regulation.

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which, in principle, would seem to require neutral – and in that sense, objective – connecting factors.[8]

b. Some qualifications are in order, however. Considerations of power are woven into the European private international law framework.[9] These may be the implicit explanation for some specific connecting factors, too. This article focuses on another aspect, that is how specific provisions allow for explicit considerations of power. As prime examples, the public policy exception and overriding mandatory provisions deserve attention.[10]

aa. The public policy exception (as in arts 21 Rome I Regulation, 26 Rome II Regulation, 12 Rome III Regulation, 35 European Succession Regulation; cf recitals 37 Rome I Regulation, 32 Rome II Regulation, 25 Rome III Regulation, 58 European Succession Regulation) allows a court to refuse the application of the law as specified by the general framework of the regulations if such application is manifestly incompatible with the public policy (*ordre public*) of the forum. This exception marks a departure from an objective system: If the interests of the forum state are manifestly at odds with the result of the application of the law objectively determined and there is a sufficient nexus between the case and the forum state, this state's courts may *not* apply that law. Hence, this public policy exception gives power a negative function, as it blocks a specific law's application.[11]

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8 See Matthias Weller, 'Mutual Trust: In Search of the Future of European Union Private International Law' (2015) 11 J Priv Int'l L 64, in particular at 71–73; see also Koen Lenaerts, 'Der Grundsatz des gegenseitigen Vertrauens im internationalen Privatrecht: Über den Dialog der Gerichte' in Burkhard Hess, Erik Jayme and Heinz-Peter Mansel (eds), *Liber Amicorum Christian Kohler* (Gieseking 2018) 287.

9 See, extensively and in depth, Schwemmer (n 5) 187–217; Wulf-Henning Roth, 'Öffentliche Interessen im internationalen Privatrechtsverkehr' (2020) 220 AcP 458.

10 See, primarily on mandatory provisions, Jan von Hein, 'Eingriffsnormen und ordre public als Instrumente zur Durchsetzung von öffentlichem Wirtschaftsrecht im internationalen Verhältnis' in Peter Jung (ed), *Die private Durchsetzung von öffentlichem Wirtschaftsrecht* (Mohr Siebeck 2018) 23; Michał Wojewoda, 'Mandatory Rules In Private International Law' (2000) 7 Maastricht Journal of European and Comparative Law 183.

11 The public policy provision can be used to highlight that one could also adopt an understanding of objectivity and power different from the one of this contribution. While here, *ordre public* is associated with power, it could also be associated with objectivity: The public policy provision limits the leeway states have in legislating, or, put differently, in exercising their power.
For a discussion of *private* power in private international law as yet another approach, see Giesela Rühl, 'Private Macht im Internationalen Privatrecht' in Florian Möslein (ed), *Private Macht* (Mohr Siebeck 2015) 475 and Giesela Rühl, 'The

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bb. The provisions on overriding mandatory provisions in contract law, tort law and succession law go further.[12] Arts 9 Rome I Regulation, 16 Rome II Regulation and 30 European Succession Regulation (cf recitals 34, 37 Rome I Regulation, 32 Rome II Regulation, 54 European Succession Regulation) allow for power to be exerted by applying specific provisions (of the forum state or, in the case of contracts, of a state that has a specific nexus to the contract, or, in the case of succession, of a state where specific assets or enterprises are located) – irrespective of the law applicable to the case in general, as identified by the (more or less) objective connecting factors.[13]

To qualify as an overriding mandatory provision, a law needs to be sufficiently important to the legal order to which it belongs. Art 9 Rome I Regulation thus defines overriding mandatory provisions as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.' The specific interests need to be ascertained by the court handling the case.[14]

Para 2 of that provision states that overriding mandatory provisions of the law of the forum can be applied. At the same time, according to

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Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy' (2014) 10 J Priv Int'l L 335.

12 See, generally, Jan D Lüttringhaus, 'Eingriffsnormen im internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar' [2014] IPRax 146.

13 Art 10 para 3 Rome III Regulation could be understood as a provision that adopts the same technique for a specific case to implement the principle of non-discrimination in international divorce proceedings. It also differs from the general provision in that it does not allow for a balancing of competing interests. See Marc-Philippe Weller, 'Vom Staat zum Menschen: Die Methodentrias des Internationalen Privatrechts unserer Zeit', RabelsZ 81 (2018) 747, 768 and Marc-Philippe Weller, Irene Hauber, and Alix Schulz, 'Gleichstellung im Internationalen Scheidungsrecht – talaq und get im Licht des Art. 10 Rom III-VO' [2016] IPRax 123; cf also Susann Gössl, 'Art. 10 Rom III-VO' (1 February 2021) in Beate Gsell and others (eds), BeckOGK, para 3 <https://beck-online.beck.de/?vpath=bibdata/komm/BeckOGK/cont/BeckOGK.htm> accessed 31 December 2021 and Michael Stürner, 'Politische Interessen und Internationales Privatrecht' in Christoph Benicke and Stefan Huber (eds), *Festschrift für Herbert Kronke* (Gieseking 2020) 557, 565–567.

14 ECJ, Opinion of AG Szpunar, Case C-315/15 *Nikiforidis* ECLI:EU:C:2016:281, para 88. Von Hein (n 10) 34–36 discusses the distinction between public and private interests in this context.

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art 9 para 3 Rome I Regulation, effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application. So in cases of art 9 para 3 Rome I Regulation, a balancing of powers is required.

This provision allows taking into consideration 'the legitimate interests of the other state'.[15] It may, under certain conditions, further the international harmony of decisions,[16] and it may promote international cooperation and solidarity.[17] However, yielding to a specific state's interests conflicts with the objective of other provisions of the Rome I Regulation, which designate a state whose provisions have to be obeyed.[18] In particular, the application of overriding mandatory provisions is in conflict with legal certainty and foreseeability[19] and thus has been described by the ECJ as a 'disturbance to the system of conflict of laws'.[20] That may be a reason why, during the drafting of the regulation, the scope of art 9 Rome I Regulation was curtailed. A Commission Proposal considered giving effect even to overriding mandatory provisions of a state 'with which the situation has a close connection',[21] but the EU legislature removed that option.[22]

2. *US approaches to international cases*

In the US, federal law (a.) and state law (b.) adopt different approaches to international cases.

15 *Nikiforidis*, Opinion of AG Szpunar (n 14) para 80.
16 *Nikiforidis*, Opinion of AG Szpunar (n 14) para 80.
17 *Nikiforidis*, Opinion of AG Szpunar (n 14) paras 80 and also 88.
18 ECJ, Case C-135/15 *Nikiforidis* ECLI:EU:C:2016:774, para 48.
19 *Nikiforidis* (n 18) paras 46–47.
20 *Nikiforidis* (n 18) para 45.
21 COM(2005) 650, art 8 para 3; see also art 7 para 1 of the Convention on the Law Applicable to Contractual Obligations 1980.
22 See *Nikiforidis* (n 18) para 45; for more details on the legislative history of the provision see Felix Maultzsch, 'Art. 9 Rom I-VO' (1 December 2021) in Beate Gsell and others (eds), BeckOGK, paras 94–100 <https://beck-online.beck.de/?vpath=bibdata/komm/BeckOGK/cont/BeckOGK.htm> accessed 31 December 2021.

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a. Federal law

US courts engage with international cases from quite a different vantage point, as far as areas of US federal jurisdiction are concerned. Federal courts address questions of power at a far earlier stage of their analysis.[23] In that context, questions of jurisdiction and applicable law are intertwined. What is important here is that US courts adopt a unilateral approach when faced with an international case. Rather than ascertaining in a multilateral fashion what law applies to a case, US federal courts will inquire whether they have subject matter jurisdiction and whether US law extends to a particular set of facts. (If it does not, US courts will regularly dismiss the case rather than apply foreign law.[24])

That analysis openly addresses questions of power. The question of US law's reach is connected with the question of the US interest in the case, and may also be answered with a view to another state's interest to control the case.[25]

b. State law

Regarding private international law on a state level, a general characterization is far more difficult to make. The approaches taken by US states differ vastly.[26] Still, a few overarching remarks are in order before turning to current developments later. Conflicts questions in state courts more frequently arise from interstate cases within the US than from international cases. As US states are all under the roof of the US constitution, policy differences tend to be larger internationally than between US states,[27] so some caution needs to be taken when juxtaposing interstate and international cases. Still, US states also have an authority to regulate extraterritori-

23 These issues are touched upon in the Restatements on Foreign Relations Law, see most recently Restatement (Fourth) of Foreign Relations Law.

24 See generally, Andreas Engel, *Internationales Kapitalmarktdeliktsrecht* (Mohr Siebeck 2019) 57–68.

25 Kermit Roosevelt III and Bethan R Jones, 'The *Draft Restatement (Third) of Conflict of Laws*: A Response to Brilmayer & Listwa' (2018) 128 YLJ Forum 293, 306 <https://www.yalelawjournal.org/forum/a-response-to-brilmayer-listwa> accessed 31 December 2021.

26 For an overview of the approaches currently followed in different US states, see Hay, Borchers, and Symeonides (n 1) § 2.15, 65ff.

27 Ralf Michaels and Christopher A Whytock, 'Internationalizing the New Conflict of Laws Restatement' (2017) 27 Duke J Comp & Int'l L 349, 352.

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ally and internationally – an authority analogous to that of the federation[28] – and state legislatures use that authority. However, unlike federal law, the states' approach generally is not unilateral when dealing with conflict cases. Rather, they try to find the law that applies to a specific case in a multilateral fashion. Thus, US states are more welcoming towards the application of foreign law. In this regard, the approach is similar to the one adopted by European private international law.

III. Developments in Europe

With that background in mind, the analysis now turns to specific developments in private international law that have shaped the relationship between objectivity and power. For the European Union, the ECJ's jurisdiction on the public policy exception (1.) and overriding mandatory provisions (2.) will be scrutinized. It will turn out that so far, the ECJ may have given more leeway to exercise power with the latter than the former.[29]

1. Public policy exception

ECJ jurisprudence on *ordre public* so far has not concerned the question of applicable law but has been set in the context of recognition of judgments.[30] The court's reasoning still is of interest, as it may be transferable from one context to the other. In short, the court interprets this gateway for the consideration of state interests restrictively.

Notably, the ECJ does not define or ascertain the content of the public policy of Member States. Rather, it sets out the limits within which the

28 *Skiriotes v Florida*, 313 US 69, 78–79 (1941); Hannah L Buxbaum, 'Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy' (2017) 27 Duke J Comp & Int'l L 381, 389.

29 See also Juliane Kokott and Wolfgang Rosch, 'Eingriffsnormen und ordre public im Lichte der Rom I-VO, der Rom II-VO, der EuGVVO und der EU-InsVO' in Christoph Benicke and Stefan Huber (eds), *Festschrift für Herbert Kronke* (Gieseking 2020) 265, 273.

30 For general remarks on *ordre public* and an extensive discussion of the pertinent case law, see Kokott and Rosch (n 29).

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courts of a Member State may have recourse to public policy at all.[31] In doing so, the court has held that recourse to the public-policy clause regarding recognition of judgments can be had 'only in exceptional cases'.[32] Specifically, the infringement of public policy would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order.[33] Hence, the forum state can only wield its power in particular cases.

To illustrate, in *Krombach* the right to fair legal process was at issue, but public policy could not be invoked merely for jurisdictional issues.[34] However, the ECJ qualified that statement and noted that public policy may be considered if, in an action for damages based on an offence, the court of the state of origin refused to hear the defence of the accused person, solely on the ground that that person was not present at the hearing.[35] The German court to which the lawsuit then returned went on to deny recognition based on the public policy exception.[36]

The ECJ reiterated its restrictive line with regard to the right to be notified of procedural documents and, more generally, the right to be heard in *Eurofood*[37] and with regard to the right to a fair trial in the context of a judgment given in default of appearance.[38]

Similarly, the ECJ held that the mere fact that a judgment given in a Member State was contrary to EU law did not in itself justify invoking the public policy exception.[39] Rather, the decision in question would need to be at variance at 'an unacceptable degree with the legal order of the State in which recognition is sought, inasmuch as it would infringe a fundamental

31 ECJ, Case C-7/98 *Krombach* ECLI:EU:C:2000:164, paras 22–23; ECJ, Case C-38/98 *Renault* ECLI:EU:C:2000:225, para 33; ECJ, Case C-302/13 *flyLAL-Lithuanian Airlines,* ECLI:EU:C:2014:2319, para 47; ECJ, Case C-681/13 *Diageo Brands* ECLI:EU:C:2015:471 para 42. For examples from Germany see eg Dietmar Baetge, Art. 6 EGBGB in Markus Würdinger (ed), *juris PraxisKommentar BGB vol 6*, paras 94ff (juris 2020) <www.juris.de> accessed 31 December 2021.

32 *Krombach* (n 31) para 21.

33 *Krombach* (n 31) para 37, confirmed in ECJ, Case C-341/04 *Eurofood* ECLI:EU:C:2006:281, para 63.

34 *Krombach* (n 31) para 34.

35 *Krombach* (n 31) para 44.

36 BGH IX ZB 23/97, BGHZ 144, 390.

37 *Eurofood* (n 33) paras 60–68.

38 ECJ, Case C-619/10 *Trade Agency* ECLI:EU:C:2012:531, paras 47–62.

39 *Renault* (n 31) para 33; *Diageo Brands* (n 31) para 68.

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principle'.[40] Most recently, the ECJ held that a breach of the rules of lis pendens[41] in itself did not amount to an infringement of public policy.[42]

To sum it up, so far there has only been one instance where the ECJ has acknowledged an infringement of public policy in a private international law case – hence this tool to bring to bear considerations of power has only been of limited importance.

2. *Overriding mandatory provisions*

As regards overriding mandatory provisions, they have the potential to allow for open consideration of competing power. This potential has been unlocked to a certain extent.

Ingmar[43], the first case regarding overriding mandatory provisions, related to the payment of compensation to agents on termination of their agreements with their principals, as determined in an EC directive. The court arrived at the conclusion that the norms in question were indeed overriding mandatory provisions. For the court, it was decisive that the legislator had a strong interest in what the provisions aimed at: they were designed to protect the commercial agent,[44] which protection was particularly evident as the parties were not allowed to derogate (to the detriment of the commercial agent) from the provisions.[45] Thus, the provisions aimed to safeguard a key goal of the European Community: to protect the freedom of establishment and the operation of undistorted competition in the internal market. As the ECJ stated, this goal would be undermined if a third-state principal could escape that provision when he used a commercial agent in a Member State.[46]

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40 *Krombach* (n 31) para 37; *Renault* (n 31) para 30; ECJ, Case C-420/07 *Apostolides* ECLI:EU:C:2009:271, para 59; *flyLAL-Lithuanian Airlines* (n 31) para 49; *Diageo Brands* (n 31) para 44.

41 On current European rules on lis pendens, see eg Christian Heinze and Björn Steinrötter, 'The Revised Lis Pendens Rules in the Brussels Ibis Regulation' in Vesna Lazić and Steven Stuij (eds), *Brussels Ibis Regulation* (TMC Asser Press 2017) 1.

42 ECJ, Case C-386/17 *Liberato* ECLI:EU:C:2019:24, paras 47–56.

43 ECJ, Case C-381/98 *Ingmar GB* ECLI:EU:C:2000:605.

44 *Ingmar GB* (n 43) para 21.

45 *Ingmar GB* (n 43) para 22.

46 *Ingmar GB* (n 43) para 25.

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In a follow-up case, *Unamar*[47], the court had to deal with a national (Belgian) law adopting the same solutions regarding the payment of commercial agents in another field as a potential mandatory rule of the forum. The court held that all means necessary could be taken to ascertain the intentions and characterization of the provision. The mandatory nature of a provision was to be determined taking 'account not only of the exact terms of that law, but also of its general structure and of all the circumstances in which that law was adopted.'[48] The ECJ left it to the national court to decide 'on the basis of a detailed assessment'[49] whether that threshold was met, but not without noting that there was a specific twist to this case: The law to be rejected for the *lex fori* was the law of another member state.[50] While the court did not spell out the consequences, it stands to reason that an *overriding* mandatory provision would only be found if a specific national interest could be distinguished.

In *Da Silva Martins*[51], a case concerning the period of limitation after a traffic accident, the ECJ confirmed that the definition for overriding mandatory provisions established for contracts in the context of the Rome I Regulation could be transposed to the Rome II Regulation for non-contractual claims.[52] The court held that also in the context of the Rome II Regulation, a mandatory overriding provision can be found 'on the basis of a detailed analysis of the wording, general scheme, objectives and the context in which that provision was adopted'.[53] On that base, the ECJ did not find a national provision regulating a period of limitation to be sufficiently 'important' in a national legal order to be considered an overriding mandatory provision.[54]

In its most recent decision, *Nikiforidis*[55], the ECJ provided further clarification and a methodological twist. First, the court held that art 9 Rome I Regulation must be interpreted strictly[56] and thus does not allow for

47 ECJ, Case C-184/12 *Unamar* ECLI:EU:C:2013:663.
48 *Unamar* (n 47) para 50.
49 *Unamar* (n 47) para 52.
50 *Unamar* (n 47) para 51.
51 ECJ, Case C-149/18 *Da Silva Martins* ECLI:EU:C:2019:84.
52 *Da Silva Martins* (n 51) paras 27–28.
53 *Da Silva Martins* (n 51) para 31.
54 *Da Silva Martins* (n 51) para 35.
55 n 18.
56 *Nikiforidis* (n 18) para 44; *Unamar* (n 47) para 49; cf von Hein (n 10) 51–56; Matthias Lehmann and Johannes Ungerer, 'Applying or Taking Into Account of Foreign Overriding Mandatory Provisions – Sophism Under the Rome I Regulation' (2017/2018) 19 YbPIL 53.

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the application of overriding mandatory provisions from a third country (ie not the forum state or a state linked to the contract as provided for in art 9 para 3 Rome I Regulation). At the same time, the court held that mandatory provisions of such a third state, even if not applicable via art 9 Rome I Regulation, may be taken into account as matters of fact while applying the substantive law of another state. The can is being kicked down the road, so to say. The decision of how to deal with another state's claim to regulate a specific matter is left to the applicable substantive law. What is lamentable about this is that the criteria for this decision are not predictable.

An illustration for this new approach can be found in a somewhat infamous German case that concerned a lawsuit an Israeli citizen brought against an airline. It was based upon a claim out of a contract for transportation that hinged upon a Kuwaiti law that prohibited the airline from fulfilling a contract with an Israeli citizen. Balancing interests, as demanded by art 9 para 3 Rome I Regulation, the German court did not bring that law in as an overriding mandatory provision. However, when it applied the German provisions on contract law, it gave the Kuwaiti norm factual consideration.[57]

As a final remark, it is noteworthy that an unofficial draft of a German supply chain law expressly stated that it was designed as an overriding mandatory provision.[58] The German legislator cannot change the harmonized rules on private international law of contracts (ie the Rome I Regulation) and cannot change the definition of overriding mandatory provisions. What a Member State can do, however, is to create a provision that fits the definition.[59] The draft provision was meant to make this intention explicit, thus highlighting the role of power.

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57 OLG Frankfurt am Main NJW 2018, 3591; see also Felix Maultzsch, 'Forumsfremde Eingriffsnormen im Schuldvertragsrecht zwischen Macht- und Wertedenken' in Christoph Benicke and Stefan Huber (eds), *Festschrift für Herbert Kronke* (Gieseking 2020) 363, 371–72; von Hein (n 10) 47–49, 56–57.

58 Giesela Rühl, 'Towards a German Supply Chain Act?' [2021] European Yearbook of International Economic Law (forthcoming), 9 <https://ssrn.com/abstract=3708196> accessed 31 December 2021; in the same vein, see the modifications to the bill proposed by the Green Party Bundestag document (BT-Drs.) 19/30505, 26–27. The law ultimately adopted by the German Parliament on 11 June 2021 (*Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*) does not contain a similar provision.

59 cf the points discussed between Wulf-Henning Roth and Marc-Philippe Weller per Hannes Wais, 'Diskussionsbericht zum Referat von *Wulf-Henning Roth*' (2020) 220 AcP 538, 539.

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IV. Developments in the US

US private international law, on a federal level, has seen the exercise of power being limited (1.) and, on a state level, the relevance of power being explicitly discussed and analysed in the context of the Draft Restatement (Third) of Conflict of Laws (2.).

1. Federal law

As stated before, in international cases, US federal law follows a unilateral approach, which can easily accommodate considerations of power. However, the actual exercise of power by courts has been curtailed by recent US Supreme Court decisions.

These decisions concern 'complex and distinctively American statutory regimes'.[60] In dealing with these, the Supreme Court returned to a tool of statutory interpretation that can be traced back two hundred years.[61] The Court referred to the presumption against extraterritoriality, which 'serves to protect against unintended clashes between [US] laws and those of other nations which could result in international discord.'[62] According to the presumption, Congress ordinarily legislates with respect to domestic, not foreign matters,[63] which, according to the Supreme Court, only states a commonsense notion.[64] Hence, absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.[65]

Federal courts therefore deal with international cases that raise questions of extraterritoriality in a two-step approach.[66] In a first step, they enquire whether the presumption against extraterritoriality has been rebutted – which is the case if there is a clear, affirmative indication that a

60 Patrick J Borchers, 'How "International" Should a Third Conflicts Restatement be in Tort and Contract', (2017) 27 Duke J Comp & Int'l L 461, 461.

61 See also Engel (n 24) 63–68.

62 *EEOC v Arabian American Oil Co*, 499 US 244, 248; for an overview see William S Dodge, 'The New Presumption Against Extraterritoriality', (2019) 133 Harv L Rev 1581, 1589–614.

63 *Morrison v National Australia Bank*, 561 US 247, 255 (2010).

64 *RJR Nabisco, Inc v European Community*, 579 US _ (2016) 8 (slip opinion).

65 *Morrison v National Australia Bank* (n 63) 255; *RJR Nabisco, Inc v European Community* (n 64) 7.

66 See *WesternGECO v ION Geophysical Corp*, 585 US _ (2018) 5 (slip opinion); *RJR Nabisco, Inc v European Community* (n 64) 9.

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statute is to apply extraterritorially. Questions of a US interest can openly be addressed at this stage. If the statute is not extraterritorial, then in the second step, the court will ascertain whether the case has a sufficient nexus to the US to be covered by a domestic application of the statute, or, as the Supreme Court puts it, whether the case is within the statute's focus. This second step again allows taking into account considerations of power, as the focus of a norm depends on the interests informing it.

The first of the relevant decisions, *Morrison* (delivered by the late Justice *Scalia*), concerned provisions about securities fraud in the Securities Exchange Act. The Court only saw a national public interest (referred to in 15 USC § 78b) that did not pertain to the case before it, as it was based upon transactions conducted upon foreign exchanges and markets by foreign parties.[67] Before this landmark decision, such a case would have been entertained before US courts, which now lost their position as a 'Shangri-La of [securities] class action litigation'[68].

A second decision, *Kiobel* (delivered by Chief Justice *Roberts*), concerned the Alien Tort Statute, which creates a cause of action[69] and provides jurisdiction for violations of international law. The ATS, too, was held to be subject to the presumption against extraterritoriality.[70] Citizens of Nigeria had brought a claim against certain Dutch, British, and Nigerian corporations alleging violations of international law in Nigeria. Claimants could only litigate before US courts if the Alien Tort Statute allowed that. However, the Court saw a 'danger of unwarranted judicial interference'.[71] Specifically, the Supreme Court mentioned that the will of the US might be imposed upon another sovereign,[72] which would lead to international discord.[73] Hence, the Court saw 'no indication the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms'.[74] Turning to the facts before it, the court found that no relevant conduct had taken place in the United States and that the claims did not 'touch and concern the territory of the United States (…)

67 *Morrison v National Australia Bank* (n 63) 262.
68 *Morrison v National Australia Bank* (n 63) 270.
69 See *Sosa v Alvarez-Machain*, 542 US 692 (2004); Hay, Borchers, and Symeonides (n 1) § 3.74, 255.
70 *Kiobel v Royal Dutch Petroleum Co*, 569 US 108, 116 (2013).
71 *Kiobel v Royal Dutch Petroleum Co* (n 71) 116.
72 cf *Kiobel v Royal Dutch Petroleum Co* (n 71) 121.
73 *EEOC v Arabian American Oil Co* (n 62) 248; *Kiobel v Royal Dutch Petroleum Co* (n 71) 115.
74 *Kiobel v Royal Dutch Petroleum Co* (n 71) 123.

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with sufficient force'.[75] Hence, the Court did not see room for the ATS to apply.

Subsequent lawsuits forced lower courts to consider whether a case 'touched and concerned' the United States. These were mostly unsuccessful.[76] However, some cases stand out as instances where there was a sufficient nexus with the US. In *Mastafa v Chevron Corp*[77], the Court of Appeals for the Second Circuit held that US law applied when a company was headquartered in the US (and thus relevant decisions were made there) and relevant transactions took place and agreements were made in the US; in *Balintulo v Ford Motor Co*[78], the United States was considered touched and concerned because the defendant had developed hardware and software in the US that was later used for human rights violations in South Africa.[79]

In a third decision, *RJR Nabisco*[80] (delivered by *Alito*), the US Supreme Court had to ascertain the reach of the Racketeer Influenced and Corrupt Organizations Act (RICO), which prohibits certain activities of organized crime groups in relation to an enterprise. The European Community and 26 Member States brought an action against RJR Nabisco and related entities, alleging they participated in a global money-laundering scheme. Again, the Court saw the extraterritorial scope as a question of the content and the meaning of the law and only saw an extraterritorial application of some of the relevant provisions. Civil claims were ruled out, according to the court, as allowing recovery would create a danger of international friction.[81] It is somewhat puzzling, however, that this argument was invoked when the European Community and Member States had initiated the lawsuit.

By contrast, in *WesternGECO v ION Geophysical Corp*[82] the US Supreme Court sidestepped the presumption against extraterritoriality and resolved the case by finding that relevant conduct had occurred in the United

75 *Kiobel v Royal Dutch Petroleum Co* (n 71) 125.

76 Presumption not rebutted in *Baloco v Drummond Co, Inc*, 767 F 3d 1229 (11th Cir 2014), cert denied 136 S Ct 410 (2015); *Doe v Drummond Co*, 782 F 3d 576 (11th Cir 2015), cert denied 136 S Ct 1168 (2016); *Mujica v AirScan Inc*, 771 F 3d 580 (9th Cir 2014), cert denied 136 S Ct 690 (2015). For an overview, see Hay, Borchers, and Symeonides (n 1) § 3.76, 258ff.

77 770 F 3d 170 (2d Cir 2014).

78 796 F 3d 160 (2d Cir 2015), cert denied Ntsebeza v Ford Motor Co, 36 S Ct 2485.

79 See also *Al-Shimari v CACI Premier Technology, Inc*, 758 F 3d 516 (4th Cir 2014).

80 n 64.

81 *RJR Nabisco, Inc v European Community* (n 64) 19.

82 n 66.

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States. To reach this conclusion, the court also analysed what interests the relevant (patent law) statute[83] sought to protect.[84]

One important qualification is indicated. The jurisprudence of the Supreme Court just discussed mainly concerns private actions. As regards public enforcement of securities laws (*Morrison*), US Congress has explicitly reinstated the extraterritorial reach of US laws.[85] At the same time, in *RJR Nabisco*, the Supreme Court also noted that public enforcement is subject to 'the check imposed by prosecutorial discretion',[86] and thus less prone to causing international discord.

2. *State law: Draft Restatement (Third) of Conflict of Laws*

While – due to the variety of approaches adopted by different US states[87] – it is difficult to make general remarks about state conflicts law,[88] it bears mentioning that a new Restatement (Third) of Conflict of Laws is currently being drafted. While no full draft is yet available to the public, some general tendencies have already been discussed.[89]

The Draft Restatement (Third) of Conflict of Laws does not operate unilaterally and tries to ascertain first which laws aim to regulate a specific case. While the Restatement (First) had taken a strictly territorial approach, assigning legal relationships to specific jurisdictions by territorial connecting factors, the Restatement (Second) aimed to apply the law of the state with the most significant relationship to the case.[90] The most

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83 Sec 271(f) Patent Act.

84 *WesternGECO v ION Geophysical Corp* (n 66) 6–7.

85 Sec 929P Dodd-Frank-Act.

86 *RJR Nabisco, Inc v European Community* (n 64) 19.

87 See n 26.

88 For an in-depth discussion of the politicization of US state conflicts law in the realm of tort law, see Christian Uhlmann, 'Politisierung des IPR links und rechts des Atlantiks' in Konrad Duden et al (eds), *IPR für eine bessere Welt* (Mohr Siebeck 2022) 51, 53ff.

89 For the current status, see <www.ali.org/projects/show/conflict-laws/> accessed 31 December 2021; on the role of the (Draft) Restatement in the legal system and the methodology adopted by the Reporters in drafting it see Roosevelt III and Jones (n 25) 298.

90 Lea Brilmayer and Daniel B Listwa, 'Continuity and Change in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back?' (2018) 128 YLJ Forum 266, 271 <https://www.yalelawjournal.org/forum/continuity-and-change-in-the-draft-restatement-third-of-conflict-of-laws> accessed 31 December 2021; Roosevelt III and Jones (n 24) 299.

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significant relationship was found in a less strict manner than by the Restatement (First) due to its open-ended, multifactor approach.

The Draft Restatement (Third) could be understood to make multilateral the approach taken by US federal law. It uses a two-step approach that is comparable to the Supreme Court's approach to questions of extraterritoriality.[91] The first step would be to determine which states have authority to regulate a case[92] and whether they have used that authority (which, again, is a matter of statutory construction) and thus expressed their interest in regulating that case[93] and exercising power. Any arising conflicts would then be resolved via priority rules. [94] The precise design of these priority rules is yet to be awaited. What is important here is that the first step, which can trace back its methodological roots to governmental interest analysis,[95] allows for an open discussion of what interests are at stake. While the priority rules may still resemble an objective system, the role of power is more openly recognized.

As *Michaels* points out, it remains to be seen how reinvigorating interest analysis will play out in that context.[96] Put neutrally, US states have a longer history of ascribing governmental interests to private law norms than legal systems outside the US.[97] It may prove harder to identify (or guess) the interests enshrined in non-US legal provisions. Moreover, it is

91 See Roosevelt III and Jones (n 25) 305; Brilmayer and Listwa (n 90) 267.

92 Michaels and Whytock (n 27) 353; see also Christopher A Whytock, 'Toward a New Dialogue Between Conflict of Laws and International Law' (2016) 110 AJIL Unbound (online) 150, 151 <www.cambridge.org/core/journals/american-journal-of-international-law/article/toward-a-new-dialogue-between-conflict-of-laws-and-international-law/2246B32D629EEE4C5D5D6359ABD41A01> accessed 31 December 2021.

93 Ralf Michaels, 'The Conflicts Restatement and The World' (2016) 110 AJIL Unbound (online) 155, 158 <www.cambridge.org/core/journals/american-journal-of-international-law/article/conflicts-restatement-and-the-world/495B4F01DD376CDEF3E0630D86DDD0D0> accessed 31 December 2021.

94 Brilmayer and Listwa (n 90) 270.

95 Lea Brilmayer, 'What I Like Most About the Restatement (Second) of Conflicts and Why It Should Not Be Thrown Out with the Bathwater' (2016) 110 AJIL Unbound (online) 144 <www.cambridge.org/core/journals/american-journal-of-international-law/article/what-i-like-most-about-the-restatement-second-of-conflicts-and-why-it-should-not-be-thrown-out-with-the-bathwater/440FB6ED6E969083889607D54E2CA2D6> accessed 31 December 2021; Michaels (n 93) 158.

96 Michaels (n 93) 158.

97 Michaels (n 93) 158. For the growing role of state interests in German private law cf eg Roth (n 9) 465–70.

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not yet clear how excessive assertions of power are to be moderated. The doctrine of comity might be of help, but is notoriously vague.[98]

V. Conclusion: Comparative Remarks

Where does that leave us? Two intertwined results emerge. First, the examples attest to a significant role of power in both US and European private international law. Second, the influence of power has been addressed openly in recent decisions.

We have seen that European private international law is not a merely objective system. The Savignyan tradition allows for elements of power to be acknowledged even on the meta-level of private international law. The rules on *ordre public* (arts 21 Rome I Regulation, 26 Rome II Regulation, 12 Rome III Regulation, 35 European Succession Regulation) allow preventing the application of foreign law and the rules on overriding mandatory provisions (arts 9 Rome I Regulation, 16 Rome II Regulation, 30 European Succession Regulation) allow forcing the application of a specific law. The ECJ's jurisprudence regarding art 9 Rome I Regulation enables national courts to engage in a balancing exercise and take state interests into consideration. Moreover, in some cases national legislators try to find ways to use private international law to yield a specific result, one that is considered desirable by that very legislator. For instance, the draft of a supply chain law shows that the German legislator considered making its interests known and implement a law with broad reach. Both tendencies might reflect a (further) departure from a merely objective system towards one where power *also* plays a role.

Recent developments in US federal conflicts law seem to lead to a similar role for power, even if from a different starting point. Over the last few years, the US Supreme Court has decided and affirmed that three relevant statutes that allow private actions do not apply extraterritorially. This jurisprudence may be interpreted as an acknowledgement that the US legislator's power is limited and as a sign of increased deference to other sovereigns and their respective decisions. This same deference to the

98 Michaels (n 93) 158. *Somportex Ltd. v Philadelphia Chewing Gum Corp*, 453 F 3d 435 (2d Cir 1971) calls comity 'a rule of "practice, convenience, and expediency" rather than of law'. See also Tim W Dornis, 'Comity' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Elgar 2017) vol 1, 382, and Engel (n 24) 73–76.

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interests of different sovereigns also shows up in the Draft Restatement (Third) of Conflict of Laws.

To get an idea about the systems' relative positions, one could muse how European courts would have handled the Supreme Court cases. These courts would have applied the rules of European private international law. In *Morrison*, the Supreme Court concluded that US law did not apply to a case where Australian shareowners sued an Australian company over shares listed on an Australian exchange. With all of these facts pointing towards Australia, it seems very likely that European courts would not have applied US law, either. Rather, the rules of private international law might have pointed them to the laws of Australia.[99]

As regards *Kiobel* and a claim for violations of customary international law, a hypothetical comparison is more difficult. There is no direct counterpart to the Alien Tort Statute. What can safely be said is that in a lawsuit between citizens of Nigeria and companies from a third country, European private international law would not leave leeway for the forum state to apply its own laws – yet. And turning to a specific connecting factor, it might still be easier to bring a claim under US law before US courts than for European private international law to lead to the application of the law of the state where the headquarters of a company is based[100] – particularly as the German legislator abandoned the idea of designating a draft supply chain law as an overriding mandatory provision.

Finally turning to *RJR Nabisco*, one might take a hypothetical European provision analogous to RICO. It would seem plausible that European courts might consider a provision aimed against organized crime an overriding mandatory provision – and thus apply it even in cases where the general rules of private international law lead to the application of a different state's laws.

Hence, as aspects of power have a limited, but relevant role in European private international law and the reach of US law is being curtailed, it could be said that the two systems are moving closer together.

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99 The relevant ECJ jurisprudence (albeit with regard to jurisdiction) attaches particular importance to the location of the claimant's bank account see ECJ, Case C-375/13 *Kolassa* ECLI:EU:C:2015:37; ECJ, Case C-304/17 *Löber* ECLI:EU:C:2016:774; ECJ, Case C-709/19 *Vereniging van Effectenbezitters* ECLI:EU:C:2020:1056 and also ECJ, Case C-12/15 *Universal Music International Holding* ECLI:EU:C:2016:449 and Engel (n 24) 159–212.

100 According to art 4 para 1 Rome II Regulation, the provision generally pertinent, the law of the place of injury governs claims arising out of a tort. See Rühl (n 58) 6.

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At the same time, the relevance of power also becomes more apparent. The growing importance of overriding mandatory provisions makes the ways in which Member State interests influence a specific case more explicit. Similarly, recent Supreme Court decisions have grappled with the question of how far US interests extend. The Restatement (Third) is likely to make use of interest analysis. While the actual conflict rules, which aim to balance interests, are still being finalized, at least a methodological debate is taking place.

Whether the increasing role of power disrupts the system of private international law and how well private international law could adapt to such disturbance still remains subject to debate. At the very least, the examples discussed have shown that the relevance of power is made explicit – which will hopefully facilitate future discussion about its adequate role.

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Part 5: Objectivity and Criminal Law

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§ 9 Algorithmic Crime Control between Risk, Objectivity, and Power

Lucia Sommerer[*]

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* This contribution draws from and builds on the autor's PhD thesis, Lucia Sommerer, *Personenbezogenes Predictive Policing. Kriminalwissenschaftliche Untersuchung über die Automatisierung der Kriminalprognose* (Nomos 2020).

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I. Introduction

Source: Petrarch, des Remèdes de l'une et l'autre fortune prospère et adverse, Paris, 1524.

Fortuna, the Roman goddess of destiny (left), and the goddess of wisdom and science Sapientia (right) are depicted in this 15th-century illustration in their traditional opposition. Fortuna's wheel lets people's fate rise and fall seemingly at random, her unpredictability posing risks, while science promises safety and objectivity. The attempt at a scientific 'taming of chance'[1] and thus the modern-day unification of the archrivals Fortuna and Sapientia lies at the core of the current expansion of algorithmic methods of predicting human behavior into more and more areas of crime control. This unification inadvertently brings about changes for the distribution of power and statistical likelihoods may be turned into 'legal truth'.[2] Behind the mathematical objectivity of algorithms may be looming a power shift in crime control, from traditional actors of crime control to computer scientists, from democratically legitimated modes of decision-making to processes lacking the involvement of the public, and from the logic of the law to the logic of the algorithm. A shift that is centred around the dominating category of our modern-day society: risk.[3]

This contribution will first take a look at the objectivity of algorithms (II.) and the power embedded in them (III.), before analysing a looming powershift in crime control affected particularly through reference to the seeming objectivity of mathematical models of chance (IV.).

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1 Pictured already at Gerd Gigerenzer, *The Empire of Chance: How Probability Changed Science and Everyday Life* (Cambridge University Press 1997) xiii; Gerd Gigerenzer, *Risk savvy: How to make good decisions* (Penguin 2015) 44 ff ('By "taming chance" in Ian Hacking's evocative phrase (Hacking 1990), probability and statistics had reconciled Scientia to her archrival Fortuna.')

2 Jack Balkin, 'The Proliferation of Legal Truth' (2003) 26 Harv JL & Pub Pol'y 5, 6: '[L]aw creates truth – it makes things true as a matter of law. It makes things true in the eyes of the law. And when law makes things true in its own eyes, this has important consequences in the world.'

3 Ulrich Beck, *Risk society: Towards a new modernity* (Sage 1992).

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II. Objectivity – Algorithms as a Neutral Tool?

'Do algorithms have politics?'
– in reference to Langdon Winner[4]
and
'If it's neutral, it's not technology.'
– Lance Strate[5]

Human decision-makers are not free of prejudice and subjective preferences,[6] quite the contrary. Harvard psychologists have shown with the so-called 'Implicit Association Test' that we may suffer from eg racist prejudices of which we are not even aware.[7] Studies on the criminal justice system have shown that judges tend to be more reluctant to grant an application for early release from prison before lunch than afterwards.[8] An algorithmic decision-making system is not subject to such individual preferences and fluctuations. For example, unlike a human brain, an algorithm can be strictly prescribed to ignore sensitive data such as skin color and religious affiliation as relevant input variables.[9] At first glance, algorithms thus have the potential to make decisions in a more neutral and less discriminatory way than humans.[10] But this appearance of neutrality

4 Langdon Winner, 'Do artifacts have politics?' (1980) 109 Daedalus 121, 122.
5 Lance Strate, 'If It's Neutral, It's Not Technology' (2012) 52 Educational Technology 6, 6; see already in the 1980s Winner (n 4), 122.
6 cf cognitive biases at Daniel Kahneman and Amos Tversky, 'Subjective probability: A judgment of representativeness' (1972) 3 Cognitive Psychology 430; see for Germany Gerd Gigerenzer, 'How to make cognitive illusions disappear: Beyond "heuristics and biases"' (1991) 2 Eur Rev Soc Psychol 83.
7 cf <http://implicit.harvatrd.edu> accessed 29 November 2021; cf also Mario Martini and David Nink, 'Wenn Maschinen entscheiden ... – vollautomatisierte Verwaltungsverfahren und der Persönlichkeitsschutz' (10/2017) 36 NVwZ-Extra 1; Linda Hamilton Krieger, 'The content of our categories: A cognitive bias approach to discrimination and equal employment opportunity' (1995) 47 Stan L Rev 1161 ff; Christine Jolls and Cass R. Sunstein, 'The Law of Implicit Bias' (2006) 94 Calif L Rev 969.
8 Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous factors in judicial decisions' (2011) 108 PNAS 6889.
9 Timo Rademacher, 'Predictive Policing im deutschen Polizeirecht' (2017) 142 AöR 366 374 f.
10 cf Thomas Wischmeyer, 'Regulierung intelligenter Systeme' (2018) 143 AöR 1 26; Martini and Nink, 'Wenn Maschinen entscheiden ... – vollautomatisierte Verwaltungsverfahren und der Persönlichkeitsschutz' ; Anupam Chander, 'The Racist Algorithm?' (2017) 115 Mich L Rev 1023.

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is deceptive. The widespread portrayal of algorithms as neutral, objective alternatives to human decision-making must be met with caution.[11] As *Kranzberg's* famous 'First Law of Technology' states[12] and as *Strate* in the above quotation implies, there is no such thing as truly neutral technology, and this is especially true of crime prediction algorithms. The use of algorithms does not fundamentally prevent discrimination; instead, human inequality is replaced by algorithmic inequality[13] and subjective, human preferences are hidden behind supposed neutrality and mathematical justifications.[14]

Like any other technology, algorithms, as man-made artifacts, are based on human decisions and thus, by definition, cannot work purely objectively and without the influence of these decisions. To put it bluntly, one can agree with *Strate* in the opening quote: If it is neutral, it is not technology.

For algorithms in crime control, too, programmers at all stages of the design process of the algorithm must make decisions that reflect their individual preferences and can perpetuate existing social inequalities. Given the large number of individual decisions in the algorithm design process, it is even possible that different developers who have been given the same task of designing an algorithmic crime predictions system may arrive at

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11 cf Wischmeyer (n 10), 26; Solon Barocas and Andrew D Selbst, 'Big Data's Disparate Impact' (2016) 104 Calif L Rev 671 673; see also Kelly Hannah-Moffat, 'The Uncertainties of Risk Assessment: Partiality, Transparency, and Just Decisions' (2014) 27 Fed Sent'g Rep 244 ff; Bernard E. Harcourt, 'Risk as a proxy for race: The dangers of risk assessment' (2014) 27 Fed Sent'g Rep 237, 240; Cecilia Klingele, 'The Promises and Perils of Evidence-Based Corrections' (2016) 91 Notre Dame L Rev 537, 538 ff; Sonja B. Starr, 'The New Profiling: Why Punishing Based on Poverty and Identity is Unconstitutional and Wrong' (2015) 27 Fed Sent'g Rep 229 ff.

12 'Technology is neither good or bad, nor is it neutral.' Melvin Kranzberg, 'Technology and History: "Kranzberg's Laws"' (1986) 27 Technology and Culture 544, 545.

13 Jessica M. Eaglin, 'Constructing Recidivism Risk' (2017) 67 Emory LJ 59, 97 f; cf Wischmeyer (n 10), 26; see also Kevin Macnish, 'Unblinking Eyes: the Ethics of Automating Surveillance' (2012) 14 Ethics and Information Technology 151 f; Engin Bozdag, 'Bias in Algorithmic Filtering and Personalization' (2013) 15 Ethics and Information Technology 209 ff; Barocas and Selbst (n 11), 672 ff; for police context see eg Kristian Lum and William Isaac, 'To predict and serve?' (2016) 13 Significance 14.

14 See Lucia Sommerer, *Personenbezogenes Predictive Policing. Kriminalwissenschaftliche Untersuchung über die Automatisierung der Kriminalprognose* (Nomos 2020) 105 ff.

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very different algorithms that in practice produce two divergent risk scores for the same person.

1. *Sources of lack of objectivity*

Non-objectivity can enter an algorithmic system in many ways. In view of the complexity of the procedure, it is difficult to draw up a conclusive catalogue of all potential entry points of a programmer's value judgements and thereby biases and errors into the development of a seemingly neutral algorithm. Typical problems of data analysis in the area of crime control – which can only be sketched in broad strokes here – originate, however, in all phases of algorithm design: compiling the training data set, defining the target variables, defining the input variables, and calibrating and monitoring the machine learning process.

Decisive value judgements are, eg, how to deal with pre-existing biases in training data sets. Is the programmer recognizing pre-existing biases at all, is the programmer then counter-acting the biases? Or are pre-existing biases, eg against women's reintegration into the job market after pregnancy, even at all interpreted as biases in the training data or accepted as a statistical fact, that needs to be learned by the algorithm to be efficient. The latter is what the Austrian Employment Office argued for regarding an algorithm designed to distribute financial reintegration support into the labor market.[15] Deciding what is a bias in the training data that needs to be counteracted, and what is simply an accurate depiction of reality, is an important value judgement of a highly political nature. It will often depend on the individual programmers' attitudes whether or not unequal treatment is recognized as unjustified and therefore discriminatory or not.

Further value judgements are made when deciding how the programmer is translating the goal of knowing who will commit a crime in the future into a mathematical variable. Will they, out of comfort and convenience, select police custody or an indictment rather than a conviction as an indicator for a crime, as the target variable, even though not everyone who is taken into police custody, not everyone who is indicted is actually found guilty of a crime, and even though certain groups in society may be

15 Example at Wiebke Fröhlich and Indra Spiecker (gen. Döhmann), 'Können Algorithmen diskriminieren?' Verfassungsblog <https://verfassungsblog.de/koennen-algorithmen-diskriminieren/> accessed 29 November 2021.

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at a higher risk of being taken into police custody unjustified without a subsequent conviction?

Further, through the decision for a certain input variable, the programmer often (unconsciously) decides that the algorithm will make more mistakes within a certain social group. Because how well certain input variables are suitable for predicting behaviour can differ for certain groups of society.[16]

Also, the programmer plays an important role in calibrating and overlooking the learning process of the algorithm. Core decisions are on the predictive accuracy and error rate of the algorithm, the ratio between false-negative and false-positive errors (asymmetric cost ratio) and the distribution of errors onto different subsets of society. The COMPAS-algorithm used in the US to support judges' sentencing decisions eg allegedly made false-positive errors (wrongly identifying an individual as 'high risk') twice as often for African Americans than for white Americans.[17]

Finally, the programmers at this point will have to make decisions that impact the probability of algorithm overfitting, ie, that the algorithms learn rules from a data set that are false, random correlation, not representative of actual connection between two variables in reality. Studies have also shown that data sets for minority groups often contain a higher degree of random correlations. There is therefore a risk that an algorithm may 'overfit' members of a minority group to a greater extent and thus make less accurate predictions – an issue that mindful programmers have to be aware of.

All these described value judgements can be used by programmers to discriminate against certain social groups and to hide their own discriminatory intentions behind the supposed objectivity of the numbers (so-called 'masked discrimination'). More often, however, programmers will unconsciously inscribe or perpetuate biases in an algorithm.

Since the inscription of biases in the design process can never be 100% avoided ex ante, it is all the more important to oblige manufacturers to

16 Barocas and Selbst (n 11), 688.

17 cf Julia Angwin and others, 'Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And it's Biased Against Blacks' ProPublica (23 May 2016) <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> accessed 29 November 2021; cf also differing error rates for face recognition technology, Sam Levin, 'Amazon Face Recognition Falsely Matches 28 Lawmakers With Mugshots, ACLU Says' The Guardian (26 July 2018) <https://www.theguardian.com/technology/2018/jul/26/amazon-facial-rekognition-congress-mugshots-aclu#img-1> accessed 29 November 2021.

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actively search for biases in their systems and to have their algorithms reviewed by independent third parties.

Not only numerous scientists are critical of the advertising promises of neutral decisions by algorithms.[18] Skepticism of algorithmic neutrality seems to spread in the population in Germany, too. A population survey conducted by the Bertelsmann Stiftung in 2018 showed that only 6% of those surveyed agreed with the following statement: 'I think it's better if algorithms judge me instead of people. They make objective decisions that are the same for everyone.'[19]

2. *Is algorithmic lack of objectivity superior to human lack of objectivity?*

Once the assertion of neutral, non-discriminatory algorithms has been refuted, proponents of the use of algorithms often transition to arguing that unequal treatment by an algorithm is at least preferable to unequal treatment by humans; algorithmic discrimination is considered, so to speak, the lesser of two evils.[20] In favour of algorithms, it is argued that discrimination can be detected and eliminated more easily in algorithms than in humans.[21] However, this is a false conclusion: firstly, unequal treatment by an algorithm is extremely difficult for people to prove and secondly, algorithms threaten to act as a mathematical justification for existing discrimination instead of eliminating it.[22] An example of this is

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18 cf Wischmeyer (n 10), 26; see Barocas and Selbst (n 11), 673; see also Hannah-Moffat (n 11), 244 ff; Harcourt (n 11), 240; Klingele (n 11), 538 ff; Starr (n 11), 229 ff.

19 Sarah Fischer and Thomas Petersen, *Was Deutschland über Algorithmen weiß und denkt. Ergebnisse einer repräsentativen Bevölkerungsumfrage im Auftrag der Bertelsmann Stiftung* (Bertelsmann Stiftung 2018) 25; cf however Center for the Governance of Change, *European Tech Insights 2019* (ie 2019) 10 ('25 % of Europeans are somewhat or totally in favour of letting an artificial intelligence make important decisions about the running of their country.').

20 cf already in the 1960s: 'Ultimately, there are no rational reasons for preferring manpower over machine power', Niklas Luhmann, *Recht und Automation in der öffentlichen Verwaltung* (Duncker & Humblot 1966) 60 fn 24.

21 I Bennett Capers, 'Race, Policing, and Technology' (2017) 95 NC L Rev 1241; cf also Timo Rademacher, 'Artificial Intelligence and Law Enforcement' in Thomas Wischmeyer and Timo Rademacher (eds), *Regulating Artificial Intelligence* (Springer 2020) mn 35.

22 cf Sonja B. Starr, 'Evidence-Based Sentencing and the Scientific Rationalization of Discrimination' (2014) 66 Stan L Rev 803 ('Scientific Rationalization of Discrimination').

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the already mentioned justification strategy of the Austrian Employment Office for the use of an algorithm for the allocation of financial support for an individual's labor market reintegration, which generally wanted to give women and especially mothers less subsidies than men.[23] It was argued that the algorithm does not discriminate because it only reflects statistical realities in society, namely that women are statistically less likely to be successfully reintegrated into the labor market. With this argument, existing inequalities in society are consolidated rather than corrected by algorithms.[24]

As an argument against the preference of algorithmic discrimination over human discrimination, one should also keep in mind: once an algorithm contains a discriminatory preference, this can be much more far-reaching and affect more citizens than the subjective preference of one biased individual. Indeed, an algorithm is often designed to produce predictions *en masse*, which means that algorithmic discrimination is applied *en masse*. [25]

Still, others argue that algorithmic discrimination should be welcomed if it can only be shown that an algorithm discriminates *slightly less* than a group of human decision-makers it is designed to replace.[26] This argument must be rejected, however.[27] Quite apart from the fact that it will be difficult to provide reliable evidence that people actually discriminate to a greater extent than an algorithm, unconstitutional behaviour cannot be justified by reference to another form of unconstitutional behaviour. Just because discriminatory behaviour on the part of human government officers is unconstitutional, this does not mean that an algorithm that is only slightly less discriminatory is constitutional. The question of constitutionality has to be decided for each situation – human and algorithm – in isolation.

Algorithmic lack of objectivity is thus not *per se* superior to human lack of objectivity.

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23 Example at Fröhlich and Spiecker (n 15).

24 See Sommerer (n 14), 105 ff.

25 cf Wischmeyer (n 10), 26.

26 cf Philipp Hacker, 'Teaching fairness to artificial intelligence: Existing and novel strategies against algorithmic discrimination under EU law' (2018) 55 Common Market L Rev 1143 1164 ('If this is the case [algorithmic decision making reduces bias vis-à-vis other types of (non-algorithmic) decision making], the use of the discriminating classifier should be considered appropriate as it maximizes the position of the marginalized group.').

27 Sommerer (n 14), 191 f.

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III. Power – Algorithms as Man-Made Artefacts

'Nothing in itself is a risk, there is no risk in reality.
Conversely, everything can be a risk, everything
depends on the way one analyses the danger,
looks at the event.'
– François Ewald, L'état providence [The Welfare State][28]

This section will first examine how the output of algorithms as seemingly objective truths stifles controversy (1.), and secondly, look at the man-made nature of the category at the core of all crime technology, ie risk (2.).

1. Concealing controversy

It has already been noted for the rise of statistics in crime control at the end of the 20th century that the application of supposedly objective mathematical models to complex societal issues inconspicuously conceals controversy and suppresses public discourse on these issues.[29] This phenomenon is exasperated by the use of ever more opaque[30] algorithms in present times. The concealment of man-made policy decisions and value judgements through a discursive framing as supposedly objective and without alternatives is inherent in algorithmic crime predictions.[31] In this concealment lies power. Statistical procedures divide people into different 'classes', which would actually be perceived as offensive in society and in the legal system if it were not for these mathematical, algorithmic methods: Algorithmic methods have the 'ideological power' to defuse or completely hide the moral value judgement that lies in the classification of humans.[32] 'Algorithmic Justice' thus leads to a superficial 'scientification' of criminal policy,[33] which is, however, indeed not one. In fact, the idea of a strictly rational, mathematical determination of crime risks is not

28 François Ewald, *Der Vorsorgestaat: aus dem Französischen von Wolfram Bayer und Hermann Kocyba: mit einem Essay von Ulrich Beck* (2 edn, Suhrkamp 1993) 210.
29 Jonathan Simon, 'The Ideological Effects of Actuarial Practices' (1988) 22 Law & Soc'y Rev 771 792.
30 See Sommerer (n 14), 165 ff.
31 ibid, 300 ff.
32 Simon (n 29), 794.
33 cf Starr (n 22) ('Scientific Rationalization of Discrimination').

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very realistic.[34] It neglects the fact that the definition of risks is ultimately guided by non-objective interests. It avoids the question of which risks the focus is to be put on and ignores the fact that the decision as to when a risk is no longer tolerable is a value decision.

2. *Risk as a non-objective category*

The power embedded in the concealment and suppression of controversy via algorithms can be illustrated further by taking a closer look at the non-objective nature of the term 'risks', the central category of crime control in the 21st century.

a. *Man-made definitions of risk*

A risk always carries within itself an inherent reference to the future and a certain call to action[35]: it describes the possibility of a future evil, which at the same time normatively establishes a duty to act, a behavioural imperative in the present.[36] As the French philosopher and sociologist *Ewald* notes in the opening quotation, almost anything can be declared a risk.[37] Ultimately, the justification for naming something as a risk is a narrative, a coherent story that explains why one has to protect oneself in a concrete situation and in what specific way.[38] Successful risk narratives are often used to justify political action, especially in the crime control arena, but

34 cf Karl-Ludwig Kunz, 'Grundzüge der heutigen Kriminalpolitik' (2005) 17 NK 151, 154.

35 Franz-Xaver Kaufmann, *Sicherheit als soziologisches und sozialpolitisches Problem. Untersuchungen zu einer Wertidee hochdifferenzierter Gesellschaften*, vol 4 (LIT Verlag 2012) 258.

36 ibid.

37 ibid; Bernd Dollinger, 'Sicherheit als politische Narration: Risiko-Kommunikation und die Herstellung von Un-/Sicherheit' in Bernd Dollinger and Henning Schmidt-Semisch (eds), *Sicherer Alltag? Politiken und Mechanismen der Sicherheitskonstruktion im Alltag* (Springer 2016) 57 f.

38 ibid, 58; on coherent stories for location based predictive policing Simon Egbert, 'On Security Discourses and Techno-Fixes – The Political Framing and Implementation of Predictive Policing in Germany' (2018) 3 European Journal for Security Studies 95.

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also in many other areas such as health or the environment. [39] Risk cannot be thought of independently of security and normality. *Dollinger* rightly states: There must be stories and ideas of a 'risk-free or safe life in order to be able to delimit and scandalize risks as special phenomena'.[40] This means that the characteristic of being risky is not unchangeably inscribed in a situation or person. Risk is not a descriptive term,[41] as it is possible to objectively determine and describe that a person is blond or has brown eyes. According to this view, situations only become a risk when they are assigned this very social meaning.[42] Only in this process of assigning meaning can risks be *experienced as* reality, as *Ewald* also states in the opening quotation when he notices that there is no risk *in* reality.[43] Whoever defines risks (through human or algorithmic calculations) thus actively produces a new reality with a claim to truth instead of merely describing an existing one. This is the performative effect of the concept of risk.[44] 'The productions of truth', *Foucault* emphasizes, 'cannot be separated from power and power mechanisms, because on the one hand power mechanisms enable and induce the production of truths, and on the other hand the production of truth also has power effects with a binding force on us.[45] Those who define risks thus exercise power over social reality.[46]

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39 cf Deborah A Stone, 'Causal Stories and the Formation of Policy Agendas' (1989) 104 Political Science Quarterly 281; see also Michael D Jones, Mark K McBeth and Elizabeth A Shanahan, 'Introducing the Narrative Policy Framework' in Michael D Jones, Mark K McBeth and Elizabeth A Shanahan (eds), *The Science of Stories* (Springer 2014).

40 Dollinger (n 37), 57 f.

41 ibid.

42 ibid, 57.

43 ibid.

44 cf also Tobias Singelnstein and Peer Stolle, *Die Sicherheitsgesellschaft: Soziale Kontrolle im 21. Jahrhundert* (3rd edn, Springer-Verlag 2012) 199 (‚By making risk and danger prognoses, they [the police] gain the power to define social reality'); cf also Hartmut Wächtler, 'Strafverteidigung und soziale Bewegungen. Die 1980er Jahre' in Strafverteidigervereinigungen (ed), *Kein Grund zu feiern: 30 Jahre Strafverteidigertag* (Organisationsbüro der Strafverteidigervereinigungen 2007) 136.

45 Michel Foucault, 'Macht und Wissen' in Michel Foucault (ed), *Dits et Ecrits Schriften* (Surkamp 2003) 521.

46 cf also Niklas Creemers and Daniel Guagnin, 'Datenbanken in der Polizeipraxis: Zur computergestützten Konstruktion von Verdacht' (2014) 46 KrimJ 134 137; Christian Fuchs, *Krise und Kritik in der Informationsgesellschaft* (Libri 2002) 22; cf also *Dubarle*, who called the methods of ruling of Hobbes' Leviathan 'harmless fun' compared to the possibilities of the computer, cited at Thomas Wischmeyer, '§ 21 Regierungs- und Verwaltungshandeln durch KI' in Martin Ebers and others

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b. Uneven distribution of risks

Further it must be noted that risks can be unequally distributed in society and, as already recognized by *Beck*, sometimes adhere to a class scheme, just like the distribution of wealth.[47] Thus majority decisions on accepting risks can oblige certain minority groups in society to take on excessive risks.[48] Sometimes a decision may even only superficially be about minimizing risks, when in fact it is the distribution of risk that is being decided.[49] An unequal distribution also applies to risks in crime control.[50] Thus, certain groups in society may be more vulnerable to becoming the victim of a particular crime. For example, members of lower social classes are more likely to be victims of violent crime.[51] But the use of certain crime control technologies may also put certain minority groups at greater risk of being falsely identified as risky. This is demonstrated eg by the COMPAS-algorithm for sentencing decisions[52] or by face recognition technology designed to identify wanted criminals[53] which have been reported to make significantly more mistakes for African-Americans than for white Americans.

c. Tolerated risks

There is no absolute certainty. The German Federal Constitutional Court also expressly states (in connection with a lawsuit against the construction of a nuclear power plant) that society as a whole must tolerate certain residual risks.[54] In road traffic, we tolerate high risks and have decided to make these risks manageable with an insurance approach, ie motor vehicle

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(eds), *Rechtshandbuch Künstliche Intelligenz und Robotik* (CH Beck im Erscheinen [vrsl. 2020]) 41.

47 Ulrich Beck, *Risikogesellschaft: Auf dem Weg in eine andere Moderne* (Suhrkamp Verlag 1986) 46; particularly risky risk industries are outsourced to poor countries on the periphery, ibid 56

48 Gerhard Banse, *Risiko – Technik – Technisches Handeln (eine Bestandsaufnahme)* (Kernforschungszentrum Karlsruhe 1993) 9.

49 ibid, 20.

50 Karl-Ludwig Kunz and Tobias Singelnstein, Kriminologie: eine Grundlegung (7th edn, UTB 2016) § 18 mn 22 ff.

51 ibid, § 18 mn 22.

52 cf Angwin and others (n 17).

53 cf Levin (n 17).

54 BVerfGE 49, 89, 137 f.

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liability insurance, instead of avoiding them altogether by banning cars. Victims of road traffic are to be understood as a system-immanent sacrifice of a society interested in mobility. Similarly, one can say that victims of crime are generally to be understood as a system-immanent price of a society interested in liberal, democratic and constitutional values, without total surveillance of its citizens. At what point a risk is no longer tolerated – which, conversely, can also be formulated as the question: how safe is safe enough? – cannot be answered by a mere stochastic, algorithmic calculation, but only by an evaluative discretionary decision on justifiability.[55] The goals and values that are the basis of this decision are not unchangeably fixed, but depend on the situation and time. The definition of the threshold for a tolerated risk often proves to be not exactly justifiable.[56]

Kunz emphasizes that a risk, unlike a danger, only arises in the *perception* as such. He thus also emphasizes the social construction of risk.[57] In doing so, the performative effect of the risk prediction itself must be emphasized: only through the possibility of prediction does a risk come into focus. 'With the increase in knowledge about causal chains of effects, society has instruments and institutions at its disposal to predict negative events and their consequences (anticipation) and to design or implement appropriate countermeasures. At the same time, this increases the moral requirement to take risk precautions in order to exclude or limit negative events'.[58] The less a risk can be predicted, the less power to act in this respect is narratively placed in the sphere of human control, the higher the risk tolerance is in practice.

The key points of the concept of risk, the basis of all seemingly objective algorithmic crime prediction technology, can be summed up as the following:

– A situation only becomes a risk through social attribution based on a narrative.

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55 cf in criminal law dogmatics the 'permissible risk' (*erlaubtes Risiko*); see also in different context Georg Freund, *Normative Probleme der "Tatsachenfeststellung": eine Untersuchung zum tolerierten Risiko einer Fehlverurteilung im Bereich subjektiver Deliktsmerkmale* (Müller, Jurist Verlag 1987) 198.

56 Banse (n 48), 21

57 Karl-Ludwig Kunz, *Kriminologie: eine Grundlegung* (6th edn, UTB 2011) 339; Kunz and Singelnstein (n 50), 340 ff.

58 Ortwin Renn, 'Risikowahrnehmung und Risikobewertung: soziale Perzeption und gesellschaftliche Konflikte' in Sabyasachi Chakraborty and George Yadigaroglu (eds), *Ganzheitliche Risikobetrachtungen Technische, ethische und soziale Aspekte* (Springer 1991) 6 ff.

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– The identification of risk has an inherent performative effect.
– There are tolerated risks. The point at which a risk can no longer be tolerated represents a value judgement.

We can thus state at this point that algorithms are based on and contain many political value judgements that are oftentimes concealed, invisible to the outside world wherein – to speak with *Foucault* – a power for the definition of realities lies. We can also confirm the connection between objectivity and power, ie that power is in fact embedded and at the same time concealed in the use of algorithms, particularly because of its presentation as objective.

IV. Powershift

After confirming the connection between objectivity and power, this contribution will now focus on the specific power*shifts* accompanying an increasing use of algorithms in a crime control. First a powershift away from the public eye will be discussed (1.). Further, powershifts occur away from traditional actors in crime control, away from law enforcement officials (2.) and away from courts (3.), culminating in a shift of algorithms from mere tool to authority figure in crime control (4.) and from the logic of the law to the logic of the algorithm (5.).

1. Away from the public eye – undemocratic decision-making

Many of the decisions mentioned above should rather be made in a democratically legitimized manner. Algorithmic crime predictions as man-made artefacts are necessarily based on political premises, which are, however, not revealed and discussed as such. The political discussions that have taken place so far (at best) extend to the question of *whether* an algorithmic system that is *already* represented as neutral and objective should be applied or not. The current public discussions do not touch on the important political questions of the many just mentioned value decisions made when developing an algorithmic prediction system.

Whether it should be a valid approach at all to apply statistical knowledge about groups of people to an individual and on this basis restrict constitutional rights, ie whether we want to reproach an individual for sharing characteristics with a group of people, of which a large proportion have committed crimes in the past, are complex questions and require thorough

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democratic debate.[59] Other already mentioned value decisions that are hardly ever identified as such are the questions of what false-positive rate is still acceptable to society (ie the number of persons falsely identified as highly dangerous in order to detect one *actually* highly dangerous person), and the question of the degree of probability beyond which a person may be labelled 'highly dangerous'. Finally, another highly political issue is the response to statistical discrimination, ie the different treatment of persons by a predictive algorithm, resulting from possibly pre-existing inequalities in the training data.[60]

All of these are highly political decisions that are likely to be taken differently by politicians across the political spectrum. Ultimately the fundamental issue here is one of distribution of state resources in the fight against crime, and a matter of determining how we as a society want to live. Yet there is a danger that public debate on these matters will be suppressed by simple reference to the supposedly objective calculations done by an algorithm. An 'algorithmization' of crime control thus threatens to be detrimental to public debates on issues of crime control. By removing certain issues from public debate power, too, is shifted away from the public. The power to question, discuss and decide on these issues then does not longer lie with the public but with whomever was able to embed their now unquestioned value judgement in the algorithm design in its developmental phase.

2. *Away from law enforcement officials – de-skilling*

Powershifts also occur from traditional actors in crime control onto the computer sciences. Legal practitioners might lose their ability to judge.[61] The use of an algorithm may be 'de-skilling' them, putting them in a situation where they on the one hand after a while cannot do without the

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59 It is a constitutional requirement that in the fundamentally normative sphere, especially in the area of the exercise of constitutional rights, the parliamentary legislator must regulate all essential prerequisites of state intervention itself (*Wesentlichkeitsgebot*); see particularly for person-based predictive policing Sommerer (n 4), 137 f.; in general Victor Jouannaud, 'The Essential-Matters Doctrine (*Wesentlichkeitsdoktrin*) in Private Law: A Constitutional Limit to Judicial Development of the Law?' (§ 7).

60 In detail on the issue of discrimination Sommerer (n 14), 105 ff, 171 ff.

61 Nadja Capus, 'Die Tyrannei des Wahrscheinlichen in der Justiz' Die Republik (19 September 2018) <https://www.republik.ch/2018/09/19/die-tyrannei-des-wahrscheinlichen-in-der-justiz> accessed 29 November 2021.

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algorithm anymore, and on the other hand cannot understand or review the algorithms decision themselves anymore. Such loss of human expertise and the growing dependency on machine rationality is already apparent in other areas of automation (eg aviation, medicine).[62] If de-skilling occurs the human is *de facto* only executing a higher authorities orders without being able to replace or question them. If de-skilling occurs in crime control this shifts power away for the publicly accountable individual civil servant that has to decide each situation in front of them, and places it on the humans that have in the past (shielded from the public eye) shaped the different stages of algorithm design and thereby shaped the algorithms output now followed by the civil servant. This shifts power onto the computer and data scientist developers of the algorithms.

3. *Away from the courts – limited legal scrutiny due to complexity*

A further shift away from the power of the law may occur if the competent legal authorities such as courts effectively limit their level of scrutiny of decisions that were made based on algorithmic output, due to its general claim to objectivity together with complexity and opacity of the methods involved.

Such limited scrutiny may occur eg for discriminations by an algorithm. An algorithm will generally *automatically* be able to give an initial statistical justification for any unequal treatment of two groups done by it. A refutation of this initial statistical justification may not be easy and take great effort, eg experts looking into the algorithms training data and calibration process.

It is therefore to be feared that for the review of algorithmic predictions there will be a *de facto* reversal of the burden to bring arguments and proof. In principle, in anti-discrimination law the burden of proof rests with the entity that is treating someone unequally as soon as the person concerned presents a case of unequal treatment.[63] In the case of algorithmic discrimination, however, the person affected by the unequal treatment seems to bear a doubled burden of proof: first, for proving the existence of

62 See for 'de-skilling' in detail Nicholas Carr, *The Glass Cage: Automation and Us* (WW Norton & Company 2014).

63 cf Alexander Tischbirek, 'AI and Discrimination: Discriminating against Discriminatory Systems' in Thomas Wischmeyer and Timo Rademacher (eds), *Regulating Artificial Intelligence* (Springer 2020) mn 20.

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unequal treatment and second, for the refutation of the statistical justification automatically generated by the algorithm.[64]

At the same time, it is to be feared that the judicial review of such automatedly generated statistical justifications will be rather generous, ie that courts will limit their standard of review to a control for arbitrariness (*Willkürkontrolle*), simply due to the technical difficulty and complexity of an in-depth review of algorithms' inner workings. As a consequence, the state using an algorithm will be granted a wide scope of decision-making in the selection and evaluation of correlations, even in areas highly sensitive to fundamental rights.

Such a development must be counteracted, since the German Federal Constitutional Court (BVerfG) has in recent years quite deliberately moved away from the standard of mere arbitrary control, according to which in the past any reasonable argument that did not appear completely arbitrary was sufficient to justify unequal treatment.[65] In the case of distinctions on the basis of personal characteristics, and in a context that also encroaches on other civil liberties (both the case for algorithmic crime predictions) the Federal Constitutional Court today states that courts must apply a much stricter standard of justification (a *de facto* proportionality test).[66] For algorithms such different standards of review makes the difference between asking: 'Are there *obvious* signs that make the algorithm appear arbitrary or non-objective?', or: 'Is a treatment justified based on an *in depth, over all* evaluation of the algorithms' mathematical models, input and training data?'

If courts resign themselves to only ask the first question, the power of a particularly strict review of the courts *vis a vis* government actions regresses. Courts then effectively give up part of their power bestowed onto them by the Constitutional Court when faced with algorithms that are just too complex and time consuming to understand and review in detail.

64 Fröhlich and Spiecker (n 15).

65 Angelika Nußberger, 'Art 3' in Michael Sachs, *Grundgesetz. Kommentar* (CH Beck 2018) mn. 33; Volker Epping, *Grundrechte* (8th edn, Springer 2019) 795.

66 BVerfGE 129, 49, 68 f; see overview for the criteria to determine the intensity of review at Nußberger (n 65), mn 90 ff.

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4. From tool to authority figure – algorithmic thoughtlessness

With the term 'thoughtlessness' *Hannah Arendt* described how ordinary people in the Third Reich could commit war crimes by switching off their independent thinking without having decidedly 'evil' intentions. An essential factor in the emergence of such an attitude was the integration into a bureaucratic apparatus. The Nazi war criminal *Eichmann*, for example, repeatedly referred to having merely followed instructions. *Arendt* saw the great danger here in the inability of people to reflect on the scope of their own actions. This inability could, under certain circumstances, affect almost every average person, in which Arendt saw the 'banality' of evil.

Of course, predictive algorithms do not linearly lead to crimes against humanity. And yet the concept of 'thoughtlessness' is also useful in an algorithmic context since it expresses how people in a system rely on the decisions of others, do not question them, simply follow them. As justification, they refer to the higher authority and the need to follow rules in the interest of the functioning of the system. This situation is quite comparable to the way people deal with the result of algorithmic calculations.

Even though algorithm-based systems were initially conceived only as a tool subordinated to the user, in practice they are likely to take on a more dominating role. Algorithms can take on a role similar to that of an authority figure to which the user looks up, such as a superior whose 'orders' are executed without question. Psychological studies of decision support systems in medicine and aviation have shown that people find it very difficult to make a decision that would contradict the result of algorithmic calculations.[67] This phenomenon, known as 'automation bias' leads people to refrain from obtaining and evaluating information themselves, even to deliberately ignore evidence that is clearly in conflict with the result produced by an algorithm. People are less confident in their own expertise than in the complex, opaque algorithmic processes. This is all the more true if in light of time pressure and rationalization making decisions *against* 'the machine' involves a greater expenditure of time and

67 See Dietrich Manzey, 'Systemgestaltung und Automatisierung' in Petra Badke-Schaub, Gesine Hofinger and Kristina Lauche (eds), *Human Factors –Psychologie sicheren Handelns in Risikobranchen* (2nd edn, Springer 2012) 333; Linda J Skitka, Kathleen L Mosier and Mark Burdick, 'Does Automation Bias Decision-Making?' (1999) 51 Int J Hum Comput Stud 991; Kathleen L Mosier and others, 'Automation Bias: Decision Making and Performance in High-Tech Cockpits' (1998) 8 Int J Aviat Psychol 47 63.

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explanatory effort than making decisions *in line with* 'the machine'. As a result, algorithmic calculations which were only intended as support for human decision-making (ie a mere tools), in fact completely determine the human decision. The human operator outsources responsibility to the algorithmic processes. In this constellation, the algorithm's supposedly reliable predictions ultimately become the decisive authority figure. The human succumbs to 'thoughtlessness', in light of the imposition of having to make a decision. Uncertainty demands normative decisions from humans, a demand we are tempted to free ourselves from by following the certainty that the algorithm seems to offer. The more a process is automated, the easier it is for people to become 'thoughtless' and indifferent to its results. The more crime control is automated, the easier it is for government officials using the system to feel no longer responsible for actions taken on the basis of the system. Ultimately, this, too, is a question of shifting responsibility from the traditional actors of crime control to computer scientists.[68]

5. From the logic of the law to the logic of algorithms – 'machine logic'

'If one applies [statistical] laws (...)
to the objects of politics and history indiscriminately,
then these objects have already been willfully, quietly obliterated,
namely they have been levelled as deviations
into the medium in which they appear, but which they are not.'
– Hannah Arendt, Vita Activa[69]

The logic of the law and the logic of the algorithm are at odds.[70] The question is whose mode of 'thinking' will prevail during the present algorithmic turn in crime control. 'Machines' make decisions in different ways, fact-finding and prognoses are made on a different basis than humans.

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68 Sommerer (n 14), 327 ff.

69 Hannah Arendt, *Vita Activa or Vom tätigen Leben* (Pieper 1994 [1958]) 43. [*German original*: 'Wendet man also die [statistischen] Gesetze (...) unbesehen auf die Gegenstände der Politik und der Geschichte an, so hat man diese Gegenstände bereits unter der Hand eliminiert, sie nämlich als Abweichungen in dasjenige Medium eingeebnet, in dem sie zwar erscheinen, das sie aber gerade nicht sind.'; translation by author.]

70 cf also Eric Hilgendorf, '"Die Schuld ist immer zweifellos?" – Offene Fragen bei Tatsachenfeststellung und Beweis mit Hilfe "intelligenter" Maschinen' in Thomas Fischer (ed), *Beweis* (Nomos 2019) 249 (discussing a departure from the logic of the law through the use of AI in criminal justice contexts).

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Hilgendorf calls this a 'paradigm shift' and 'no less than another way of establishing the truth.'[71]

Will law subordinate technology, harness its powers in its own interests, mould it to its own internal logic, as concepts such as 'privacy by design' or 'transparency by design'[72] may imply? Are the new algorithmic models of knowledge creation and processing to be considered a gift for the legal system that will enable it to even expand its reach and strengthen the rule of law?

In short, will we be able to embed the values of the law into technology, or will technology embed its values into the law? Will technology subjugate the law to its own internal logic? Will the new technological possibilities change our perception and interpretation of even the most fundamental legal guarantees and institutions?

The latter is not as far-fetched as it may seem. The basic prerequisites that have led to the current form and function of our legal system are changing. Even firmly established pillars of the legal system such as the principle of the rule of law can prove less stable than expected in the face of technological change.[73] Our legal system has always been decisively shaped by technologies and it cannot be thought of independently of them. Our current legal system is particularly shaped by three technologies of knowledge production and retention: language, writing and printing.[74]

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71 ibid, 250.

72 Karen Yeung, '"Hypernudge": Big Data as a mode of regulation by design' (2017) 20 Information, Communication & Society 118; Mireille Hildebrandt, 'Legal Protection by Design. Objections and Refutations.' (2011) 5 xx Legisprudence 223; Paolo Balboni and Milda Macenaite, 'Privacy by design and anonymisation techniques in action: Case study of Ma3tch technology' (2013) 29 Computer Law & Security Review 330.

73 Mireille Hildebrandt, *Smart Technologies and the End(s) of Law* (Edward Elgar 2015) 47 ff; Mireille Hildebrandt, 'Law as Information in the Era of Data-Driven Agency' (2016) 79 Mod L Rev 1 3. Her approach is an extension of earlier theories of media analysis by eg Marshall McLuhan to the field of law. See her reference to him in Hildebrandt, *Smart Technologies* (n 73), 49; McLuhan assumes that changes in the dominant forms of communication (ie the carriers of knowledge production) lead to fundamental changes in human thinking; see Marshall McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (Toronto University Press 1962); Marshall McLuhan, *Understanding Media: The Extensions of Man* (MIT press 1994 [1964]); see also Walter J Ong, *Orality and literacy* (Routledge 2012 [1982]).

74 Hildebrandt, 'Law as Information' (n 73), 3; cf also Pierre Legendre, *De la société comme texte: linéaments d'une anthropologie dogmatique* (Fayard 2001) 17 ('Man can only access the world through the mediation of the medium of language and thus through representation').

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If the significance of the processing of information through language and writing is reduced and replaced by new technologies of knowledge production, which differ substantially from its predecessors, this can have an effect on the basic structures of the legal system. The production and storage of knowledge in algorithmic form, which is no longer *directly* accessible to humans, can be regarded as a technological revolution with culture-changing significance in this regard. [75]

The view of the fundamental pillars of our legal system as monolithic and immutable is thus highly doubtful,[76] and cannot be blindly relied on. Some authors fear the legal system's fundamental pillars could be in danger if algorithms transfer their own rationalities and understandings of the world into the law and into crime control. The algorithmic rationalities, the 'machine logic' so to speak, would then become the basis for governmental and regulatory decisions, leading to a fundamental shift in values and, in the long run, even to a possible self-destruction of the legal system.[77] According to the story of Ulysses in Homeric poetry, the Trojans joyfully moved a wooden horse they thought was a gift left at their gates into their secure city. There, however, Greek warriors disembarked

75 Victor Mayer-Schönberger and Kenneth Cukier, *Big Data – A Revolution that will transform how we live, work and think* (Houghton Mifflin Harcourt 2013) 30.

76 Hildebrandt, 'Law as Information' (n 73) 2 ('We cannot take for granted that law will interact with an artificially intelligent information and communications technology infrastructure (ICTI) in the same way as it has interacted with written and printed text.'; 'We cannot take for granted that the current mode of existence of law and the Rule of Law are sustainable once the ICTI of data-driven agency takes over.').

77 cf Ian Kerr, 'Digital prophecies and web intelligence' in Mireille Hildebrandt and Katja de Vries (eds), *Privacy, Due Process and the Computational Turn: The Philosophy of Law Meets the Philosophy of Technology* (Routledge 2013) 105 ('a broad uptake of predictive and preemptive approaches across the social order might reach a tipping point wherein our systems of social control could no longer properly be called a "legal system".'); cf opposition of 'government by the law' and 'algorithmic government' by Antoinette Rouvroy, 'Political and Ethical Perspectives on Data Obfuscation' in ibid, 143; more cautious Monika Zalnieriute, Lyria Bennett Moses and George Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82 Mod L Rev 425 455 ('The rule of law is not a static concept. It evolves in response to changing societal values and the operation of government. As technology reshapes society, and government interacts with the community, it can be expected in turn that our understanding of the rule of law will shift. Values such as transparency and accountability, predictability and consistency and equality before the law may remain central to conceptions of the rule of law, but their interpretation and application may change.').

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from the horse and destroyed Troy from the inside.[78] The object, which at first seemed like a gift, turned out to be disastrous in retrospect. By adapting it to established cultural techniques (the exchange of gifts) and its symbolism (the peaceful withdrawal of the Greeks), which was welcome in the situation, the Greeks induced the Trojans to participate in their own destruction. Pointedly, some modern-day authors[79] could be given the name of *Laocoon*,[80] because they fear that now, as new technologies such as algorithmic crime predictions stand at the gates of jurisprudence, they too could turn out to be an unwholesome gift and take over the law from within. In the discourse, popular authors,[81] but also legal scholars[82] and philosophers[83] critically noted that algorithms-based decision systems transform an area from the inside once they have established themselves in it. This transformation consists in a subordination to the 'logic and rationalities of the machine', or, as *Arendt* formulated it for statistical procedures, in the 'levelling' of algorithm-external areas of life *into* machine logic and thereby extinguishing the areas' pre-existing idiosyncrasies and modes of thinking.

The term 'machine logic' in this context refers to a totality of interwoven mutually reinforcing phenomena accompanying the current algorithmic turn:

- The focus on correlations instead of causalities and an impending resignation to decision-making systems that – like eg neural networks – operate beyond the human comprehensible. [84]
- The limitation of the legal system's field of vision to the mathematically quantifiable.

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78 See Hom Od 4, 271–289; 8, 492–520; 11, 523–532.

79 cf Kerr (n 77), 105; generally critical of algorithmic processes Cathy O'Neil, *Weapons of Math Destruction – How Big Data Inceases Inequalities and Threatens Democracy* (Crown Publishers 2016); for use in crime control *ibid*, 26 ff, 71 ff; cf for the importance of different technologies as a prerequisite for the (further) development of a legal system Hildebrandt, *Smart Technologies* (n 73), 47 ff.

80 Laocoon warns the Trojans of the horse using his spear to stab the horse in order to examine it for threats from within, Verg Aen II, 40–53.

81 cf O'Neil (n 79).

82 cf Zalnieriute, Moses and Williams (n 77), 455; Kerr (n 77), 105.

83 cf Hildebrandt, *Smart Technologies* (n 73), 47 ff; Rouvroy (n 77), 143.

84 See Joshua A Kroll and others, 'Accountable Algorithms' (2017) 165 U Pa L Rev 633 638; Will Knight, 'The Dark Secret at the Heart of AI' MIT Technol Rev <https://www.technologyreview.com/s/604087/the-dark-secret-at-the-heart-of-ai/> accessed 29 November 2021.

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- A view of 'social physics' – represented eg by *Pentland* [85] – and 'data behaviorism' – as described by *Rouvroy* [86] – according to which all human behaviour can be calculated as if it were a scientific phenomenon; a view in conflict with the presumption of free will, underlying the legal system.[87]
- The reduction of human beings to data processes, [88] in the words of the computer theorist *Negroponte*, to 'information bits'[89], and the neglect, if not the negation of their characteristics as sentient, thinking beings.
- The lack of disclosure of the normativity of algorithm-based decisions in the legal system.
- The impending inability of humans to make practical decisions against the predictions of a complex algorithmic system (automation bias).
- The loss of human expertise and the growing dependence on machine rationality that is already apparent in other areas of automation (deskilling).
- The adoption of efficiency as a leitmotif in the entire control of crime and a subsequent relaxation of legal guarantees such as the principle of equal treatment in Article 3 of the German Constitution.

Each of these phenomena brings its own challenges, and the list of challenges could be extended further. However, it is precisely the interplay of all these phenomena, so the concern is in legal scholarship, that the law as the leading variable of crime control could be displaced or fundamentally changed from within.

So far, there is little empirical evidence that such a change is actually taking place. The technology is still in its infancy in Germany. Due to the multitude of possible applications and different technical designs of predictive algorithms, no general statement can be made about the overall impact of algorithmic crime control. The question of whether it will actually turn out to be an ominous gift for the legal system cannot yet be

85 Alex Pentland, *Social Physics: How Good Ideas Spread – the Lessons from a New Science* (WW Norton & Company 2014).

86 Rouvroy (n 77) 143 ff.

87 See Wolfgang Prinz, 'Der Wille als Artefakt' in Karl-Siegbert Rehberg (ed), *Die Natur der Gesellschaft* (Campus Verl 2008) 593; Eduard Dreher, *Die Willensfreiheit: ein zentrales Problem mit vielen Seiten* (Beck 1987) ff; cf also BGHSt 2, 194, 200 ('The inner reason for the accusation of guilt lies in the fact that man is designed for free, responsible, moral self-determination […]').

88 cf also Jens Puschke, *Legitimation, Grenzen und Dogmatik von Vorbereitungstatbeständen*, vol 12 (Mohr Siebeck 2017) 256.

89 Nicholas Negroponte, *Being Digital* (Hodden&Stoughton 1995).

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answered with certainty. Nevertheless, the existing concerns must not be ignored. Rather vigilance and an active questioning of algorithms by legal scholars is required to ensure that the described concerns do not become reality.

V. Conclusion

It can be concluded: The exercise of power in crime control with the help of statistics quietly and inconspicuously suppresses controversy particularly through reference to algorithms' supposed objectivity. The use of algorithms presented as mathematically objective, fair and neutral leads to the concealment of underlying man-made policy decisions and value judgements.[90] The seeming objectivity of the algorithms facilitates a powershift away from the public, away from the rationalities of the law. To ensure that the power struggle between the logic of the law and the logic of algorithms is decided in favour of the former two steps are required: firstly, legal scholars and practitioners must be made more knowledgeable about statistical, computer science methods (to know where and when to question them).[91] Secondly, novel control architectures for crime prediction algorithms must be installed. The review of compliance of algorithms with the law must not be left to individual legal proceedings which could overwhelm courts, but must be carried out systematically and preventively,[92] ie before the law is infringed, by an independent governmental standard setting and review body. Such control architecture for crime predictions is yet inexistent as of today. If these steps are not taken, algorithms threaten to perpetuate and reinforce existing prejudices and hidden value judgements behind a façade of mathematical clarity and neutrality.[93] If algorithms set rules like law, if programmers and data scientist turn into *de facto* lawmakers, the architecture of algorithms will have to be interrogated just as we interrogate the codes created by parliaments.[94]

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90 Sommerer (n 14), 300 ff.

91 cf Tischbirek (n 63), mn 44 f ('paradigm of knowledge creation').

92 cf ibid, mn 45.

93 Creemers and Guagnin (n 46) 136.

94 Lawrence Lessig, 'Code Is Law: On Liberty in Cyberspace' Harvard Magazine (1 January 2000) <http://harvardmagazine.com/2000/01/code-is-law-html> accessed 29 November 2021; Lawrence Lessig, *Code: And Other Laws of Cyberspace* (2nd edn, Basic Books 2006) 1 ff.

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§ 10 Innocence: A Presumption, a Principle, and a Status

Martín D. Haissiner

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But thus: if powers divine beholds our
human actions, as they do, I doubt not
then but innocence shall make false
accusation blush and tyranny
tremble at patience.
William Shakespeare,
The Winter's Tale

'Could it be possible!
This old saint has not heard in his
forest that God is dead!'
Friedrich Nietzsche,
Thus Spoke Zarathustra

The essay begins with a brief examination of what presuming innocence traditionally means. As the author states, there are at least two different possible understandings of the same maxim: the first, more restricted, is an epistemological rule that requires prosecutors to prove beyond a reasonable doubt the facts contained in their accusations; the second, broader, is an axiological premise that limits what can reasonably be done in judicial procedures and by government officials.

This essay contends that the first notion is neither necessary nor sufficient for securing a fair criminal procedure. The second alternative, meanwhile, is not only more consistent with the type of truth a democratic state should be bound to pursue but also a natural consequence of applying the *nulla poena* principle.

The paper closes inquiring into the future of the presumption and suggesting that a system truly committed to defending its citizens' dignity should protect them from all unjustified punishments derived from criminal accusations, even beyond the four walls of a courtroom.

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I. Introduction to the Concept of Innocence

The history of criminal procedure law is, to some extent, also the history of two competing goals: the search for objective facts and historical truths, on the one hand; and the limitation of power, on the other. While none of them implies the absolute denial of the other, there has always been debate over the right value that should be favoured in the design of our institutions and laws. Every modern system in the world is the result, at the end of the day, of a delicate balance between what is forbidden in the reconstruction of facts and what citizens must tolerate to this high end.

The presumption of innocence, it will be argued, is a perfect example of such tension. There is hardly no nation in the world where such rule isn't somehow recognized and no legal scholar who would deny its value within a liberal political state. However, such peaceful consensus starts weakening when we try to define what precisely we were all agreeing about. As with many other legal terms, the significance of the words was progressively obscured by its extended use in popular culture and the diverse evolution of meanings given to these vague concepts across nations.

The first goal pursued by this paper is, then, to offer a simple but exhaustive classification of these notions[1]. As I will argue in the next pages, almost all possible interpretations of what presuming innocence could mean tend to fall within one of the following two groups: either we are talking about an epistemological presumption or an axiological principle. To put it simply, doctrinal conceptualizations have mostly been construed around either a rule for better getting to an acceptable final decision or a moral principle under which the state is expected to act when dealing with individuals.

Agreeing on this preliminary distinction is essential for advancing the central claim of this paper, consistent of three minor premises: (i) the presumption of innocence is widely accepted as a ideal, but its content is still

1 Something similar was done in the seminal paper by Larry Laudan, 'The Presumption of Innocence: Material or Probatory?' (2005) 11 Legal Theory 333. I, however, do not share such classification. As it will be shown, an epistemically driven understanding of the principle has both probatory and material implication. In the same manner, the value-based conception does, as a matter of fact, directly shape the way in which evidence is collected and judged. In other words, the relevant distinction is not about what the principle is, but what the goals pursued by its existence are. The scope and breadth of the presumption will not, after all, be defined by any intrinsic essence of the principle that must be discovered. What matters, rather, is whether nations have favoured the search of truths or the protection of the innocent defendants.

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under dispute; (ii) the normative meaning of such a legal expectation isn't obvious, and should thus be shaped in order to advance certain interests; (iii) none of the existent meanings is necessary nor sufficient for securing the objectives theoretically being defended.

Finally, I will suggest a possible reading for the presumption that, while still in line with the two classical approaches, has a better potential for achieving the goals of criminal procedural law: attaining solid truths through a fair procedure, in order to punish those guilty of a wrongdoing without unduly affecting those who legally shouldn't be sanctioned.

II. An Epistemological Presumption

One possible way of beginning a review of the presumption of innocence is by presenting its minimal expression, that has its most salient exponent in the Anglo-American tradition. Although this basic understanding is chronologically newer and has its roots in the continental principle, there is an expositive virtue in setting first the basic elements of the concept and only after building the rest of the structure.

The common law tradition has always recognized a presumption of innocence in favour of the accused. The Supreme Court of the United States, in one of its most cited passages, has noted that 'The principle that there is a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law'[2]. But precisely its self-evident nature is what complicates the debate in comparative terms, as it might signal that there are no doubts about what the rule encompasses.

The Constitution of the United States refers at no point to this rule. Rather, the presumption of innocence has been construed as a common law principle that has its normative support in the Fifth Amendment's Due Process Clause. The significance of this praetorian mandate was slowly shaped by courts to mean something quite different to what continental lawyers typically would assume it dictates. More specifically, the rule was shaped to refer to no more than a set of evidentiary rules and jury instructions; and, as such, to govern only during trial, having no bearing in pre-trial proceedings, at the sentencing stage or in any other interaction with public authorities. The implications of this view will be subsequently

2 *Coffin v United States*, 156 US 432 (1895).

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examined but, before, it is convenient to comprehend the rationale behind such understanding.

At the core of the American mind one can find the defence of liberty, understood as a limit to the state's interreference with individual freedom or private property[3]. Many safeguards were laid to advance these objectives. Among them, probably the most relevant is the right to be judged by peers and members of one's own community, by an unanimity of citizens unaligned with governmental desires or, simply, the right of appearing before a jury prior to a criminal sentence[4].

In the Anglo-Saxon adversarial criminal procedure, most of the strict rules set by courts and legislatures are intended, therefore, to protect the jurors. It is undeniably true that Americans also care about defending innocents while advancing a fair sentence for those guilty. But, according to this model, those two objectives will be achieved if all necessary elements for a decision are carefully regulated to allow the factfinders to determine what has actually happened. So, in contrast to what is often attributed to accusatorial systems, here too the procedure intends to find material truth. The difference is that in this model, one gets to the truth only through a rigorous epistemological process designed to mitigate biases, mistakes, unfair prejudices, and distractions.

In this context, Americans incorporated the presumption of innocence, not necessarily as a right of the defendant but as a sound starting point for a prosecution, as a fair rule for interpreting evidence, as a default rule for the case of not getting to a definite conclusion, and as a guide that jurors must follow when making a tough call about another man's guilt. Or, in legal terms, what the presumption means is: (i) the prosecution needs to prove all affirmative facts contained in the accusation; (ii) the defendants can't be compelled to prove these facts; and (iii) in case where a reasonable

3 James Q Whitman, 'Equality in Criminal Law: The Two Divergent Western Roads' (1998) 1 Journal of Legal Analysis 119.

4 In fact, the right to a jury trial is so central for Americans that it was contained in the Declaration of Independence as one of the reasons for dissolving all political connection with the United Kingdom. In their words, while enumerating the wrongs against which they were fighting, one of them was: '(…) depriving us in many cases, of the benefit of Trial by Jury'.

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doubt exists, there should be a verdict of no-guilt.[5] As it can be seen, this doesn't differ much from the *in dubio pro reo* continental standard[6].

Finally, as an instruction to the jury, the rule is said to indicate something else. It works as a prudential rule to set aside any preconception derived from the arrest, prior convictions or the indictment itself.[7] However, as noted by some scholars[8], the instruction as it is conceived seems to add little or nothing to the already existent requirement of proving facts beyond a reasonable doubt[9].

Because the central aim of the presumption is to set a rule to properly allocate blame during a trial, it is not hard to anticipate what is the time frame in which innocence must be inferred. Unlike what occurs in other nations, the presumption of innocence has no bearing in pre-trial proceedings nor during sentencing[10]. In fact, this limited understanding of when and who should presume innocence was extended by the Supreme Court of the United States to apply to older and juvenile offenders alike[11].

While the scope of the presumption might slightly differ from state to state, the understanding of the United States Supreme Court is, nonetheless, highly indicative of what is the most extended conception. In fact, some notorious local precedents have even disputed the rule as a presumption, understood as an inference rule deduced from a given premise[12]. According to this view, 'if innocence was in fact presumptive evidence throughout a trial, no conviction was possible'[13]. Furthermore, 'It is (said to be) not even a presumption in the popular sense of a thing which is more likely to be true than not, for statistically more people who are charged with crimes are convicted as guilty than are acquitted as innocent.'[14]

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5 See Antony Duff, 'Who Must Presume Whom to be Innocent of What?' (2013) 42 Netherlands Journal of Legal Philosophy 3.

6 François Quintard-Morénas, 'The Presumption of Innocence in the French and Anglo-American Legal Traditions' (2010) 58 American Journal of Comparative Law 107, 112.

7 *Kentucky v Whorton* 441 US 786, 789 (1979).

8 William F Fox Jr, 'The "Presumption of Innocence" as Constitutional Doctrine' (1979) 28 Catholic University Law Revie 253.

9 *In re Winship* 397 US 358 (1970).

10 See *Bell v Wolfish* 441 US 520 (1979).

11 *Schall v Martin* 467 US 253 (1984).

12 *Carr v State* 4 So 2d 887 (Miss 1942).

13 ibid.

14 ibid 156. See also *Dinkins v State* 29 Md App 577 (1976).

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A first impression of the epistemological view could suggest that it always affords less protection to defendants than other models. But this is not necessarily true. For instance, both at the federal and local levels, there are rules that protect the defendant from appearing visibly shackled before the jury[15]. While at first this prohibition would seem to better accommodate an axiological-principle-model, a closer look reveals the opposite. Countries with a long tradition in humanistic philosophy and a deep-rooted principled conception of innocence, such as Italy[16] or Spain[17], reported an extended practice of presenting defendants handcuffed or wearing the clothes given to them while on pretrial detention[18].

The explanation to this seemingly counterintuitive contrast rests on the different goals pursued by these two systems. As an epistemic safeguard, it is clear that the jury could be influenced if a person is introduced to them for the first time as a criminal[19]. In the continental system, the classic idea was that professional judges could still be impartial, even in the face of inflammatory evidence or elements that were derogatory to the accused image. Small physical restrictions, although in tension with the respect that an innocent deserved, were then allowed in light of the overriding interest that safety within the court supposed.

So, in theory, the American conception of the presumption of innocence derives from a utilitarian and pragmatic vision, according to which such rule would better protect the jury, laying the foundation for an

15 See eg *Deck v Missouri* 544 US 622 (2005); *People v Roman*, 365 NYS 2d 527, 528 (NY 1975).

16 See Fair Trials Report, *Innocent until proven guilty? The presentation of suspects in criminal proceedings* (3 June 2019) <https://www.fairtrials.org/sites/default/files/publication_pdf/Fair-Trials-Innocent%20until-proven-guilty-The-presentation-of-suspects-in-criminal-proceedings_0.pdf> accessed 28 November 2021.

17 See Rights International Spain Report, *Sospechosos y medidas de contención: de la importancia que reviste cómo un sospechoso es presentado ante el tribunal, el público y los medios* (11 June 2019) <http://rightsinternationalspain.org/uploads/publicacion/eca5be7ba0dab99f85e605b4d73988d13a2077bb.pdf> accessed 28 November 2021.

18 This issue was not long ago addressed by the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

19 This rule seems to align with Federal Code of Evidence of the United States, Rule 403, according to which 'The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.'

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effective and fair trial. To an extent, some of the implications of assuming innocence have been proven to be epistemologically better. For instance, vast neuroscientific literature on biases has shown the worth of providing clear rules that help decisionmakers listen without a negative preconception of an accused[20].

However, this rationale with which the meaning of the presumption was construed fails in many other instances. First, as an epistemic rule that mandates for the prosecution to prove their affirmations, the rule is a double-edged sword. When combined with the classic common law distinction between offences and defences, many jurisdictions within the United States typically shift the burden of proof and expect the defendant to establish the elements of their defences.

The blurred line that distinguishes negative from affirmative elements creates a paradoxical state of affairs under which prosecutors don't need to prove moral guilt or the existence of a crime, as long as they can show that a criminal statute was violated[21]. So, while it is true that it is generally preferable to place the burden of proof on the person claiming a fact affirmatively, the normative concept of a crime, understood as the presence of certain required elements and the absence of others, complicates the distribution of burdens.

From a pragmatic point of view, presuming innocence is not even the best methodical assumption to help establish what actually happened in each case. In crimes such as inexplicable wealth and illicit enrichment, once probable cause is established, public officials are typically asked to explain the origin of their fortune against the presumption of innocence and the *nemo tenetur* principle[22]. The reason for this inverted burden of proof is, precisely, the difficulty of asking a prosecutor to prove beyond reasonable doubt the source of someone else's money. Additionally, the

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20 See eg Vicki S Helgeson and Kelly G Shaver, 'Presumption of Innocence: Congruence Bias Induced and Overcome' (1990) 20 Journal of Applied Social Psychology 276; Danielle M Young, Justin D Levinson & Scott Sinnett, 'Innocent until Primed: Mock Jurors' Racially Biased Response to the Presumption of Innocence' (2014) 9 PLOS ONE 1.

21 See Glanville Williams, 'Offences and defences' (1982) 2 Legal Studies 233; Paul H Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 Columbia Law Review 199; George P Fletcher, 'Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases' (1968) 77 Yale Law Journal 880.

22 See Booz Allen Hamilton, *Comparative Evaluation of Unexplained Wealth Orders*, Final Report prepared for the US Department of Justice, 31 October 2012 (Order Number: 2010F_10078).

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interest in fighting corruption and the relatively easy demand on the defendant seem to back up the model. But, once one considers this assertion closely, it is possible to note that many other crimes have the same structure. Would it be reasonable, then, to ask defendants to explain what has happened whenever it is easier for them to do so or is it, on the contrary, that there must be another good reason for not putting the burden on the accused?

Moreover, if the presumption is designed merely as an evidentiary rule and meant to govern during trial, it's hard not to mention an additional factor that seriously limits its scope[23]. Roughly 97% of federal criminal convictions and 94% of State sentences are obtained through plea bargains[24]. This is, if not indicative of an inconsistency, at least a sign of the inconvenience of the significance given to the presumption.

Finally, it must be noted that there is no inextricable connection between the common law system and this axiological rule. While it is true that, in its origins, the adversarial model and an empiricist mindset had a big influence in the craft of the rule, many countries within the same tradition have departed from this restrictive reading. Such is the case, for example, of countries like Ireland[25] and Canada[26].

III. An Axiological Principle

As a principle, assuming innocence within a procedure means something quite different. From an axiological perspective, the rule refers to a value that must be pursued and defended by all public officials while dealing with a criminal accusation. The principle, then, projects itself in many other rules within the procedure and sometimes even out of the courtroom. But before moving forward and in order to avoid misunderstandings, the close connection between the two concepts must be first addressed.

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23 Robert Schehr, 'Standard of Proof, Presumption of Innocence, and Plea Bargaining: How Wrongful Conviction Data Exposes Inadequate Pre-Trial Criminal Procedure' (2017) 55 California Western Law Review 51.

24 Clark Neily, 'Prosecutors are packing prisons by coercing plea deals, and it's totally legal' (2021) NBC News <https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201> accessed 29 November 2021.

25 *PO'C v The Director of Public Prosecutions* [2000] 3 IR 87, 103.

26 *R v Pearson* [1992] 3 SCR 665, 683.

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To speak about these diverse epistemic and axiological faces is not to say that they are two absolutely different, unconnected things; on the contrary, it is almost impossible to disentangle one from the other. Any system that recognizes an epistemic presumption of innocence must, to a certain extent, derive its existence from a moral value, according to which innocence must be somehow protected. On the other hand, every nation that believes that people must be treated as if they were innocent until proven guilty has tailored epistemic rules, like *in dubio pro reo*, to give efficacy to this more abstract mandate.

Indeed, the interrelation between the two forms of rules has existed from the beginning and has had enormous impact on later debates. For instance, the common law rule of evidence derives from Blackstone's well-known formulation: 'it is better that ten guilty persons escape than that one innocent suffers'[27]. So, even in countries like the US, where the evidentiary perspective predominates, there is still a close tie between such rules and a particular ideal of justice. In fact, the tensions between the two can be seen in many judicial cases where the scope of the rule was under debate. Particularly from the time when there was a vivid debate about the significance of innocence, some notorious precedents acknowledged this latter perspective in their dissents.

In *United States v Rabinowitz*[28], for example, the Supreme Court had to decide whether a search and seizure was valid, although performed without a valid warrant. In that case, Justice Frankfurter, dissenting, said:

> By the Bill of Rights, the founders of this country subordinated police action to legal restraints not in order to convenience the guilty, but to protect the innocent. Nor did they provide that only the innocent may appeal to these safeguards. They knew too well that the successful prosecution of the guilty does not require jeopardy to the innocent.

Some years later, in *United States v Salerno*[29], the Court had to analyse the constitutionality of a statute that allowed pretrial detentions of people considered dangerous to their communities. In that case, it was Justice Marshall who dissented and expressed:

> Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day, the presumption of innocence protects the innocent; the shortcuts we take with those whom we

27 William Blackstone, *Commentaries on the Laws of England* (4th edn, Clarendon 1723–1780) 352 (book 4 ch 27).

28 *United States v Rabinowitz* 339 US 56, 82 (1950).

29 *United States v Salerno* 481 US 739, 767 (1987).

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> believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.

So, as it can be seen, the epistemic rule certainly derives from an axiological commitment and, thus, it would not be accurate to say that a nation recognizes one single face of innocence. Rather, the distinction serves as a tool to see when a system prioritizes one aspect over the other and to judge the consistency of a given interpretation with the objectives it claims to advance.

From the point of view introduced in the previous subtitle, innocence is a sound starting point to begin a dialectic process in which whomever claims a fact has the burden of proving it and where innocence wins in the absence of clear proof of criminal guilt. Here the principle has some additional implications. The principle of innocence is an ethical agreement done by citizens that resembles a Ulysses Pact. Public officials are bound to treat people as if they were innocent until there is a final sentence, not necessarily because this is a way of arriving at a better truth, but because it is the best way of doing it. We limit ourselves not because of the reward, but because we are far more fearful of the dangers of acting unrestrained.

This vision derives from specific theories of punishment and citizenship. On the one hand, it is believed that only one type of sanction is legitimate, and that is the one legally applied by the state after a fair procedure in which responsibilities were determined. Treating people with respect and granting them all the rights that any other citizen has is precisely the way in which the system builds its legitimacy, transforming the final sentence into something inherently different from other uses of force or even simple vengeance. Therefore, when the principle is ignored, the failure is not one of truth but one of moral legitimacy of the sovereign. The main idea behind this value is that a fair procedure is the one that better secures the protection of the innocent and the punishment of the guilty. To achieve this, just like in the other conception, it is paramount to achieve solid factual findings.

But two other things must also be done. First, one of the goals of a criminal process is to adjudicate an evil to a person, either because of deterrence, retribution or a combination of both. When too much suffering is anticipated along the way, the final decision loses both discursive and factual force. So, protecting defendants across all different stages of a procedure is, in a way, a precautionary measure that secures the object of

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the trial, i.e., the legal suffering of a wrongdoing[30]. Second, the principle also serves as conceptual framework for deciding what kind of restrictions can be reasonably imposed on persons not yet guilty.

Some scholars have noted that pretrial detentions and other preliminary restrictions are only justified in the context of a democratic society where we all have a certain duty of tolerance in order to achieve a greater good, such as the resolution of criminal cases. All limitations to liberty, then, have to be examined in the light of what is proportional and reasonable to ask from an innocent man. So, for instance, it is arguably justifiable to ask one person, innocent or guilty, to tolerate a brief detention while a legal search is being conducted at her place. In contrast, it is hardly acceptable to restrict the freedom of anyone during an investigation that takes a couple years[31]. In short, what this formulation expects from government officials is not solely that they assume innocence in case of doubt – i.e., *in dubio pro reo* – but that they minimize all unjustified harm until there is a judicial determination of criminal responsibility – i.e., *nulla poena sine iudicio* –.

This latter conception seems to find a better consistency between the objectives it intends to promote and what it actually achieves. To begin with, the rule portrays itself as an ethical one and, as such, there are multiple theoretical positions from where it is safe to conclude that the standard is in fact just. For instance, in a Rawlsian sense, it is undoubtably a fair and sensible idea to preclude any suffering until we can be certain that a person deserves it. It is possible to assume that even without knowing which role one will have in a given procedure, no one should oppose to a prohibition that protects the innocent, defers legitimate punishment to a later stage and still gets to solve criminal controversies effectively.

It could be argued that a rule about values that seem to be fair does not need to offer much more. But still, the principle of innocence has a further virtue: its utilitarian worth. As an epistemological rule of adjudication, I have tried to explain that the presumption is not consistent. Sometimes it works and sometimes it doesn't. But as an axiological mandate, the rule often serves properly its functions. Criminal procedures guided by this principle are, as a matter of fact, better prepared for protecting individuals from unjustifiable suffering than those that neglect such standard. At the

30 See Claus Roxin and Bernd Schünemann, *Derecho Procesal Penal* (Mario F Amoretti and Darío N Rolón tr, 29th edn, Didot 2019) 146.

31 ibid; Klaus Volk, *Curso fundamental de Derecho Procesal penal* (Alberto Nanzer and others tr, 7th edn, Hammurabi 2010) 79.

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same time, government officers also legitimate themselves by procedures in which people are treated with respect and agency along the way. In this sense, several empirical studies have shown that humans are more willing to accept adverse decisions when they are seen as the result of a process in which they were treated with dignity[32].

The proper scope of protection of this ethical rule, insofar as we are talking about a legal requirement that correlates with a defendant's right, needs to be defined. Accordingly, it would seem narrow and arbitrary to limit its application only to behaviours within a criminal trial or conducts of judicial actors. For instance, the European Court of Human Rights has said that the principle forbids premature expressions of guilt, by the trial court or by any other public officials[33], although statements by judges are subject to a stricter scrutiny than those by other investigative authorities or politicians[34]. Suspicions can be voiced, of course, as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation[35]. Once an acquittal has been made, however, the voicing of suspicions is incompatible with the presumption[36].

Also, the Court has said that the rule binds not only judges or courts but also other public authorities[37], like police officials[38], the President of the Republic[39], the Prime Minister or the Minister of the Interior[40], the Minister of Justice[41], the President of the Parliament[42], prosecutors[43], and other prosecution officials, such as an investigator.[44] In short, as axiological

32 Tom R Tyler, 'Procedural Justice and the Courts' (2007) 44 Journal of the American Judges Association 217.

33 *Allenet De Ribemont v France* App no 15175/89 (ECtHR, 10 February 1995); *Nešťák v Slovakia* App no 65559/01 (ECtHR, 27 February 2007).

34 *Pandy v Belgium* App no 13583/02 (ECtHR, 21 September 2006).

35 *Sekanina v Austria* App no 13126/87 (ECtHR, 25 August 1993).

36 *Asan Rushiti v Austria* App no 28389/95 (ECtHR, 21 March 2000); *O v Norway* App no 29327/95 (ECtHR, 11 February 2003); *Geerings v The Netherlands* App no 30810/03 (ECtHR, 1 March 2007); *Paraponiaris v Greece* App no 42132/06 (ECtHR, 25 September 2008).

37 *Allenet De Ribemont v France* App no 15175/89 (ECtHR, 10 February 1995); *Daktaras v Lithuania* App no 42095/98 (ECtHR, 10 October 2000); *Petyo Petkov v Bulgaria* App no 32130/03 (ECtHR, 7 January 2010).

38 *Allenet De Ribemont v France* App no 15175/89 (ECtHR, 10 February 1995).

39 *Peša v Croatia* App no 40523/08 (ECtHR, 8 April 2010).

40 *Gutsanovi v Bulgaria* App no 34529/10 (ECtHR, 15 October 2013).

41 *Konstas v Greece* App no 53466/07 (ECtHR, 24 May 2011).

42 *Butkevičius v Lithuania* App no 48297/99 (ECtHR, 26 March 2002).

43 *Daktaras v Lithuania* App no 42095/98 (ECtHR, 10 October 2000).

44 *Khuzhin et al v Russia* App no 13470/02 (ECtHR, 23 October 2008).

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principle, presuming innocence is an ethical standard that can be expected from any individual acting in her political capacity and that must be zealously defended during the different stages of an accusation. This is how states construe their legitimacy, protect the object of a criminal trial, and advance justice.

IV. A Protected Status

The presumption or principle of innocence may be limited to a set of objective rules for arriving at solid truths. Or, as it was previously argued, it could also be understood as a broader standard of behaviour for public officials. Both interpretations have their merits and their limitations. Some of the inconveniences and virtues of the first were already presented in the previous pages, while only positive things were said of the second one. I will now develop some kind of critique of the principled version of innocence, which will also inspire a different reading of the same maxim.

It is not surprising that almost every nation has been ambivalent about the scope of application of the axiological concept. The general assumption is that this is an expectation designed to bind primarily public servants. However, there is a growing tendency to recognize some kind of validity of the presumption as applied to private parties under certain circumstances[45]. Such ambivalence can be explained looking at the high costs that opting for one or the other alternative could carry out. Both imposing the presumption upon every citizen or solely to State officials could be highly unwise.

On the one hand, a narrow reading of the principle, under which only government officials were required to treat defendants as if they were innocent, would render the presumption void. For instance, if the media were allowed to openly treat someone as a criminal before a final sentence has been rendered, many cases would see the main harm irreparably anticipated while, at least in some judges' minds, the *onus probandi* would be likely inverted.

When a person is being subject to a criminal investigation, one of the biggest dangers they face is being irreparably damaged in their reputation. Thus, we should all aim to preserve the honour of any defendant until we can be certain that we aren't inflicting an unjustified punishment upon

45 See eg *Bédat v Switzerland* App no 56925/08 (ECtHR, 29 March 2016); *Rupa v Romania* (no 1) App no 58478/00 (ECtHR, 16 December 2008).

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someone who is not guilty. This legitimate expectation extends to every subject and particularly to those with a high capacity to harm, such as huge tech companies, the media, and business organizations. Little would it help to protect someone from an anticipated public punitive reaction if we let individuals be displayed as criminals or censored from certain forums.

In the same line of ideas, we must address the effect on jurors and judges that a distorted image can produce. By giving our back to defendants in the name of individual freedoms, we might get to the point in which no institutional safeguard could correct the negative bias and prejudice that could arise from a wide campaign against someone. Inasmuch as we would like to believe that humans are completely rational[46], the truth is that we don't have any way of guaranteeing a fair process to any defendant that has been presented as a felon to her community.

On the other hand, such ethical standard imposed on all individuals would be far from desirable. To begin with, its enforcement would demand a huge bureaucracy regulating almost every aspect of life. Even if this issue could be sorted out, the rule would still be impractical and undesirable. Many daily decisions are made on the basis of personal preferences and priorities. Some of these choices might even be influenced by criteria that, if expressed by members of the public sector, would not be permitted. So, while a Ministry can't hire people solely based on their race or ethnicity, citizens are allowed to choose their intimate partners based on these factors.

Moreover, when talking about criminal accusations, there is a further reason for rejecting this extensive alternative. The reason for labelling certain restrictions as discrimination is that they rest on differences which don't have a functional explanation. To put it differently, we believe it can't be tolerated that someone is precluded from teaching at a public school based on their height[47], because we believe this distinction is irra-

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46 Multiple studies have shown the limitations of the rational decisionmaker model. See eg Daniel Kahneman 'A Perspective on Judgment and Choice: Mapping Bounded Rationality' (2003) 58 American Psychologist 697; James E Smith and Thomas Kida 'Heuristics and Biases: Expertise and Task Realism in Auditing' (1991) 109 Psychological Bulletin 472; Jonathan St. B.T. Evans 'In two minds: dual-process accounts of reasoning' (2003) 7 TRENDS in Cognitive Sciences 454; Amos Tversky and Daniel Kahneman 'Judgment under Uncertainty: Heuristics and Biases' in Dirk Wendt and Charles Vlek (eds), *Utility, Probability, and Human Decision Making* (Springer 1975) 141–162.

47 Supreme Court of Argentina *Arenzon, Gabriel Darío v Nación Argentina* (Fallos 306:400).

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tional and it can only be a sign of prejudice or of bad animus. But the same requirement would be perfectly accepted if it was set by a basketball coach. Something similar happens when someone has been accused of a felony. Compared to unaccused citizens, the probability of the alleged misconduct having actually taken place is elevated and thus a suspicion arises that a similar conduct could occur in the future. To illustrate this point: it would be insensate to ask all parents to ignore an accusation of sexual misbehaviour when hiring a babysitter until a final verdict has been offered.

One way of thinking innocence and defining who should presume it and how to enforce it is by examining the *nulla poena sine iudicio* prohibition and its implications. The mainstream reading suggests that no state punishment can legally be imposed until a final decision on the merits has been taken and criminal responsibility has been established through a fair trial. But, as I propose reading this maxim, governments should guarantee that no one suffers an unjustified consequence derived from a judicial proceeding until guilt has been finally determined. State officials have a primary duty of enforcing the law and punishing those who don't abide. But, as a collateral responsibility, when a judicial procedure has been put in motion to determine guilt and establish the appropriate reaction, they have to be certain that no one is harming another based on these allegations, that no punishment is anticipated until the time is ready and that people are treated with dignity and respect during all process. For ages, innocents have seen their rights unjustifiably limited due to the effects of criminal accusations and a very soft protection was awarded by the presumption of innocence. But especially at a time at which the information spreads as fast and extensively as it does today, the risks of criminal investigations are as alarming inside courtrooms as they are outside.

Just like in the case of discriminatory acts against other suspect categories, here too governments should do a serious effort to protect people from the unnecessary consequences of the procedures they have triggered. And also like in the case of discrimination, here too the obligation originates in a past state act or omission. People can still, of course, assume whatever they prefer; but after the judiciary has taken the conflict in its hands and decided that they are the only authority to allocate punishment for that conduct, there needs to be some safeguards that protect those innocent of the crime under investigation.

When legal innocence is conceived as a status and defendants as a suspect category, the role of governments shifts dramatically. Now, not only one can expect to be treated respectfully in court and can demand prosecutors to prove facts beyond a reasonable doubt, but also a legitimate interest

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arises on every defendant to demand the cease of certain acts that restrict their rights based solely on their procedural situation. Of course, such right would not be absolute and should compete with other legitimate interest that may have bearing on each case. For instance, in the case of the babysitter, it could be argued that there is an overriding interest in protecting a child from an abhorrent crime and that, if found not guilty, the person can reapply later for the same opportunity. On the other extreme, if a bus driver is fired from his job based on an investigation for tax fraud, his rights as an innocent man should be defended by the same authority that is subjecting them to doubt. In the absence of solid reasons for advancing a sanction that could be delivered after a final verdict has been reached and in the face of a clear disconnection between the limitation and the crime, only prejudice can be inferred from such a resolution.

The principle should be construed to limit most forms of anticipated punishment derived from public accusations. As a general rule, people should be treated as if they were innocent in most instances and scenarios, only having to accept a very limited number of restrictions derived from their procedural situation and justified by legitimate interests.

Federal and State Legislatures should make laws protecting innocent people and defining what reasonable limitations individuals can suffer when dealing with an accusation. But the central element is separating preventive from retaliatory measures. People should have a judicial remedy to limit the former and resist the latter. No private punishment should be allowed solely as a derivation of a criminal investigation, and protective actions should be subject to a heightened scrutiny under which reasonableness, necessity and the protected interests are analysed.

V. Conclusion

As an epistemological rule, by itself, the presumption of innocence is not necessarily the best mean for achieving a better truth. As it was stated, the existence of such inference must be based on an underlying value component that justifies its widespread adherence. But, once this ethical factor is acknowledged, it gets harder to sustain its limited actual scope. My main thesis is that any given definition of the standard is purely contingent and could therefore be broadened. In the same lines of ideas, for example, George Fletcher explains:

> By becoming aware of linguistic and philosophical differences, we can generate a sense of our historical contingency. We could have evolved in a different way. The way things are is the way they must be. And if we can

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> understand the roots of our resistance to change perhaps reforms become thinkable. This is the subversive potential of comparative law.[48]

Being aware of the existence of two kinds of legal presumptions of innocence may well serve this function. For example, an American may discover that its understanding of innocence is not inextricably linked to any common law requirement or that such rule is not the one that affords the best protection to its citizens. A European might also ask herself if the principle in which they believe is actually protecting the full range of conducts that they wanted to defend or if there are enough good reasons for limiting the ethical requirement as they had. Revisiting a legal concept, particularly from a comparative perspective, doesn't necessarily imply that the concept must be reshaped. Rather, it represents an opportunity to think again about its significance while trying to keep it as it is, offering new and better arguments, or to propose slight modifications to advance the goals that were theoretically behind its adoption.

48 George P Fletcher, 'Comparative Law as a Subversive Discipline' (1998) 46 American Journal of Comparative Law 683, 700.

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Part 6: Objectivity and International Arbitration

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§ 11 Stateless Justice: The Evolutionary Character of International Arbitration

Fabio Núñez del Prado[*]

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[Arbitration] is like a river. It is unfortunate that there are so many hydraulic engineers.
Inspired by Quino, *Mafalda.*

I. Introduction

Arbitration is today the principal mechanism of resolving international disputes involving states, individuals, and corporations. This is one of the consequences of the increased globalization of world trade and investment.[1] However, the theoretical foundations of arbitration are still disputed. The actors of international arbitration lack a compass to guide them and that allows the arbitration order to be coherent and effective.[2]

In the following, I will analyse arbitration in Hayekian terms: should it be the product of human design (*construction* or *taxis*) or spontaneous human action (*evolution* or *cosmos*)?[3] I will argue that arbitration should be decentralized and evolutionary rather than centralized and constructivist. The process of creating arbitration rules should not be one in which legislators exercise their own discretion. Instead, legislators should only create arbitration rules that either are a result of the spontaneous arbitration practice and the behavior of the market participants or that create legal certainty for the spontaneous order to develop. In the terms of this book, one can say that arbitration should follow the logic of *observational objectivity*[4]: the spontaneous order guides and limits legislative power. Immutable rules are only at place to prohibit individual behavior contrary to the market order free from discrimination and protectionism.

The article proceeds as follows: In a first part, I will outline my main position: that most of the current arbitration practice can and should be understood as a spontaneous order (II.). In a second step, I will focus on the role of legislators and show what it means for them to respect the spontaneous order. I will do by giving two examples: the disappointing experience of a country in which legislators designed an arbitral institution

1 Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, Kluwer Law of Arbitration, 2015).
2 Sonsoles Huerta de Soto and Fabio Núñez del Prado, 'International Arbitration as a Spontaneous Legal Order' (2020) 28 Procesos de Mercado Journal 117, 119.
3 Friedrich A Hayek, 'Kinds of Order in Society' in New Individualist Review [1981] Indianapolis Liberty Fund <https://oll.libertyfund.org/page/hayek-on-kinds-of-order-in-society> accessed on 28 November 2020.
4 Philip M Bender, 'Ways of Thinking about Objectivity' (§ 1).

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constructively, and a successful experience of a country in which lawmakers legislate under the awareness that arbitration is a spontaneous order (III.). In a third step, I will take a doctrinal stance and describe two arbitration concepts – 'consent' and 'arbitrability'– that illustrate the evolving nature of arbitration (IV.). Finally, I briefly conclude (V.).

II. Arbitration as a Spontaneous Order

International arbitration is praxeological. Its formation has been the product of constant interaction of individuals. As explained by De Benito and Huerta de Soto, no one could ever have sat down and designed international arbitration as we know it today: with the innumerable corporations that include arbitration clauses in their contracts, the states that enter into thousands of bilateral investment agreements, all arbitral institutions, arbitration law firms, arbitrators competing for new appointments, organizations such as the International Bar Association (IBA) or the United Nations Commission on International Trade Law (UNCITRAL) that frequently create soft law rules or arbitral associations that promote academic discussion.[5] No one could have the intelligence, knowledge or information necessary to create a sophisticated system from scratch.[6]

Despite the multiple interventions from different states, international arbitration has remained functional because human action has always prevailed. It is impossible to deny that international arbitration has been evolving during the last decades. But this has not happened because of the State, but despite the State: international trade operators have frequently corrected mistakes from states. This is not surprising. Indeed, spontaneous orders with their component of trial and error best implement mechanisms of Popperian falsificationism.[7]

Each state of the arbitral order that we accept today as legitimate has the character of provisionality and is open to rebuttal. Each new refutation implies an evolution in international arbitration. As explained by Huerta de Soto, something fascinating about international arbitration is that, de-

5 Marco de Benito and Sonsoles Huerta de Soto, 'El Arbitraje Internacional como Orden Jurídico Espontáneo' (2015) 22 Spain Arbitration Review 113, 126.

6 ibid 126.

7 Karl Popper, *The Logic of Scientific Discovery* (Routledge Classics 2005) 32. The aspect of trial and error as the most appropriate way of resolving conflicts was already highlighted by David Hume, *A Treatise on Human Nature* (1st edn, David F Norton and Mary J Norton eds, 2011) 315.

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spite its inherent diversity, everyone speaks in the same code. Nationality, culture, religion, ethnicity or language are of secondary nature. South American lawmakers did not sit down to negotiate with Asian lawmakers to make international arbitration work in the same way in both continents. That was a gift of spontaneous order.[8] What is more, Huerta de Soto correctly stresses that the formation of international arbitration is itself not far from the formation of language, traffic rules, family, the market economy, the price system, money, and so on. All of these institutions are, *mutatis mutandis*, formed by the same evolutionary and spontaneous process. They are like a river, which flows with all the impetus and irregularity of nature.[9] Arbitration rules are created by the participating actors of the arbitration community.[10] The arbitration system consists of reciprocal expectations that arise out of human interaction.[11] Consequently, it could best be defined as a language of interaction.

A current academic debate might illustrate that point – the debate between proponents of the IBA Rules and the Prague Rules: The assertion that the IBA Rules were one of the keys to the success of international arbitration has been refuted through the launch of the Prague Rules, which largely contradict the IBA Rules. It is yet to be determined which of the two rules ensures to a greater extent the success of international arbitration. However, what is important here is that this question will not be a decision taken by the IBA committee, nor the ICC Secretariat, nor the most reputable arbitrators in the world, nor a group of experts who will meet to discuss it. It will be the interaction of thousands of arbitral actors that will determine which set of rules is more suitable for the success of international arbitration. It will be the interaction of arbitrants, the arbitral tribunals, the arbitral institutions, the states, among others, which will determine whether or not the IBA Rules are the appropriate set of rules of evidence for international arbitration. Indeed, no single individual or entity has enough information to determine that one set of rules is

8 Huerta de Soto (n 2) 130–131.

9 De Benito (n 5) 126. In the words of Leoni, 'People who ignore this fact ought to take seriously a couplet once sung in a cabaret in Montmartre: "*Voyez comme la nature a en un bon sens bien profunds á faire passer les fleuves justement sous les ponts*." (See how nature had the extreme good sense to make the rivers flow exactly under the bridges).' Bruno Leoni, *Freedom and the Law* (3rd edn, Liberty Fund 1991) 50–51.

10 Alfredo Bullard González, 'Comprando justicia: ¿genera el mercado de arbitraje reglas jurídicas predecibles?' (2007) 53 THĒMIS Law Journal 71, 86.

11 Lon L Fuller, *The Principles of Social Order* (1st edn, Kenneth L Winston 1981) 673.

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better than the other. As Hayek points out in *The Use of Knowledge in Society*, knowledge is dispersed among thousands of individuals.[12] It is the spontaneous order of the arbitration order which will take the decision. The arbitration order is formed through a process of natural selection. When problems arise, the practices that are most efficient in facilitating dispute resolution displace those that are inefficient.[13]

III. Why Is It Important to Understand International Arbitration as a Spontaneous Order?

Only by understanding that international arbitration is praxeological, it is possible to avoid tragedies that discredit the legitimacy of international arbitration. When one is aware that international arbitration has a praxeological foundation and, therefore, is formed through a spontaneous order, it is much easier to be a good recipient of paradigm shifts. At the end, it is human action that is demanding them.

Several decades ago, for example, it did not make sense to think about the existence of an international treaty by virtue of which the parties were entitled to enforce an award derived from an arbitral proceeding rendered in any state of the world. Then, however, spontaneous order gifted us with a precious universal treaty under which the parties can enforce an international award in virtually any country of the world: the New York Convention. Today, many specialists are demanding a new New York Convention (or as some have called it, a 'New York Convention 2.0'). In my view, it is the spontaneous order that is demanding this new convention. International arbitration cannot be analysed from the lens with which it was viewed in 1958, that is, more than half a century ago. It has evolved dramatically, and we cannot be oblivious to this reality.

A century ago, it also seemed illusory to think that an investor could be entitled to sue a state through investment arbitration. And it was absurd: the investor was not a subject of international law. But international law evolved and what seemed impossible became possible. Therefore, investment arbitration is nothing more than a sophisticated system created praxeologically as a result of spontaneous order.

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12 Friedrich A. Hayek, 'The Use of Knowledge in Society', (1945) 35 Am Econ Rev 519, 520.

13 Bruce L Benson, *The Enterprise of the Law: Justice without the State* (2nd edn, Independent Institute 2011) 47–48.

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With the purpose of demonstrating how catastrophic it can be for the arbitration community to ignore the praxeological foundation of international arbitration, we will briefly describe two experiences: a disappointing experience from a country that ignored the praxeological foundation of international arbitration (1.), and a successful experience from a country that understood arbitration as a spontaneous order (2.).

1. *Disappointing experience: the elimination of the recourse of annulment in Belgium in 1985*

In Belgium, in the year 1985, a statute was passed, which eliminated all motions to set aside awards in order to increase the attractiveness and effectiveness of international arbitration. The Belgian legislator naively believed that through the elimination of the setting aside, the arbitral procedures would conclude more quickly and, consequently, Belgium would become an attractive seat.[14]

On what sources did the Belgian legislator rely to adopt such an extreme decision? Nobody knows. All we know is that a group of experts decided in a constructivist way that by eliminating the recourse of annulment they were – allegedly – going to attract hundreds of arbitrations to Belgium. However, no one had claimed a measure like that in the business community. The Belgian legislator did not support his decision in surveys, statistics or data. It was a simple whim. In other words, the Belgian legislators illusively thought that they had the information to adopt a decision of such magnitude *motu proprio*.

Nevertheless, the result was exactly the opposite, and dramatically so. The number of arbitrations that were seated in Belgium while this measure was in force can be counted on the fingers of one hand. The country was forced to return to the previous system, and on 19 May 1998, an amendment to the Belgian Judicial Code was approved, under which the setting aside was reintroduced.[15]

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14 In this regard, Vandereist explains that 'the legislation was adopted with the expectation that it would increase Belgium's attractiveness as an arbitral seat.' Alain Vandereist, 'Increasing the appeal of Belgium as an international arbitration forum? The Belgian Law of March 27, 1985 concerning the annulment of arbitral awards' (1986) 3 J Int'l Arb 77, 80.

15 Article 1717(4) of the Arbitration Law 1998 (Belgium), amending the Judicial Code 1985.

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This event was so controversial internationally that it was recounted in books and articles by many of the most important specialists in international arbitration. William Park describes the tragic transition in Belgium in the following words:

> Perhaps the best evidence of business community desire for court scrutiny at the tribunal situs lies in Belgium's failed experiment in mandatory 'non-review' of awards. Hoping that a completely laissez-faire system would attract arbitration, 1985, Belgium eliminated all motions to vacate awards in dispute between foreign parties. Consequently, in 1998, the Belgian legislature enacted a new statute that now leaves a safety net of judicial review as the default rule.[16]

This is a perfect example of how things should not be done. The problem was that the Belgian legislator had ignored that international arbitration is to be understood as a spontaneous order.

2. *Successful experience: the recognition of the non-signatory theories in the Peruvian Law of Arbitration in 2014*

The Legislative Decree 1071, Peruvian Arbitration Law, has been recognized by many experts as one of the most successful in the world. The reason for its success is not a coincidence. Peruvian arbitration legislators like Alfredo Bullard and Fernando Cantuarias are recognized intellectuals who have deeply read the Austrian literature. In fact, the President of the commission that drafted the Peruvian Arbitration Law is an illustrious member of the Mont Pelerin Society. Consequently, the Peruvian legislators knew they just needed to recognize (not create) the arbitral order as something that had been previously formed and to ensure that it can develop freely and organically in the future.[17] The example par excellence that demonstrates that the Peruvian legislators understood very well the evolutionary foundation of arbitration is Article 14 of the Peruvian Law of Arbitration. This rule states:

> The arbitration agreement comprises all those whose consent to submit to arbitration is determined in good faith by their active and decisive participation in the negotiation, execution, performance or termination

16 William Park, 'The specificity of International Arbitration: the case for FAA Reform' (2003) 36 Vanderbilt J of Transnational Law 1241, 1267.

17 De Benito (n 5) 122.

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> of the contract that contains the arbitration agreement or to which the agreement is related.[18]

Peruvian arbitration legislation is – to the best of my knowledge – the only legislation on arbitration in the world that has incorporated a specific rule that allows arbitrators to incorporate parties that did not execute the arbitration agreement to the arbitral procedure.[19]

Peruvian legislation sought to incorporate this rule because it considered it to be consistent with international arbitration practice, which for decades had allowed the possibility of incorporating a party into the arbitral procedure that did not sign the arbitration agreement. The arbitral legislator recognized in the Peruvian Law of Arbitration the arbitral *ius* – it thereby did precisely what the Austrian School of Economics suggests. In this regard, Silva Romero has affirmed:

> Arbitral and foreign jurisprudence was the one that inspired the Peruvian legislator to write Article 14 of the Peruvian Arbitration Law.[20]

Likewise, Cristián Conejero and René Irra de la Cruz have argued:

> Article 14 of the Peruvian Arbitration Law has been elaborated on the basis of a rich experience in the extension of the arbitration agreement to non-signatory parties constructed from jurisprudence and doctrine compared, mainly European and American.[21]

Similarly, Alfredo Bullard – President to the Commission that drafted the Peruvian Law of Arbitration – has stated:

> From the legislative point of view, article 14 is a worldwide novelty. There is no other law or regulatory body that includes a rule like this one. However, it is not an absolute novelty because the principles contained in

18 Alfredo Bullard, 'Arbitration Guide IBA Arbitration Committee: Peru' (2012) 7 Int'l Bar Ass'n <http://www.ibanet.org/Document/Default.aspx?DocumentUid=BC90E22B-3A24-4B9B-86F20B 9744A936F5> accessed 29 November 2021.

19 International Council for Commercial Arbitration, ICCA's Guide to the Interpretation of the 1958 New York Convention (1st edn, Pieter Sanders ed 2011) 58.

20 Eduardo Silva Romero, 'El artículo 14 de la nueva Ley Peruana de Arbitraje: Reflexiones sobre el Contrato de Arbitraje – Realidad' (2011) 4 Lima Arbitration Review 53, 55.

21 Cristián Conejero y René Irra de la Cruz, 'La Extensión del Acuerdo Arbitral a Partes No Signatarias en la Ley de Arbitraje Peruana: Algunas Lecciones del Derecho Comparado' (2013) 5 Lima Arbitration 56, 57.

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> the rule are included in different arbitral and judicial jurisprudence and also in the doctrine.[22]

The Peruvian arbitral legislator recognized an already existing phenomenon that had spontaneously evolved for many years. Indeed, by drafting article 14 of the Peruvian Law of Arbitration, the Peruvian legislator relied on two emblematic international cases: (i) the case *Dow Chemical v Isover Saint Gobain*[23] in which a French tribunal recognized the group of company's doctrine, and (ii) the case *Thomson*[24] in which five additional theories of non-signatory parties were systematized by the US Court of Appeals for the Second Circuit. As faithful followers of the Austrian School, the Peruvian legislators recognized the theories of the non-signatory parties as a spontaneous order. The result: article 14 of the Arbitration Law is a resounding success.

These two legislative experiences – the Belgian and the Peruvian one – demonstrate how important it is to understand that international arbitration is a spontaneous order. Only by being aware that it is a spontaneous order, states are prudent enough to avoid the creation of artificial or constructivist rules, which very often end up stagnating the evolution of international arbitration. Understanding the foundation of international arbitration is a recipe that provides legislators with moderation: the legislation of an arbitral rule should be an act of recognition, not of creation.

IV. The Evolutionary Character of Consent and Arbitrability

In recent decades the arbitration order has suffered from a tireless struggle against constructivism. States have created innumerable constructivist rules that have stagnated the development of international arbitration, such as (i) the duality of the arbitration clause/arbitration commitment; (ii) the requirement that the arbitration agreement be executed in writing; (iii) rules that establish that only lawyers can act as arbitrators; (iv) a minimum scope for the arbitrability of disputes, among many others. It is the arbitration market itself that has spontaneously corrected some of these irrational situations that for many years caused – and continue to cause

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22 Alfredo Bullard González, '¿Y Quienes Están Invitados a la Fiesta?' [2010] Latin Arbitration Law <http://www.latinarbitrationlaw.com/y-quienes-estan-invitados-a-la-fiesta/> accessed 29 November 2021.

23 ICC Award No 4131 de 1982, Yearbook Commercial Arbitration, 1984.

24 *Thomson-CSF, SA vs American Arbitration Association*, US Court of Appeals 2nd Circuit, judgment 64 F3d, 1995, 773–776.

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– much damage to the arbitration order. In the following, I will show how the spontaneous order dealt with two concepts: the requirement of consent (1.) and the requirement of arbitrability (2.).

1. *The spontaneous evolution of the concept of consent*

The history of consent is the history of a tragedy. Once upon a time there was a New York Convention that stated in its article II that for an arbitration agreement to be valid, it had to be in writing. With the passing of time, human action relativized this requirement and consent is in decline. As Karim Youssef has correctly pointed out:

> The tradition of consensualism is so deeply rooted in international arbitration theory and practice that evoking non-contractual or less-contractual international commercial arbitration would have seemed until recently a self-contradiction or an abuse of language. However, as all empires rise and fall, the empire of consent in arbitration, believed eternal, is falling.[25]

After a long time in which the formality of the arbitration agreement being executed in writing was understood as an *ad solemnitatem* formality, most of the judges of different states of the world began to recognize it as an *ad probationem* formality. Moreover, article 7 of the UNCITRAL Model Law was amended, making it clear what it specifically meant that the arbitration agreement needed to be executed in writing and giving several options of what counts as arbitration agreement and as writing.

Later on, substantive exceptions to the consent-requirement were created, such as (i) 'arbitration without privity' in investment arbitration[26]; (ii) theories of non-signatory parties in which consent was tenuous[27] or virtually non-existent[28]; (iii) the abbreviated procedure of the ICC; or (iv) Gary Born's proposal called the 'cross-institution consolidation protocol'. What is more, (v) the proposal of default arbitration at the international level is currently being highly debated. For example, Gilles Cuniberti has proposed a system of default arbitration for international disputes, and

25 Karim Youssef, *Consent in Context: Fulfilling the Promise of International Arbitration* (1st edn, West 2012) 53–54.

26 Jan Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Review – Foreign Investment Law Journal, 232, 232.

27 Within this category is included the theory of the group of companies recognized in the case *Dow Chemical v Isover Saint Cobain* from ICC case No 4131.

28 *Hill v GE Power Systems, Inc*, US Court of Appeals for the Fifth Circuit, 282 F3d 343 (5th Cir 2002).

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Gary Born has proposed Bilateral Arbitration Treaties (BATs). Finally, one might also count (vi) the recognition of theories of 'good faith' or 'estoppel' as a weakening of the consent-requirement.

However, in many countries, judges have failed to understand that the concept of 'consent' has evolved. They continue to deny recognition of arbitral awards by contending, for example, that the theories of non-signatory parties are inadmissible because the arbitration agreement must be executed in writing. They start from the wrong premise: that international arbitration is a static order. Instead, the New York Convention must be interpreted from an evolutionary perspective. It does not create international arbitration: it only takes note, records its existence and its development. It only intends to promote its evolution.[29]

2. *The spontaneous evolution of the concept of arbitrability: towards universal arbitrability*

Arbitrability determines the types of issues which can and cannot be resolved by arbitration. Arbitrability is used by every country to exclude some matters from the scope of arbitration.[30] Thus, the arbitrability of a certain matter depends, fundamentally, on the legislation of each country. It is ultimately a question of state sovereignty, public interest and public policy.[31] Arbitrability is a concept that is adapted periodically in order to meet the changing societal needs, including political, social, cultural, moral and economic dimensions. In the following, I will describe the evolution and continuous expansion of the concept of arbitrability.

a. The original criterion of arbitrability: economic nature or similar concepts

One of the basic paradigms of arbitration originally was that only patrimonial or economical disputes can be submitted to arbitration. In that vein, state legislators usually require an *economic nature* for a matter to

29 De Benito (n 5) 126.

30 Veena Anusornsena, 'Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: The United States, Europe, Africa, Middle East and Asia' [2012] Theses and Dissertations 4 <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1033&context=theses> accessed 29 November 2021.

31 ibid 13.

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be arbitrable. According to this general criterion of arbitrability, typical examples of non-arbitrable subjects include criminal matters; family claims; inheritance law; bankruptcy law; antitrust claims; consumer claims; labor grievances; and certain intellectual property matters. The concrete framing of this general criterion of arbitrability differs from country to country:

The Swiss, Austrian, and German legislations explicitly refer to the economic nature of the dispute ('*jeder vermögensrechtliche Anspruch*'), as is shown by article 177(1) of the Swiss Federal Act on Private International Law, section 582(1) of the Austrian or section 1030(1) of the German Code of Civil Procedure.

In a similar vein, article 1 of the Brazilian Arbitration Law (No 9307 of 1996) conditions arbitrability upon the requirement of 'freely transferable property rights'. This approach is also followed by articles 2 and 18 of the Law on Alternative Dispute Resolution and Promotion of the Social Peace of Costa Rica (No 7727 of 1997).

A third group of countries uses the concept of tradability: one might refer to article 1676, subsection 1, of the Belgian Judicial Code, article 115 of the Colombian Statute of Alternative Dispute Resolution Mechanisms (Decree No 1818 of 1998); article 1 of the Arbitration and Mediation Law of Ecuador of 1997; article 806 of the Italian Code of Civil Procedure; article 2 of the Paraguayan Arbitration Law (No 1879 of 2002); article 1 of the Swedish Arbitration Act 1999 or article 3 of the Commercial Arbitration Law of Venezuela of 1998).

Finally, there are legislations that simply refer to matters within the free disposition of the parties, such as article 3 of the Bolivian Arbitration and Conciliation Law (No 1770/96); article 2(1), of the Spanish Arbitration Law (No 60 of 2003); article 2059 of the French Civil Code; article 3, subsection 1, of the Arbitration Law of Guatemala (Decree No 67 of 1995); article 1020, subsection 3, of the Dutch Civil Procedural Code (according to the arbitration law of 1986); article 2 of the Law of Arbitration, Conciliation and Mediation of Panama (Decree-Law No 5 of 1999) and article 2(1) of the Peruvian Law of Arbitration (Legislative Decree No 1071 of 2008).

b. The expansion of arbitrability: broad interpretation of the general criterion

In recent years, however, the concept of arbitrability has evolved significantly. As a result of the rulings of several courts and arbitration tribunals, the arbitrability of disputes has been expanding by leaps and bounds. With the passing of time, there are fewer and fewer matters that cannot be submitted to arbitration. Thus, in different parts of the world, arbitrability has

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been expanded to disputes that initially would never have been possible to submit to arbitration. In this regard, Roque Caivano has expressly stated:

> One of the greatest advances has been made in the area of 'arbitrability': issues that a few decades ago were considered insusceptible to be resolved by arbitration, are gradually being admitted as 'arbitrable' matters. As a result, the list of matters that can be validly submitted to arbitration has undergone a notable expansion.[32]

In the same vein, Karim Youssef has stated:

> In recent years, the scope of rights amenable to arbitration has grown to such an extent that, the concept of arbitrability (or its mirror image, inarbitrability) as central as it may be to arbitration theory, has virtually died in real arbitral life. Gradually, the issue of arbitrability faded in disputes on jurisdiction. The defence that a particular subject matter is not arbitrable has almost disappeared in the practice of developed fora, and arises less frequently in emerging ones. Arbitrability seems to be the least of a modern practitioner's problems.[33]

One of the most paradigmatic cases is that of the United States. Before 1970, the United States had a very restrictive view of the arbitrability of disputes. However, *Scherk*[34] and *Mitsubishi*[35] represent an overall trend of US courts expanding the scope of arbitrability since 1970.[36] As explained by Gary Born, 'as in France, the past four decades have witnessed a substantial evolution of the non-arbitrability doctrine in the United States.'[37]

Over the last three decades, the US Supreme Court has pioneered the international expansion of arbitrability to areas of economic activity heavily impregnated with public interest. More and more US courts have provided a much-needed conceptual frame for universal arbitrability.[38]

Another paradigmatic example is Switzerland. Article 177(1) of the Swiss Private International Law Act (PILA) provides that 'any claim involving an economic interest may be submitted to arbitration'. The term used

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32 Roque Caivano, 'Arbitrabilidad y Orden Público' (2013) 12 Foro Jurídico 62, 63.

33 Karim Youssef, 'The Death of Inarbitrability' in Loukas A Mistelis and Stavros Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (1st edn, Kluwer Law International, 2009) 47, 47.

34 *Scherk v Alberto-Culver Co*, 417 US 506 (1974).

35 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985), 105 S Ct 3354.

36 Rufus V Rhoades and others, *Practitioner's Handbook on International Arbitration and Mediation* (1st edn, JurisNet 2007) 223–224.

37 Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law of Arbitration 2014) 981.

38 Youssef (n 33) 57.

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in this article – 'economic interests' – is not given a statutory definition. However, Swiss courts have interpreted the notion of economic interest of article 177(1) of PILA broadly: it 'covers all claims which have an either active or passive financial value for the parties or, in other words, all rights which, at least as far as one of [the parties] is concerned, can be appreciated in money.'[39] Under this interpretation, it is difficult to conceive how virtually all non-criminal would not be arbitrable: even issues such as divorce or a declaration of bankruptcy involve pecuniary value.[40] As explained by Karim Youssef, this is an extremely broad notion of arbitrability, perhaps unparalleled in the modern history of arbitration. Arbitrability is virtually 'universal'; and parties are given the autonomy to arbitrate almost all disputes.[41]

One might also refer to Germany, notably to section 1030 of the German Code of Civil Procedure, which uses the same criterion, requiring an economic matter.[42] As explained by Klaus Peter Berger and Catherine Kessedijan, this formulation is intended to be interpreted expansively (and to limit the scope of the non-arbitrability doctrine in Germany).[43] What is more, a number of German statutory provisions that previously excluded certain categories of disputes from arbitration have been expressly repealed.[44]

Finally, in Canada, the Supreme Court has ruled that parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding.[45] In effect, while it is true that the decision deals with the arbitrability of copyright disputes, the generality of the court's pronouncement suggests the general presumption that claims which parties have chosen to arbitrate are arbitrable.[46] What is more, Canada not only allows the parties to

39 Judgment of the Swiss Federal Tribunal, DFT 118 II 353, 767 (1992).
40 Born (n 37) 970.
41 Youssef (n 33) 60.
42 Youssef (n 33) 61. See also Austrian ZPO, § 582 ('Any claim involving an economic interest that lies within the jurisdiction of the courts of law can be the subject of an arbitration agreement. An arbitration agreement on claims which do not involve an economic interest shall be legally effective insofar as the parties are capable of concluding a settlement on the issue in dispute.').
43 Klaus Peter Berger and Catherine Kessedijan, *The New German Arbitration Law in International Perspective* (1st edn, Kluwer Law International 2000) 7.
44 Born (n 37) 970.
45 *Les Éditions Chouette inc and Christine l'Heureux v Hélène Desputeaux and others*, 2003 SCC 17.
46 Youssef (n 33) 61.

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arbitrate almost any kind of dispute, but has established that arbitration is the default jurisdiction for professional artists contracts. Thus, section 37 of the Quebec Professional Artists Act states the following: 'In the absence of an express renunciation, every dispute arising from the interpretation of the contract shall be submitted to an arbitrator at the request of one of the parties.'

In other words, the default rule has been switched. Unless parties to a professional artists contract agree otherwise, the dispute will be resolved through arbitration.

One can conclude from these developments that the expansion of arbitrability has been spontaneous and evolutionary in several countries, and the consequence of multiple decisions of various courts. Over time, states have realized that, in order to decongest their judicial branch and get the parties to internalize the costs of their disputes, expanding the arbitrability of disputes was a very efficient measure. In this regard, Karim Youssef has affirmed the following:

> While some authors have warned that an absolute freedom to arbitrate may undermine State sovereignty, the evolution of legal systems to expand the definition of arbitrable claims did not slow down. On the contrary, the trend in favour of arbitrability has recently taken a new dimension, with the inception of what can be termed 'universal arbitrability.' Put simply, this means that arbitrability today is rarely an issue.[47]

Commentators have described this trend as the 'ultimate doctrinal ascendancy of arbitration.'[48] With arbitration being the rule rather than the exception in international settings, legal systems need to determine the exceptions, ie, what disputes are not arbitrable.[49]

c. Concrete examples of extended arbitrability

In the following section I will analyse how concretely this trend of expanded arbitrability lead to the extension of arbitration in areas which have originally been excluded from arbitration:

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47 ibid 55.

48 Douglas Jones, 'Arbitration and Party Autonomy: How free is the Choice to Arbitrate?' in G M Beresford Hartwell (ed), *The Commercial Way to Justice* (1st edn, Kluwer Law International 1997) 121.

49 Bernard Hanotiau, 'L'Arbitrabilité et la favor arbitrandum: un réexamen' (1994) 4 Journal du Droit International Clunet 899, 899.

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(i) *Family Law*. Family law is one of the areas with great restriction to party autonomy. For a long time, it was thought that family disputes could not be submitted to arbitration simply because they were not freely disposable.[50]. According to Augusto C Belluscio, these restrictions are supposedly justified by the institutional nature of the family and by the need to perform the ethical purposes of the legal organization of the family nucleus.[51] Thus, for a long time it was unimaginable to think that family disputes could be resolved through arbitration.

However, over time, several legislations started to allow the parties to submit their family disputes to arbitration. This process occurred spontaneously. It is precisely due to the inefficiency of courts – that are saturated with family cases – that arbitration has appeared as a viable answer for the resolution of this type of controversy. For example, in Texas, according to title 1 and 5 of the Texas Family Code[52], and in Australia, according to section 5 of Family Law Regulations 1984 (Statutory Rules No 426)[53], it is perfectly possible to submit family disputes to arbitration, and it has proven to work very well. In this regard, McLaughlin has stated: '(…) most courts in the U.S. now allow binding arbitrations of family law matters, such as disputes over alimony, property division, and spousal support, as long as the matters do not involve children.'[54]

(ii) *Inheritance Law*. In some legislations it is perfectly possible to submit inheritance law controversies to arbitration. For example, Bolivia[55],

50 Article 2059 of the French Civil Code establishes, for example, that ‚disputes relating to divorce and separation of bodies or those that interest public communities and public establishments cannot be resolved in arbitration'.

51 Augusto C Belluscio, *Manual de Derecho de Familia* (1st edn, Depalma 1987) 29.

52 In this respect, Compere and Pool have stated that 'on written agreement of the parties, the court may refer a suit under Title 1 (spouses and property) and Title 5 (parent and child) of the Texas Family Code to arbitration.' John Compere, 'How to use arbitration and other ADR procedures in Texas Family Law?' Texas Barcle <http://www.texasbarcle.com/Materials/Events/2141/24054_01.pdf> accessed 29 November 2021.

53 In Australia it is also perfectly possible to arbitrate family disputes in accordance to section 5 of Family Law Regulations 1984 (Statutory Rules No 426), available at <https://www.refworld.org/docid/4d3eb7ae2.html> accessed 29 November 2021.

54 Joseph T McLaughlin, 'Arbitrability: Current Trends in the United States' (1996) 59 Albany L Rev 905, 929.

55 Article 3 of the Bolivian Arbitration Act No 1770/96.

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Spain[56], France[57], Guatemala[58], the Netherlands[59], Panamá[60] and Perú[61] condition the arbitrability of disputes to the fact that the rights that are submitted to the controversy are freely disposable, which does not exclude succession law controversies.

(iii) *Antitrust Law*. In *Mitsubishi v Soler Chrysler*, the US Supreme Court declared arbitrable the questions related to the legislation that protects free competition ('Antitrust Act'). Indeed, in that case, it was expressly stated that 'we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration.'[62]

With the US Supreme Court opening the way, today international antitrust disputes are widely arbitrable, in jurisdictions as diverse as New Zealand[63], France[64], Italy[65], the United Kingdom and Switzerland.[66] For example, the Paris Court of Appeal (*Cour d'appel*) upheld the validity of an international arbitration agreement that was invoked for civil claims under EU competition law:

> If the character of the economic policy of community competition law rules prohibits arbitrators from granting injunctions or levying fines, they may nonetheless assess the civil consequences of conduct held to be illegal with respect to public order rules that can be directly applied to the parties' relations.[67]

Indeed, French courts have repeatedly upheld the arbitrability of antitrust law claims categorically.[68] As explained by Gary Born, the result of the

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56 Article 2 literal 1) of the Spanish Arbitration Act (No 60 of 2003).
57 Article 2059 of the French Civil Code.
58 Article 3 literal 1) of the Guatemalan Arbitration Act (Decreto No 67 of 1995).
59 Article 1020 literal 3) of the Dutch Code of Civil Procedure (Arbitration Law of 1986).
60 Article 2 of the Panamanian Law of Arbitration, Conciliation and Mediation (Decree-Law N° 5 of 1999).
61 Article 2.1 of the Peruvian Arbitration Act (Legislative Decree N° 1071 of 2008).
62 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985), 105 S Ct 3354.
63 *Attorney General of New Zealand v Mobil Oil New Zealand Ltd* (NZ High Court) [1989] 2 NZLR 649.
64 CA Paris, *Aplix v Velcro*, 14 October 1993, [1994] Rev Arb 164, Note Ch Jarrosson.
65 Antoine Kirry, 'Arbitrability: Current Trends in Europe' (1996) 12 Arb Int'l 373, 376.
66 Youssef (n 33) 53.
67 Born (n 37) 974.
68 See Judgment of 18 November 2004, *SA Thalès Air Défense v GIE Euromissile*, 2004 Rev Arb 986 (Paris Cour d'appel) (2005). See also Judgment of 4 June 2008, *SNF*

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past four decades' judicial development in France has been a substantial retrenchment of non-arbitrability limits in the international context. Notwithstanding potentially expansive (and archaic) non-arbitrability provisions of the Civil Code, and almost equally expansive historic judicial interpretations of those provisions, French courts have progressively narrowed the scope of non-arbitrable matters.[69] The United Kingdom has followed the same trend. For instance, in the case *ET Plus SA v Jean-Paul Welter*, the English High Court has affirmed that there is no realistic doubt that competition or antitrust claims are arbitrable.

(iv) *Labour Law*. The US Supreme Court's decision in *Gilmer v Interstate/Johnson Lane Corp* rendered most employment disputes arbitrable.[70] Concretely, it declared arbitrable the claims based on a public order rule such as the one that prevents age discrimination in employment, even though it acknowledged that said legislation is intended to protect an obvious public interest. The US Supreme Court simply held that there is no inconsistency between this social function and arbitration, to the extent that arbitration is equally adequate to protect the public interests at stake: the arbitrators are capable of properly protecting them – as much as the judges would – and they can apply all the remedies provided by law.[71]

In addition, in *Granite Rock v International Brotherhood of Teamsters ('IBT')*[72], the US Supreme Court resolved two important issues in federal labor law. The first one was whether there was an agreement between parties or not, and the other one was about tortious interference claimed by the employer, Granite Rock.[73] In the same vein, in the case *Perry v Thomas*, the US Supreme Court declared that the disputes arising from an employment contract are arbitrable[74].

International employment disputes are now arbitrable in France, too. In effect, *Grenoble* was the first French decision to hold that the 'arbitration agreement included in an international individual employment agreement is valid.'[75]

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v Cytec, 2008 Rev Arb 473 (French Cour de cassation, civ 1e); Judgment of 20 March 2008, *Jacquetin v SA Intercaves*, 2008 Rev Arb 341, 341 (Paris Cour d'appel).

69 Born (n 37) 974.

70 *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20 (1991).

71 Caivano (n 32) 73.

72 *Granite Rock v Int'l Bhd. of Teamsters*, Local 287, 546 F3d 1169 (9th Cir 2008).

73 Anusornsena (n 30) 37.

74 *Thomas Kenneth v Perry, Barclay*, 482 US 483 (1987), no 86-566.

75 Grenoble Cour d'appel, 13 September 1993, Rev Arb (1994) 337.

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(v) *Intellectual Property Law*. The US and most European countries[76] are likely to accept the arbitrability of almost all intellectual property disputes.[77] In this regard, Youssef has stated: '(…) copyrights and contractual disputes related to patents and trademarks (such as licensing) are arbitrable in most European jurisdictions and the U.S.'[78] Indeed, intellectual property gives exclusive rights between contractual parties.[79] This trend is illustrated by the *Saturday Evening Case* of 1987 in which a US court ruled in favour of the arbitrability of copyright validity.[80] Thus, after that case, it is likely that all issues regarding copyright will be arbitrable in the United States.[81]

(vi) *Bankruptcy Law*. In the case *United States Lines* the court affirmed that 'the [Federal Arbitration Court] as interpreted by the Supreme Court dictates that an arbitration clause should be enforced unless doing so would seriously jeopardize the objectives of the [Bankruptcy] Code.'[82] As a consequence, US courts have to conduct a case-by-case analysis to determine whether the circumstances of particular bankruptcy proceedings, and particular arbitrations, justifies overriding the parties' agreement to arbitrate.[83]

In a similar vein, there are authors who have already proposed expanding arbitrability for bankruptcy matters in Peru and Chile. In this regard, Brenneman, Arce, Mori and Schwartz have pointed out the following:

> There is, however, another alternative, which to date remains largely untested in the region: a local bankruptcy proceeding, with some or all of the case handled through arbitration proceedings. With this option, debtors could have the certainty of a full and final resolution of their restructuring, but with the flexibility to use arbitration and mediation procedures that in many circumstances provide for a quicker resolution of the case by arbitrators that are more familiar with the sorts of issues

76 Article L 615-617 of the French Intellectual Property Code (FIPC) states: 'The above provisions shall not prevent recourse to arbitration in accordance with Article 2059 and 2060 of FCC.'
77 Anusornsena (n 30) 41.
78 Youssef (n 33) 53.
79 Julian D M Lew and others, *Comparative International Commercial Arbitration* (1st edn, Kluwer Law International 2003) 32.
80 *Saturday Evening Post Co v Rumbleseat Press, Inc*, 816 F2d 1191 (7th Cir 1987).
81 David W Plant, 'Arbitrability of Intellectual Property Issues in the United States' [1994] Am Rev Int'l Arb 11, 36–38.
82 *United States Lines Inc v American Steamship Owners Mutual Protection & Indemnity Ass'n Inc*, 197 F3d 631, 640 (2d Cir 1999).
83 Born (n 37) 1030.

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> that arise in international financial contracts and that are less susceptible to judicial corruption.[84]

(vii) *Consumer Law*. US law currently recognizes the validity of agreements to arbitrate between consumers and businesses and permits the arbitration of both existing and future consumer disputes, subject to restrictions based on principles of unconscionability and due notice.[85] Thus, today virtually all American consumer contracts contain arbitration clauses. In this regard, Gilles Cuniberti has stated:

> In most legal orders, arbitration is confined to commercial matters. Exceptions exist, however, the most remarkable being the United States, where arbitration has been accepted in consumer and employment disputes. In such legal orders, the proposed model would then be part of a wider phenomenon of privatization of adjudication.[86]

In contrast to that, Germany does not allow any kind of arbitration in consumer matters *before* a dispute has arisen. However, *after* a dispute about securities has arisen, arbitration agreements are possible even here.[87]

A third group of countries is more lenient towards consumer arbitration than Germany, but still requires some protective formalities. In that direction, section 11 of the New Zealand Arbitration Act states that an arbitration agreement will be enforceable against a consumer only if the consumer, by separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it. Similarly, article 4(2) of the Brazilian Arbitration Law states that 'in adhesion contracts, the arbitration clause will only be valid if the adhering party initiates arbitral proceedings or if it expressly agrees to arbitration by means of an attached written document, or if it signs or initials the corresponding contractual clause, inserted in boldface type.'

(viii) *Securities Law*. In *Shearson v McMahon*, the US Supreme Court declared arbitrable the actions based on rights contained in the legislation

84 Pablo Mori and others, 'You Have Options: The Use of Alternative Dispute Resolution in Insolvency Proceedings' (2017) 17 Pratt's J Bank L 336, 336–337.

85 Born (n 37) 1049.

86 Gilles Cuniberti, 'Beyond Contract. The Case for Default Arbitration in International Commercial Disputes' (2008) 32 Fordham Int LJ 417, 464.

87 On that, see eg German Securities Trading Act, § 37h. On the position of the German courts, see eg German Federal Court of Justice (*Bundesgerichtshof*), 9 March 2010, XI ZR 93/09, RIW 2010, 391.

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on stock transactions (securities claims).[88] A couple of years later, in the case of *Rodríguez de Quijas v Shearson/American Express Inc*, the Supreme Court upheld this criterion by reinterpreting the 1933 law (Securities Act of 1933).[89]

(ix) *Constitutional Law*. In Argentina, it is perfectly possible to submit constitutional issues to arbitration. Indeed, it was determined that the arbitrators retain their competence in the face of unconstitutionality claims and, if necessary, are empowered to declare the unconstitutionality of legal rules.[90] This is possible provided that the declaration of unconstitutionality only projects consequences among those who are parties to the process, having no other effects than the non-application of the rule declared contrary to the Constitution.

Likewise, in Peru the Constitutional Court has established that arbitrators are empowered to exercise constitutional control. Indeed, in the binding precedent *María Julia* rendered through judgment No 142-2011-PA/TC, the Constitutional Court affirmed that 'it is a necessary consequence of this that the guarantee of decentralized control of constitutionality, provided for in the second paragraph of article 138 of the Constitution, may also be exercised by the arbitrators in the arbitration jurisdiction, since Article 138 cannot be the object of a restrictive and literal constitutional interpretation.'[91]

(x) *Criminal Law*. Finally, although we disagree with the reasonings, several US courts have found certain criminal law claims, especially fraud claims, to be arbitrable.[92] For example, the US Supreme Court ruled that the claims based on the violation of the anti-fraud-legislation –the Racketeer Influenced and Corrupt Organizations Act (RICO) – are arbitrable, insofar as it is not possible to interpret that Congress has tried to reserve their application in exclusivity to state legislation.[93]

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88 *In re Shearson/American Express Inc v McMahon*, 482 US 220 (1987). See also Michael Reisman and others, *International Commercial Arbitration* (1st edn, Foundation Press 1997) 309.

89 *In re Rodriguez de Quijas v Shearson/American Express Inc*, 490 US 477 (1989).

90 Roque Caivano, 'Planteos de Inconstitucionalidad en el Arbitraje' (2006) 2 Revista Peruana de Arbitraje 107, 107.

91 Judgment of the Constitutional Court, Case № 142-2011-PA/TC, 21 September 2011, 24 (own translation).

92 *Shearson/American Express Inc v Mcmahon*, 482 US 220 (1987) (finding RICO claims arbitrable); *Meadows Indemnity Co v Baccala & Shop Ins Services Inc*, 760 F Supp 1036 (EDNY 1991) (finding fraud claims arbitrable).

93 *In re Shearson/American Express Inc v McMahon*, 482 US 220 (1987).

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d. Towards universal arbitrability

Having reviewed the evolutionary process that has occurred with arbitrability in different jurisdictions, we can affirm that international arbitration has dramatically changed on its face. Evolution is leading us towards universal arbitrability.

The review that we have made on the arbitrability of different matters in several countries is reliable proof that conditioning the arbitrability of disputes on whether the disputes are economic is at least questionable. I believe that in countries that have institutional weaknesses and that have highly congested judiciary, the expansion of arbitrability to other matters should be the subject of intense debate as a possible legislative policy.

It has been argued, however, that expanding arbitrability to family, inheritance, antitrust or bankruptcy disputes is contrary to public order or public interest. It is unpersuasive, however, to affirm that submitting these types of disputes to arbitration is contrary to public order or public interest without further arguments; it must be explained why it allegedly contravenes these concepts, and such explanation is conspicuously absent. As explained by Karim Youssef, an expansion of arbitrability can be justified by several reasons:[94]

- *first*, the simple yet fundamental observation that, over the last few decades, arbitration has become a better justice. For many contemporary thinkers, arbitration is the normal forum (if not *the juge naturel*);
- *second*, international arbitration is a sophisticated justice that has 'matured' to provide sufficient protection for weaker parties or the public interest;
- *third*, the classic fear that arbitrators would under-enforce public laws is no longer tenable, since international arbitrators routinely apply mandatory rules, foreign *lois de police* and may occasionally be brought to apply constitutional or international rules;
- *fourth*, arbitrators are not insensitive to considerations of equity or efficacy, and may even apply moral rules;
- *fifth*, arbitrators are also equipped to deal with complex contracts or highly technical subject matters.

Arbitrability will continue to evolve and, therefore, it will increasingly gain ground. As the years go by it will become more obvious that there are several disputes that should never have been left to the state. In a few years

94 Youssef (n 33) 65–66.

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it might seem absurd for the state to establish which are the arbitrable controversies. The rule might rather be the opposite: the State will have to determine which are the non-arbitrable controversies. As explained by Karim Youssef, in the not-too-distant future, national laws would find vain the provision of definitions of what claims are arbitrable.[95]

In my opinion, prohibiting the parties from submitting their family, inheritance, antitrust, intellectual property, or bankruptcy disputes to arbitration is an illegal restriction to party autonomy and freedom of contract. Defending that parties should not be always entitled to decide how their disputes should be resolved – regardless of the type – implies assuming that the state knows better than the parties how their disputes should be resolved. However, in accordance with the principle of consumer sovereignty, it is the parties who know better than anyone what is the best way to resolve their disputes.

In the US discourse, much has been written about when the State is entitled to enact a mandatory rule. In the words of Ayres and Gertner:

> (…) immutable rules are justifiable if society wants to protect (1) parties within the contract, or (2) parties outside the contract. The former justification turns on paternalism; the latter on externalities. Immutable rules displace freedom of contract.[96]

Thus, immutability is only justified if unregulated contracting would be socially deleterious because parties internal or external to the contract cannot adequately protect themselves.[97] None of this would happen if the arbitrability of disputes is expanded, especially in countries with institutional weaknesses. Indeed, the expansion of arbitrability in various jurisdictions has not led to socially undesirable, but rather positive results.

Finally, it is worth mentioning that the proposal to expand arbitrability to any type of dispute is also in harmony with International Law. In effect, the New York Convention establishes in article II (1):

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, *whether contractual or not*, concerning a subject matter capable of settlement by arbitration. (emphasis added)

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95 ibid 66.

96 Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1990) 99 Yale Law Journal 87, 88.

97 ibid 88.

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Additionally, article V(2)(a) of the New York Convention states:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
> (a) The subject matter of the difference is not capable of settlement by arbitration *under the law of that country*. (emphasis added)

It follows from this provision that the New York Convention provides states with discretion to decide the scope of arbitrability of their own legal system. Therefore, in accordance to International Law, States are entitled to expand arbitrability to administrative, family, consumer, antitrust, bankruptcy and other types of disputes without inconvenience.

V. Conclusion

Arbitration rules and institutions should not be an invention of the legislature, but rather the result of an evolutionary process. The legislator has to let the spontaneous order do its job. In arbitration, the *lex* has only one function: to recognize the arbitral *ius* as prior to it and to ensure that it can continue to develop freely and organically. Thus, one might say that the arbitral legislator, bound by *observational objectivity*, must do as the Royal Spanish Academy does with language: just polish and recognize the words that make up the language, which is the first and most important spontaneous order. It should give splendor to arbitration, which is the only thing that, at the end, must shine.[98]

98 De Benito (n 5) 126.

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§ 12 International Arbitration as a Project of World Order: Reimagining the Legal Foundations of International Arbitration

Santiago Oñate[*]

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…the complex of social processes and organization that are generally referred to as "the law" may be viewed from many different perspectives. People trained and sometimes locked into one perspective can scarcely believe there may be others, even less that they are equally authentic and that, for some or all tasks, they may be even more useful than the one with which they were indoctrinated, and as a result, with which they are comfortable.

Michael Reisman[1]

I. Introduction

International Arbitration has gained traction not only as a popular mechanism to resolve transnational commercial disputes, but in many cases, as the default mechanism. However, despite its steady incorporation into the realm of dispute resolution and even norm creation, a comprehensive theoretical backbone is lacking. Especially one question is still awaiting a definitive answer: where does the arbitrator's power come from? Some have even referred to this as the 'ultimate question'.[2] This question deals with the nature and content of international arbitration, the notion of an arbitral legal order, and the allocation of power between state courts and arbitral tribunals.[3] International arbitral tribunals are private adjudicative actors that decide transnational commercial disputes between private actors or private actors and public entities.

The *ultimate question* does not concern the law applicable within arbitration proceedings, but rather the theoretical premises for the law applicable to arbitration. As Jan Paulsson has stated, 'the law applicable to arbitration is not the law applicable in arbitration. The latter provides norms to guide arbitrators' decisions. The former refers to the source of their authority and of the status of their decision: the legal order that governs arbitration.'[4] In the

1 W Michael Reisman, *The View from the New Haven School of International Law*, Proceedings of the ASIL Annual Meeting, 86, 118-125 (1992).

2 Alan Scott Rau, *The Allocation of Power between Arbitral Tribunals and State Courts* (The Hague Academy of International Law 2018). 15

3 On the potential tension between state courts and arbitral courts *see* Emilia Onyema, *The Jurisdictional Tensions between Domestic Courts and Arbitral Tribunals*, in Andrea Menaker, (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity* (Alphen aan den Rijn: Kluwer Law International 2017). 481-500. In that context, it has now become common place to define the seats of arbitrations by their proclivity towards arbitration. One can identify 'arbitration friendly' or 'pro arbitration' seats.

4 Jan Paulsson, *The Idea of Arbitration* (Oxford University Press 2013) 29.

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terminology of the introductory chapter to this book, one might say that it is a question concerning *productional objectivity*; is the foundation of arbitration left to the discretion of those in power or are there objective principles that underlie the arbitral order and legitimize the arbitral activity?[5]

So far, one might classify the existing theoretical approaches to the *ultimate question* into three camps[6]: (i) The *localist* approach argues that the power of the arbitrators stems from the State of the seat[7] of the arbitration. Insofar that that they are bound by a specific domestic legal system, they are part of that domestic system's dispute resolution apparatus. (ii) The *pluralist* approach is still State-centred. However, it is already the fruit of the 'broad consensus in favour of an increasingly liberal approach towards arbitration'[8]. Indeed, according to this approach, arbitration is not linked only to one state, but to the community of states altogether. (iii) The *autonomous* approach conceives arbitration as a *sui generis* legal order, not anchored in any domestic legal system. At the root of these ideas lies an ideological perspective as to the role arbitration should have, a quest for order, and a desire to delimit the allocation of power between state courts and arbitral tribunals.

I argue that the existing theories do not provide a satisfactory account of the normative purposes of international arbitration. In the terminology of the introductory chapter to this book, one might say that I reject purely voluntaristic or *subjectivist* interpretations of arbitration, which only point to the will of the state (*localists*), the community of states (*pluralists*) or of the parties to the arbitration agreement as part of an order on its own

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5 In detail on this notion *see* Philip M Bender, 'Ways of Thinking about Objectivity' (§ 1), under II. Whether these principles are also part of the concept of law, is a definitional question, which will not be pursued here. On that, see Bender (n 5) (§ 1), text to n 8–14.

6 Philippe Fouchard, Jean Fran-François Poudret, Sébastien Besson, Frederick Alexander Mann, Emmanuel Gaillard and Jan Paulsson have been some of the ones who have attempted to theories of arbitration. For a comprehensive analysis of the main theories of the arbitral order *see*, Francisco González de Cossío, *Arbitraje* (Porrúa 2014).

7 The seat of the arbitration is not necessarily a physical but legal concept. The seat determines de legal home for the arbitral proceeding and will determine which courts can intervene in matters of the constitution, provisional measures, jurisdiction and annulment of the final award, among other things. The *lex arbitri* will de that of the seat of the arbitration.

8 Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff 2010) 13.

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(*autonomists*).[9] Indeed, the idea that arbitration is merely and purely a creature or matter of contract, and all that is set up around or within it is to maintain said consent, is, as Scott Rau once put it, 'a point so banal, so commonplace, so formulaic, that readers justifiably wince when they see it repeated'[10]. The contractual and territorial approaches to the *ultimate question* lack 'the ability to resolve by itself the many questions relating to the source of an arbitration agreement's validity'.[11] Therefore, a purely observational logic (*observational objectivity*[12]), according to which arbitration norms can be set by merely observing the spontaneous activity of the arbitration community[13], does not guide us in deciding how we should behave as norm setters. In the end, subjectivist approaches (on the state and contractual level) do little to clarify the normative purpose of international arbitration. Many of the ideas that have surrounded the notion of the arbitral legal order have not only parted from this contractual premise but, in addition, have purported the idea of arbitration only as an *alternate* mechanism to resolve disputes *vis a vis* state courts, rather than a mechanism playing a role within a larger system, and not necessarily as a matter of dispute resolution but as a matter of policy, better yet: international legal policy.

In contrast to the existing arbitral theories, the goal of my approach is to explicitly recognize that international arbitration is not a value-free normative order, but rather the expression of a global normative consensus. I argue that the global community has set certain values to be pursued, specifically in matters of international commerce and development. To turn yet again to the terminology of the introductory chapter, my approach can be described as one which aims at *deontological objectivity*.[14] My approach is deontological in that I find the legitimacy of arbitration in the values of the global community – even though I do not necessarily argue for a natural law concept since I consider these values binding due to a global consensus.[15] These values provide international arbitration with a

9 Bender (n 5) (§ 1), text to n 4–6 (on subjectivity in general), 120–136, 147–155 (on subjectivity on the productional level).
10 Scott Rau (n 2).
11 Gaillard (n 8) 13.
12 For this type of objectivity see Bender (n 5) (§ 1), text to 16–32.
13 For this conceptualization of arbitration see Núñez del Prado, 'Stateless Justice: The Evolutionary Character of International Arbitration' (§ 11).
14 On this way of obtaining objectivity see Bender (n 5) (§ 1), text to 33–42.
15 Therefore, one might say that I accept a subjective element at the highest level. See in detail Bender (n 5) (§ 1), text after n 52 (on the possibility of combining

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normative purpose, so that arbitration is to be understood as a project that serves these values – the *arbitration project*. The role domestic legal systems are called to play in relation to international arbitration, is not to be the source of its juridicity or the recognition of an autonomous arbitral order, but rather the participation in the iterative process by which the *arbitration project* is executed. Insofar, I rely on the theory of the *transnational legal process* in order to dispel the ideas that hold the relationship between domestic systems and international arbitration as a dichotomy, rather than as one of common players in the execution 'of the value-based international community'.[16]

In what follows, I will first outline the existing theoretical approaches more in detail (II.), before I present my own value-based approach, which conceives arbitration as the project of a specific world order (III.). Then, I will further conceptualize and concretize this world-order-approach by reference to different theories of (international) law (IV.). Finally, a short section briefly concludes the aforementioned (V.).

II. Existing Theoretical Approaches to the Arbitral Legal Order

There have been many proponents of several theories. However, the theoretical premises of each can be categorized into three main conceptual building blocks: (i) the *localist* approach – international arbitration as an element or mechanism of a single national legal order; (ii) the *pluralist* approach – international arbitration as an element of a plurality of legal orders and; (iii) the *autonomous* approach – international arbitration as an autonomous legal order.

1. The localist approach

The first theory which conceives international arbitration as dependent on a single national order has normally been referred to as a *jurisdictional*[17] theory, which can also be referred to as a *localist* theory. The essence of this

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different modes of thought), text to 120–147 (on permutations of subjectivity and objectivity on different levels).

16 Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press 2014) 46.

17 See González de Cossío (n 6) 132.

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theory can be relegated to the attempt of equating the arbitral function to that of a judiciary or judge. The exercise of comparison is concentrated in defining the similitudes and differences between one and the other, ultimately anchoring both to the same legal order but outlining their differences.

This theory has a strong territorial component since international arbitration is seen as an element of the corresponding seat. In the words of one of its most outspoken advocates, Frederick Alexander Mann, 'there is a pronounced similarity between the national judge and the arbitrator in that both of them are subject to the local sovereign (…)'.[18] This notion clearly puts forth a concept of international arbitration in which its *international* component is set aside, and the adjudicatory function is seen as its essence, making it not only similar to the public function of the judiciary but also making it part of the state's legal apparatus. In this first theory, the idea of parties' consent as the root of arbitral power does not even enter into play, since the legal system of the seat is seen as grantor of adjudicative power.[19]

Foucault said that the anxiety of our era had to do fundamentally with a fixation on space.[20] The localist approach represents this fixation because it demonstrates the incapability of abstraction beyond the physical space we come to know and interact with. In so doing, the localists believe that the only plausible source of power for arbitration is that of the *place* in which it is called to adjudicate.

Moreover, this idea has also found footing in more contemporary explanations of the arbitral order. Some proponents of a subjectivist approximation to the *ultimate question* have considered that the parties' choice of seat is not trivial in the sense that their consent to submit the arbitral proceeding to a specific country implies that they are subjecting the arbitration to a specific legal order. In so doing, proponents of this subjectivist approach to the localist theory root the essence of the concept of *lex loci* in the selection of a determined legal order. [21] This approach inevitably presupposes that one can only be subject to one legal order at a time.

18 Cited in Gaillard (n 8) 16.

19 See Gaillard (n 8) 13.

20 Michel Foucault, 'Of Other Spaces: Utopias and Heterotopias' in Neil Leach (ed), *Rethinking Architecture: A Reader in Cultural Theory* (Routledge 1997 [1984]) 330–336.

21 Roy Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17 Arbitration International. 19–40.

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Furthermore, this idea rests on the premise that each country is its own legal order, functioning in legal vacuums.

As was stated above, the reference to the different theories of the *ultimate question* are of little relevance for a conceptual debate if we are unable to identify the normative premises with which they operate. Regarding the previously mentioned *localist* theory, *state positivism* is the driving force of such conception. Closely following Kelsen's idea of *Grundnorm* and Hart's preposition of primary and secondary norms, localists seem to find the only logical explanation of the source of international arbitration in a state-centred legal outlet which can have both. The localist conception is insolubly connected to a sovereign state's jurisdictional power. I will not contend nor dwell with such theories because they exceed the purpose of this presentation. However, they are very limited analytical tools when analysing transnational legal processes as well as international legal policy.

2. *The pluralist approach*

The *pluralist* (or multiple legal orders) approach considers that the source of power of arbitration comes from states' commitments to recognize the effectiveness of arbitral awards. In line with the object and purpose of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'), proponents of this theory suggest that the law of the seat is one among many legal orders that can recognize the legal effects of an arbitral award and 'the law of the country or the countries where enforcement is sought has indeed as much entitlement in this respect as that of a State in which the arbitration took place'.[22]

This has led to the idea that the internationalization of arbitration has pushed towards its delocalization, thereby implicating that the power or force is not due to the seat of the arbitration.[23] This approach has not found a homogenous judicial understanding around the world. While Courts in the United States have incorporated the idea of *primary* and *secondary* jurisdictions to describe the relation between the seat of the arbitration and that of the place of enforcement[24], French courts have gone as far as to determine that an award (and therefore, international

22 Gaillard, (n 8) 25.

23 Jan Paulsson, 'Delocalisation of International Commercial Arbitration' (1983) 32 The International and Comparative Law Quarterly 53; González de Cossío (n 6).

24 *Karaha Bodas Co v Perusahaan Pertambangan Minyak Dan Gas Bumi Neg*ara (2007) United States Court of Appeals, Fifth Circuit, 364 F3d 274, 287; *Termorio SA v*

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arbitration as a whole) is not integrated into the legal system of the seat.[25] Despite the latter affirmation having been made to establish that the place where enforcement was sought had as much authority as the seat, it goes to show the intended relevance of multiple jurisdictions and the unanchoring of arbitration from the seat.

It is precisely the unanchoring of awards the primary driving force behind the delocalization theory and the chief aim of a multiple legal order approach. This is so because by multiple orders what is meant is that there is a possibility that the award be recognized and enforced elsewhere, and the potential of enforceability inevitably means that the source of power cannot be localized. Contrary to the localist approach, which almost exclusively concentrates on the legal order that recognizes the possibility of an arbitral agreement (ie the seat), proponents of the multiple legal orders theory shift the relevance to the outcome of an arbitral proceeding (ie the award).[26] Therefore, the possibility of it being enforced in multiple places means that the source of power can be found in multiple legal orders.

However, the pluralist approach is still very much related to the localist theory. Despite the fact that it conceives a more internationalized perspective of arbitration and seeks to give operativity to the New York Convention, its normative premise is still strongly based on state positivism and sovereignty. This is because even though the relevance of the seat is shifted, 'the conception that roots the juridicity of arbitration in a plurality of legal orders does not consider the parties' will to be the sole source of the binding force of the arbitration agreement'[27] but rather the domestic legal systems which are giving effect to the different stages of the arbitral proceeding. Therefore, Gaillard refers to this approach as the 'Westphalian model' because states are the sole source of sovereignty and therefore, the legitimacy of international organizations comes not from a supranational global order but rather from the will of states.[28] In the words of the Court of Appeals for England and Wales:

> Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral pro-

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Electralanta SA ESP (2007) US Court of Appeals for the District of Columbia Circuit 487, F.3d 928.

25 *Hilmarton Ltd v Omnium de traitement et de valorisation* (1994) Cour de Cassation, Chambre civile 1, 92-15.137.

26 Gaillard (n 8) 25.

27 Gaillard (n 8) 26.

28 Gaillard (n 8) 28–29.

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> cedures floating in the transnational firmament, unconnected with any municipal system of law.[29]

A partial recognition of the pluralist theory was also upheld in the *Apis AS v Fantazia KeresKedelmi KFT* case in which the English court considered that the fact an award had been set aside in the country of origin did not hinder the possibility to enforce it abroad.[30] However, the juridicity of an award is still thought to derive from the judicial interaction.

The multiple legal orders approach is troublesome both for its practical and theoretical implications. Regarding the former, the reinvigorated judicial perception that each judicial body, whether in the seat or place of enforcement, is endowed with the mission or obligation to grant juridicity to arbitration has had many complex or 'chaotic'[31] practical consequences, like the enforcement of annulled awards. Regarding the theoretical implications, this approach does not ring true to the values set forth by the New York Convention. Contrary to private international law practice of enforcement and recognition of foreign judicial rulings or judgments in which domestic courts have to internalize and make *theirs* the judgment, in international arbitration the judicial attitude of domestic courts towards foreign awards is not based on a preconceived notion of the juridicity given to that award by the judicial authorities of the seat, but rather it owes its judicial enforcement to a global value set forth in an international convention.

Moreover, the multiple legal orders approach provides more of a descriptive account than a normative premise for arbitral power. This is so because it sets forth the idea that the foundations of arbitral power not only stem from the legal order of the seat, but of any other jurisdiction in which the award is sought to be enforced. However, this theory fails to recognize an overarching normative premise with which this operates. The legal recognition of arbitration by domestic legal systems is a mere description of the implementation effects of the New York Convention, rather than a convincing argument for its transnational use. In the end, the multiple legal orders theory is a partially appropriate account of the

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29 *Bank Mellat v Helliniki Tachniki SA* (1983) England and Wales, Court of Appeal H730.301.

30 AA Otynshieva, AM Ergali and TT Arvind, 'The Effect Of The Delocalisation Theory In The Context Of Art. V (1) (E) Of The New York Convention – An Investigatin Of Uniformity In Enforcement Of Awards In Various Jurisdictions: Delocalisation In Practice' (2018) 86 Journal of Actual Problems of Jurisprudence 66, 70.

31 Paulsson (n 10) 39.

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execution of a much larger systemic enterprise to which I will come back when presenting my own theoretical approach in the upcoming section.

3. *The autonomous order approach*

Finally, as a response to the aforementioned approaches or theories, a third explanation came about: the idea of international arbitration as an autonomous legal order. Gaillard, as chief proponent of this theory, suggests that the juridicity and source of arbitration is to be found in a particular transnational legal order that can be labeled as *the arbitral legal order*.[32] At the center of this idea lies the argument that it is not the domestic legal system that determines juridicity but rather the arbitrators 'strong perception' that they do not administer justice under the umbrella of a particular state, but rather as agents of an international community. The center of gravity of this idea are the arbitrators. This can be further seen by the fact that Gaillard conceives arbitrators as the 'organs of a distinct legal order'[33] and that they apply transnational legal rules, which although based on state's legal activity, do not belong exclusively to any state.[34]

In so doing, Gaillard correctly distinguishes between the monopoly of enforcement that state courts have and the source of juridicity of international arbitration, and therefore separates the legal effects of an act from its genesis. The purpose of said distinction lies in his assertation that the monopoly of enforcement by states does not surrender arbitration to all the potential forums where an award might be enforced. Paulsson pushes back on Gaillard's proposition on the basis that it does not adequately represent reality, insofar as arbitrators do not base their jurisdiction on the multiplicity of fora where their awards might be enforced. This has even been categorized as a 'false start'.[35] In so doing, Paulsson rejects all the aforementioned approximations and proposes a 'realistic' account by revising the pluralistic theory. Despite its use as a valid criticism, it still falls short of proposing a sound normative framework to define the normative bases of international arbitration.

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32 Gaillard (n 8) 35.
33 Gaillard (n 8) 59.
34 ibid.
35 Paulsson (n 4) 40.

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However, my main contention to Gaillard's theory is that, to an extent, it conceives law as shaped by the discretion of those who hold power (in this case, arbitrators). The center of gravity of his theory is the activity and perception of arbitrators, meaning that the mere will of the agents interacting with this legal order, determines its content (*subjectivism*).[36] In this regard, even though Gaillard identifies that arbitrators see their activity (and with it, international arbitration) as part of an arbitral legal order, the source and content of said order lacks a normative framework. Under Gaillard's theory, the recognition of an autonomous order is sufficient to identify not only the source of international arbitration, but its relevance.

It must be said that Gaillard does mention the idea of pre-positive principles and their relation to arbitration. When analysing international arbitration as an autonomous legal order, Gaillard considers that one of the philosophical postulates that could support it is a *jusnaturalist* approach. He specifically mentions that through a *jusnaturalist* outlook the autonomous arbitral order could be justified because it acknowledges higher values that result from 'the nature of things or of society'.[37] However, he does not agree with it. In his rejection, Gaillard – as well as proponents of the *jusnaturalist* trend like René David, Bruno Oppetit and Pierre Mayer – conceive the *jusnaturalist* trend as something that infuses the applicable law in arbitration. They analyse this trend by identifying the influence natural law or principles have over the development of commercial law by arbitral tribunals and even the tension between *lex mercatoria* and applicable law.[38] My proposal, while recognizing or asserting the existence of a value-based system to justify the existence of international arbitration, does not recognize it as the values to be applied within arbitrations, but rather as the normative justifications of its legal essence. As will be presented in the following sections, the assertion that there is a world order which enshrines certain values to be attained through projects, is not the same as recognizing a natural order of things that permeates to the way in which arbitrators resolve disputes.

Despite the aforementioned contentions, Gaillard's proposal does point us into a correct direction in terms of attempting to find the answer to the 'ultimate question' in a transitional order and set aside the anchoring value the *localists* give to domestic legal systems. Nevertheless, his theory

36 See Bender (n 5) (§ 1), text to 4–6 (on subjectivity in general), text to 53–75 (on subjectivity and lawmaking), text to n 120–136, 147–159 (on different forms of subjectivity in adjudication).

37 Gaillard (n 8) 40.

38 Gaillard (n 8) 40–45.

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is strongly based on the self-perception of arbitrators and the role they claim to have. That approximation is not only empirically questionable but theoretically inadequate to explain a transnational legal order. Therefore, in order to redeem what Gaillard correctly identifies as a transnational essence, we must look at the narratives and values that underlie that transnational order, in order to try and identify the possible normative proposals of international arbitration. Moreover, Gaillard claims that international arbitration is an autonomous transnational legal order. However, this autoreferential explanation also falls short of an adequate description of the context and system in which arbitration functions.

When analysing legal phenomena, one can do it in either of two ways: through its concept or its function. While the former tries to capture the defining and evident elements and discuss its conventionally settled meaning, the latter is concentrated in identifying the contributions of the legal phenomenon to a larger whole.[39] Therefore, my chief concern with the existing approximations to a legal theory of international arbitration is that they are all done through its concept, but are inapt to locate international arbitration in a transnational and global context and with it, achieve what Jhering described as 'jurisprudence of interests'[40]. Viewing international arbitration as a single-function enterprise ignores its contribution to a larger whole. It is within a value-based global order where we must look for the meaning of the *ultimate question*.

III. The World Order Approach

International Arbitration theories have seldom tried to identify the underlying narratives and values that justify adjudicatory power. The debate over *lex mercatoria* that took place in the 80s and 90s[41] or even the suggestion that the New York Convention can serve as a *Grundnorm* in terms of *Kelsenian* theory[42], do not do so. The former deals with a question of substantive law applicable to a dispute, even though it can be the manifestation of an underlying normative premise, and the latter is the legal

39 von Bogdandy and Venzke (n 16) 6–7.

40 'Interessenjurisprudenz', see Herbet D Laube, 'Jurisprudence of Interests' (1949) 34 Cornell Law Review 291.

41 See Filip de Ly, *International Business Law and Lex Mercatoria* (TMC Asser Institute 1992).

42 González de Cossío (n 6) 167 (even though the term seems to be used differently from what Kelsen had in mind).

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representation of a global value. Therefore, we must look more abstractly as to what lies beneath. I am sure that both *lex mercatoria* and the New York Convention are part of the same *project*. However, they are not its origin.

In the aftermath of World War II the protectionism of the remaining imperial orders and the fascist states ceded to a revitalized globalized and inclusive economic system.[43] This led to the rise of multinational enterprises which became 'advocates of international order in that they appreciate the utility of maintaining and enhancing a stable transnational economic environment that enables their various enterprises to flourish'.[44]

In this context, in 1974 the UN General Assembly solemnly proclaimed its 'united determination to work urgently for the establishment of a new international economic order.'[45] This new order set the stage for new world values to shape cooperative action. This can be seen by the fact that in the same year the UN General Assembly adopted the Charter of Economic Rights and Duties of the State, which established that economic relations should be governed by 'international co-operation for development'[46] and that 'all states have the duty to contribute to the balanced expansion of the world economy'.[47] Furthermore, in 1986 the UN General Assembly adopted the Declaration on the Right to Development, which further emphasized the reconfiguration of global economic values. It specifically stated that 'states have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.'[48] These global commitments can be seen as 'the most explicit normativization of this view of foreign investment'[49] and the values set forth by a new global order.

Moreover, the latter also entailed new collective arrangements and the creation of economic, political, and legal theories that could reinforce

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43 W Michael Reisman, *The Quest for World Order and Human Dignity in the Twenty-first Century: Constitutive Process and Individual Commitment* (The Hague Academy of International Law 2012) 57.

44 ibid 60.

45 United Nations General Assembly Resolution 3201 (S-Vi), Declaration on the establishment of a New International Economic Order (1974).

46 Charter of Economic Rights and Duties of the State, ch I (1974).

47 ibid, ch IV, art 31.

48 Declaration on the Right to Development Adopted by General Assembly resolution 41/128 of 4 December 1986, art 4.

49 W Michael Reisman, 'The Empire Strikes Back: The Struggle to Reshape ISDS' (2017) <http://dx.doi.org/10.2139/ssrn.2943514> accessed 2 October, 2020. 6.

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these globalized tendencies. This strongly influenced the subject at hand because notions of state power (including judicial power) started to be redefined to accommodate a new world order and the sacrosanctity of domestic jurisdiction began to dilute in the transfers of power to international institutions.[50] New consensus as to the global values to be protected (ie global commerce and investment) also required a transition of adjudicatory power from domestic systems to transnational ones. In the words of Michael Reisman:

> The implications for the Westphalian theory are drastic. In the aggregate, all of these entities and all who participate in the global economy constitute a transnational force. (…) a collective decision of the transnational market may view a national statute to deal with a legitimate national concern as less conducive to profitable enterprise than arrangements in other available venues (…).[51]

This new era of a globalized economy also gave way to a 'new generation of international adjudicatory mechanisms'[52] that included arbitration as the default mechanism to solve specific categories of commercial and investment disputes. In so doing, certain types of disputes began a process of adjudicatory displacement, from what was originally a judicial endeavour to a transnational enterprise of conflict resolution and international norm advancement. To some, the migration from exclusive state jurisdiction over certain international commercial disputes to international arbitration responded to a pragmatic need of parties to resolve their disputes in a more cost-efficient, private, predictable, and self-composed manner. While that may be true to some extent, the underlying narrative was one of globalized commercial norms and the objective of facilitating arrangements that pursued values of open economies. Therefore, while the choice to celebrate an arbitration agreement between international companies may be a specific and personal decision of the parties, it is also a collective arrangement to internationalize commercial disputes in an effort to homogenize global commercial values and expectations.[53]

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50 Reisman (n 43) 61.

51 Reisman (n 43) 60.

52 Gary Born, 'A New Generation of International Adjudication' (2012) 61 Duke Law Journal 775, 793.

53 The decision to arbitrate is not merely or purely in the hands of potential litigants but also in the hands of state legislatures, international organizations, arbitral institutions and other agents that create *nudges* to arbitrate, and mold institutional designs to facilitate it.

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In this vein, if we wish to construct a more complete and substantive narrative for the social, political, and legal relevance of international arbitration, and with it, identify its legal nature, we must do it from a multifunctional perspective. Some theorists like Armin von Bogdandy and Ingo Venzke have contributed to the public theory of international adjudication by proposing a multifunctional approach. This consists of departing from the idea that adjudication serves a single dispute resolution function, and rather stating that they have other functions such as the stabilization of normative expectations, law making, and functioning as 'organs of the value-based international community'.[54] While von Bogdandy's and Venke's theory concentrated on international tribunals, I think their concept can very well be applicable to international commercial arbitration.

Therefore, international arbitration's adjudicatory power does not stem from pure party or state voluntarism[55] but from a systemic whole that justifies its existence through the values it pursues. It is when we look at international arbitration from a multifunctional approach that we are better placed to try and identify a sound legal theory that explains its legal content and source, because arbitration, as any other activity, has a function in relation to something else.

IV. Further Conceptualization of Arbitration as a Project of the World Order

The previous section demonstrates that there is an identifiable world order which seeks to promote certain values. A global economic consensus has created new mechanisms by means of which these objectives and values are to be attained. Hence, the need to create agile adjudicative institutions that not only promote investment, commerce, and the rule of law, but enhance normative expectations based on said values. However, how concretely can we think of international arbitration as an activity with the normative purpose or function to achieve those goals and values? In what follows, I will answer this question through the lens of three theoretical concepts.

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54 von Bogdandy and Venzke (n 16) 46.

55 In detail Bender (n 5) (§ 1), text to 4–6 (on subjectivity in general), text to 53–75 (on subjectivity and lawmaking), text to n 120–136, 147–159 (on different forms of subjectivity in adjudication).

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1. *Projects and systems (Kahn)*

Paul W. Kahn has provided not only an enriching new account of systems but a very conceptually useful one as well.[56] Kahn identifies that within natural and political orders, two ideas have always loomed into society's organization: *project* and *system*. He suggests that a system has an internal normative structure that is quite distinct from that of a project. While a project strives to achieve an idea that is outside itself, a system maintains an 'immanent principle of order'.[57] Moreover, he states that a system (acting as a whole) operates as a principle of order and the project is the intention to fulfill certain objectives. He specifically states: 'to imagine a system, then, is to imagine order outside of the terms of a project. For this reason, we ask of a system not what its goal is, but what its laws are'.[58] In this vein, laws give specific projects stability and help them attain the objectives that lie outside themselves.[59]

We can say that systems are value-based principles of order, they have an array of projects that set out to attain the systemic whole's end and pursue its values. Therefore, 'the ethos of a system is not to accomplish an end, but to maintain itself'.[60] However, this does not necessarily entail that systems are perpetual and never-changing orders. They can very well be pushed towards change and are not immune to externalities. However, the change must be explained in terms of the objectives of the system (eg growth).[61]

Furthermore, a key distinction of systems is that they have patterns of self-correction, while in projects there is a deliberate act to correct, amend or change. While the former alludes to a more natural arrangement of order, the latter implies a more conscious and deliberate mission to accomplish the objectives of order set out by the systemic whole. This is also relevant when analysing specific changes to the system because a disturbance or change within a project might be an expression of order at the systemic level. Indeed, the laws of the system might conceive a change in the projects as part of the order.[62]

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56 See Paul W Kahn, *Origins of Order. Project and System in the American Legal Imagination* (Yale University Press 2019).
57 ibid, 18.
58 ibid, 19.
59 ibid, 10.
60 ibid, 20.
61 ibid.
62 ibid, 21.

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Withing this framework I propose that international arbitration is a *project* of world order (the system). Arbitration cannot be conceived as a system because it lacks an internal normative structure. It is a deliberate plan or mechanism created for a specific function and while projects can have sub-projects, this does not mean that they are systems in themselves. After World War II, and after the Cold War, the natural order of the global community received an exogenous shock that pushed it towards change – a change that conceived global order in new ways, one of which was global commerce. Therefore, the new world order that set new global values, instilled the necessity to craft new projects to attain systemic order. One of these projects was a collective and international arrangement[63] for dispute resolution that would foster global order in the subject of commerce. This exogenous shock can be characterized by the fact that in the *travaux preparatoires* of the New York Convention it was stated that 'the continuing expansion of world trade and the acceleration of the commercial processes had soon caused the business community to regard the provisions of the Convention as inadequate and, in 1933, the International Chamber of Commerce had prepared a new draft of a "Convention on the Enforcement of International Arbitral Awards"'.[64]

The fact that the outlines of the world order system were redrawn do not diminish its systemic traits. To this end, Kahn makes a poignant example about immigration:

> Disruption of a system can be a cross-border phenomenon: the entry of something new. If the system can absorb the new by incorporating it into its internal order, then the boundaries of the system may be effectively redrawn. What had been outside becomes a part of the systemic order of the whole. Think, for example, of immigration. We might imagine immigrants – particularly undocumented – to disturb the internal order of the community. Our response, however, might be to reimagine the borders of the relevant system. We might move from thinking of the territorial state as the boundaries of the system to thinking of regions and their population flows as the system.[65]

63 One can say that there is no consensus or collective arrangement if we still find countries that are not as open to the idea of international arbitration as others. However, we can say that there is a general consensus on the main objectives of international arbitration. The clearest example would be there are currently 168 parties to the New York Convention.

64 United Nations Economic and Social Council, E/CONF.26/SR.1 12 September 1958.

65 Kahn (n 56) 21.

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Therefore, the redrawing of the world order after World War II did not necessarily entail a new system, but rather a reconceptualized notion of order, and the need to envisage new projects to attain that order and the newfound values of the world community. This means that world order (as a system) reconceived its normative structure to include new notions of order, such as the guarantee of international trade, and the legal order of transnational transactions.

International arbitration finds its normative purpose in its mission as a *project* of global order. It is the *system* of global order that grants it not only its course of action, but its legitimacy, content, and purpose. In order to maintain this notion, we also have to recognize that projects can deviate from their indented course and that their function will always be measured with reference to their end.[66] This is particularly relevant when we observe the creation of new arbitration rules by institutions, new soft law measures or even doctrinal reconsiderations as to certain arbitral subjects. They are not examples of a system with internal rule creation, but rather the active and conscious enterprise of amending, reconfiguring, and restructuring a project, in order to best attain its systemic function.

Another example of the recognition of a global project can be seen through the adoption of certain rules regarding international arbitration by the Institute of International Law. In its Article 2 it was emphasized that 'in no case shall an arbitrator violate principles of international public policy as to which a broad consensus has emerged in the international community.'[67]

Finally, the idea that the resolution of international commercial disputes corresponds to international order has been recognized in some cases like *Mitsubishi Motors Corp v Soler Chrysler Plymouth, Inc.*, in which the United States Supreme Court asserted that '(…) the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration".'[68] Therefore, the imagination of

66 Kahn (n 56) 11 (using the metaphor of a machine, which can only be repaired by agents conscious of its function).

67 Institute of International Law Eighteenth Commission, Rapporteur, 'Arbitration Between States, State Enterprises, or State Entities, and Foreign Enterprises' (1989).

68 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985).

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international arbitration as a project of world order or global governance[69] is readily recognizable within the international experience.

After these reflections, we can now further clarify what distinguishes Gaillard's transnational order or autonomous legal order approach and my idea of the *arbitration project* as part of a world order. While Gaillard recognizes that there is a transnational order of arbitration, he emphasizes its existence on the perception arbitrators have as international judges and the creation of transnational rules that apply to international arbitration, which do not belong exclusively to domestic systems. Furthermore, the interaction of international arbitration (as an autonomous order) is seen by Gaillard to interact with domestic orders by means of 'recognition'.[70] However, his transnational theory does not identify the normative purpose of arbitration as a transnational phenomenon and with it, it fails to identify what bounds that transnational order to domestic systems. Additionally, Gaillard's theory seems to relegate domestic systems to a role of recognizing an existing order that lives outside themselves, and with it, ignores the multifunctional roles different actors play in the execution of a common *project*. I contend that it is only through the identification of a value-based system of global order that we can identify the normative purpose of arbitration as a *project* and the deliberate execution of said project by individual states, not as a recognition of an autonomous system but as a deliberate role in the execution of a common project.

2. *Dédoublement fonctionnel (Scelle)*

The idea of an arbitral *project* also resonates with much older doctrines of international law. For example, George Scelle, through his theory of *dedoublement fonctionnel* (role splitting) departed from purely positivistic accounts of International Law and did not conceive the international community, as most other international lawyers did, as a collection of states and international organizations governed by a body of rules designed to direct and regulate their behavior. Rather, he proposed four main building blocks for his theory: (i) the idea of a world community integrated by dif-

69 The state-oriented understanding of international adjudication has been challenged by community-oriented approaches in which international tribunals and courts are seen though their contribution to global governance. See Tomer Bourde, *International Governance in the WTO: Judicial Boundaries and Political Capitulation* (Cameron May 2004); von Bogdandy and Venzke (n 16).

70 Gaillard (n 8) 60.

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ferent elements, from provincial groupings all the way to a *civitas maxima* or world community. This idea rested on the premise that the 'international community swarms with myriad legal orders (in today's parlance we would call them "sub systems"); they do not live by themselves, each in its own area, but intersect and overlap with each other.'[71] (ii) the world community does not result from the coexistence or the juxtaposition of states, but rather consists of the interaction between peoples and individuals through international intercourse and international law. Therefore, for Scelle, the distinction between private and international law is a fiction because both attain to the same objective. (iii) All national legal orders subject to the international legal order. (iv) A legal system needs to have three basic functions: law-making, adjudication, and enforcement.[72]

Furthermore, for Scelle, both members of the executive from a particular country as well as domestic courts, fulfill dual roles when acting within their own national systems and when they act within the international order or system. Specifically in the case of domestic courts, he argues that when dealing with issues of international law or even conflict of laws, judges act as international judicial bodies, thereby fulfilling their 'dual role'.[73]

Scelle's theory has great potential to explain the arbitration *project*, and especially its interaction with domestic legal orders. What he understood as 'sub systems' can really be conceived as *projects* of the international legal order, and the international legal order can be seen through his idea of a *civitas maxima* of the world community. Moreover, the traditional dichotomy between judicial power and international arbitration power can be put aside by conceiving the international legal order not as a juxtaposition of states, but the interaction between peoples and the legal mechanisms that facilitate said interaction. Both, arbitrators, and state actors (which have a dual role) participate in the same common project. In this regard, international arbitration is a common legal project that facilitates commercial interactions with the objective of creating sustainable normative expectations in the international community. In doing so, it contributes to the maintenance of world order. Specifically, international arbitration can be said to 'provide a neutral playing field on which transnational economic

71 Antonio Cassese, 'Remarks on Scelle' s Theory of "Role Splitting" (dedoublement fonctionnel)' (1990) 1 European Journal of International Law in International Law 210, 211.
72 ibid.
73 ibid, 213.

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law is enforced'[74] and its role as a project can also be seen by the fact that 'the process of global wealth creation normally is justified by neither speed or cost, but rather because its neutrality forum and delocalized procedure provide a means of avoiding "hometown justice" of the other party's judicial system'.[75]

3. *Transnational legal process (Jessup and Koh)*

I further suggest that the interaction between the arbitration *project* and domestic systems can be understood through the concept of *transnational legal process.*

When trying to grapple with the task of identifying a concept that described the legal phenomena that transcended domestic borders, Philip C. Jessup regarded that the traditional concept of *international law* was inadequate for said purpose. This was so because the term misleads to thinking about exclusive relations between nation states. For this reason, he coined the term *transnational law* to include 'all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories'.[76]

After the idea of *transnationality* was introduced as a valid concept to describe certain legal phenomena, other theorists began to expand on the concept, and furthered the scope of international legal theory. As one of the main proponents of this concept, Harold Koh purported the idea that transnational legal issues are commonly determined outside the bounds of judicial mechanisms or courts, and that there rather exists a *process* by means of which lawyers and other agents play a more impactful role than traditional judicial commands.[77] Furthermore, he emphasized that the transnational legal process is a trans-substantive process where transnational actors internalize legal norms that are not domestic norms.[78]

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74 W Michael Reisman, W Laurence Craig, William W Park and Jan Paulsson, *International Commercial Arbitration. Cases, Materials, and Notes on the Resolution of International Business Disputes* (Foundation Press 2015) 188.

75 Reisman, Craig, Park and Paulsson (n 74) 188.

76 Philip C Jessup, *Transnational Law* (Yale University Press 1956) 1.

77 Harold Koh, 'Why Transnational Law Matters' (2006) 24 Penn State International Law Review 745; Harold Koh, 'Transnational Legal Process' (1996) 75 Nebraska Law Review 181.

78 ibid.

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The interaction that domestic authorities have with international arbitration (ie courts and legislatures) is an example of a transnational legal process. It is not, like some theorists have proposed, the origin of power of international arbitration or the subjugation of a concept, but rather the process by means of which national authorities play a role (*dédoublement fonctionnel*) in the realization of the *arbitration project*. The most obvious and lasting example of this is the ratification of the New York Convention by more than 160 States and the fact that legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been adopted in 83 States and in a total of 116 jurisdictions.[79]

Moreover, the fact that arbitral institutions, professional associations, and individuals in the practice of arbitration have great influence in the design of procedures, rules, objectives, and best practices, is a patent example of Koh's account of a transnational legal process. Perhaps international arbitration is one of the legal realms where private actors have a bigger and more impactful role in its day-to-day execution and development than in other legal realm. This only shows that there is a *transnational legal process* by means of which the *arbitral project* is executed.

Furthermore, for Harold Koh, the transnational legal process in which private and public actors interact, is a dynamic process to 'interpret, enforce, and ultimately, internalize rules of transnational law'.[80] This process 'mutates, and percolates up and down, from public to the private, from the domestic to the international level and back down again'.[81] Therefore, what by some is regarded as the localization of an international concept, the national creation of a concept with transnational repercussions, or even the domestic recognition of a transnational order, is really a transnational legal process in which domestic and international actors interact for the execution of common goals, objectives, values, and the *arbitration project*.

The fact that a court or a legislature adopts, interacts, interprets or mutates international arbitration does not mean that they make it theirs, that they simply recognize it, or that they grant it power. It is only a manifestation of the transnational legal process at work. In this regard, Koh also considers that the transnational legal process is both descriptive and normative because it not only describes a legal phenomenon, but

79 Figures obtained from <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 29 November 2021.

80 Koh (1996) (n 77) 183–184.

81 ibid, 184.

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it creates rules. These rules can be thought of as part of the *arbitration project*. In this regard, when domestic legal systems interpret arbitration principles, enforce foreign awards, adopt model laws or ratify international conventions, they engage in an interactive process of internalization by which 'international law acquires its "stickiness" (…) nation-states acquire their identity, and that nations come to "obey" international law out of perceived self-interest'[82] and with the aim of executing a global project.

In other words, we can say that the iterative and interactive process in which states participate in international arbitration represents the role they play in the execution of the *arbitral project*. This is so because as with any project they are not self-executing and regularly require the participation of many actors. The involvement of a plurality of actors in international arbitration is the *transnational legal process* by which the project is executed and can be seen through an array of activities such as the application of soft law by litigants, institutions and parties,[83] the interpretation of substantive rules of international arbitration by arbitrators, the definition of the judicial scope regarding the court's interaction with arbitration, as well as the use of courts in aid of arbitration, among others. While some might argue that the involvement of many actors renders uniformity a futile task, I would say that uniformity is only a relevant concept if we define a *system* from a positivistic approach. If we come to terms with the realistic notion of a *transnational legal process*, the interaction and activity of a plethora of actors is evidence of the vitality of the global project which requires iterative action for its execution.

By the same token, the 'double contradictory trend'[84] in international arbitration consisting, on the one hand, in the modernization of local arbitration laws and, on the other, zealous judicial attempts to limit the scope of arbitration, are not proof of an absence of an *arbitration project* but rather of its inherent need to be mended, as all projects need to be, because they are imperfect processes.

In this vein, the interaction domestic systems have with international arbitration must be seen not as a dichotomy between judicial power and arbitral power, or as the domestic recognition of a transnational order, but rather as the execution of a common and transnational *project*. This

82 Harold Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale Law Journal. 2599, 2655.

83 See William W. Park, *The Procedural Soft Law of International Arbitration*, in Loukas A Mistelis and Julian DM Lew (eds) *Pervasive Problems in International Arbitration* (Kluwer Law International 2006).

84 Gaillard (n 8) 23.

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underlying idea has been recognized by theorists such as Jens Damm and Henry Hansmann, when they have asserted that 'good courts are central to sustained economic development.'[85] While not directly referring to arbitration, they do conceive a globalized commercial litigation practice, which attempts to promote and attain sustained economic development. This is proof that there are transnational objectives and values that are pursued by projects, and the agents in charge of their execution can have multiple roles leading to 'conversations among courts and domestic and international adjudicators'.[86]

The idea of a universal or transnational public policy (value system) has also been recognized in several judicial decisions. For example, the Swiss Federal Supreme Court determined that the review of awards must be based on 'transnational or universal public policy'.[87] Moreover, French courts have led the way in expressly recognizing a transnational concept when they have asserted the existence of 'international public policy' with regards to arbitration.[88]

Some theorists like Jan Paulsson have stated that 'the great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself (…). What will the state tolerate? To what will it lend its authority and power?'[89] Paulsson seems to present an apparent dichotomy between arbitral and judicial powers. However, arbitral and judicial powers are two elements of the same *transnational*

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85 Jens Damman and Henry Hansmann, 'Globalizing Commercial Litigation' (2008) 94 Cornell Law Review 71.

86 See André Nollkaemper, *Conversations among Courts: Domestic and International Adjudicators* in Cesare P. R. Romano, Karen J. Alter, and Yuval Shany (eds.) *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 523.

87 *United Arab Emirates et al v Westland Helicopters Ltd.* Federal Supreme Court (1994) ATF 120 II 155.

88 *Société Ganz And Others v Société Nationale Des Chemins De Fer Tunisiens* (1991) Paris Court Of Appeal, 1st Chamber – Section C, 29: '(…) hors les cas où la non arbitrabilité relève de la matière – en ce qu'elle intéresse au plus près l'ordre public international et exclut de manière absolue la compétence arbitrale du fait de la nullité de la convention d'arbitrage – l'arbitre international, dont la mission consiste aussi à assurer le respect de l'ordre public international, a le pouvoir de sanctionner les comportements contraires à la bonne foi qui doit présider aux relations entre partenaires du commerce international.'; *Ministère tunisien de l'Equipement v Societe Bec Freres*, (1997) Paris Court of Appeal 92.23638 & 92.23639.

89 Jan Paulsson, 'Arbitration in Three Dimensions' (2010) LSE Legal Studies Working Paper No. 2/2010 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536093> accessed 29 November 2021.

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legal process and *project*. This is so because, on the one hand, the idea of international arbitration derives from a global commitment to attain global order. On the other hand, the monopoly of execution of awards that states have is not the source of power of international arbitration or what determines its juridicity but rather the role domestic courts are called to execute within the *arbitral project*, through a *transnational legal process*. Paulsson's statement faces arbitration with judicial courts as if they were at odds. I believe that if we imagine international arbitration as a *project* of global governance and its internalization into domestic legal systems as part of a *transnational legal process*, this apparent paradox is rather the organic, evolutive and elastic realization of the *project*.

One subject in which this is of the utmost relevance is the case of subject matter arbitrability and the power of domestic legal systems to determine what subjects may not be arbitrable. To some, this might seem like an argument against my previous assertation. However, I believe it is a pure manifestation of the ways in which norms that lay in the realm of the international percolate to the domestic level and then, the definition of certain parameters is left to state sovereignty. One of the defining characteristics of International Law is that it always implicates the transfer of sovereignty in one way or another, and in turn it also entails the conservation of sovereignty for some matters. This is part of the organic functioning of an international legal order. The case of an *arbitral project* is no different.

The arbitrability of certain subjects can be seen through the enforcement and annulment of arbitral agreements and awards. Both are instances where domestic courts can intervene to determine if the precise subject-matter of the dispute lie outside of what national policy deems permissible. On the one hand, both the New York Convention[90] and the UNCITRAL Model Law[91] give deference to national laws to determine arbitrability. In this regard, many national arbitration statutes provide that an arbitration agreement may be denied enforcement in particular circumstances because the subject-matter is non-arbitrable.

However, the fact that domestic legal systems have a legitimate entitlement to define public policy and determine when their courts must not recognize an act that is contrary to said public policy, is not by its essence contrary to the recognition of an *arbitral project*. On the contrary, it is part

90 New York Convention, art V (2).

91 UNCITRAL Model Law Article 34 (1) (b) (i): 'The subject matter of the dispute is not capable of settlement by arbitration under the law of this State'.

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and parcel of the *transnational legal process* by means of which domestic and transnational orders interact for a common purpose and attainment of global values. This should not be understood to mean that domestic systems must revere unconditionally to the *arbitration project*. It only means that the execution of that global *project* finds some limitations in domestic public policy.

Furthermore, the interaction of national courts with international arbitration can also have the function of *normative development.*[92] This is so because national courts can support the development of international arbitration and help stabilize normative expectations.[93]

Moreover, the interplay between international arbitration and public policy of a state can be seen in the way the United States has dealt with the issue. For example, originally, American case law banned arbitration of competition law matters. Then, judicial concern was not about whether arbitrators should decide competition law claims but rather how arbitration of such claims should unfold procedurally.[94] Additionally, it was precisely through the understanding that in international arbitration, the execution of a global *project* entails a different attitude by domestic judicial actors, that the Supreme Court of the United States allowed a wider scope for subject matter arbitrability in international arbitration, compared to domestic arbitration.[95] In this vein, public policy as a potential hand break to a specific dispute is not a hindrance to the *arbitration project*, but rather the expression of an interactive process to execute the *arbitral project*, as well as its necessary balance against other *projects*.[96] In this same vein, it has been said that the health of the *project* of international arbitration depends not on the permissibility of public policy challenges but rather on the timing of judicial interference.[97]

92 Nollkaemper (n 86).
93 ibid.
94 Reisman, Craig, Park and Paulsson (n 74) 158.
95 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc* (n 68).
96 Domestic systems also have projects and these projects also purport certain values and objectives. Therefore, when two or more projects are in tension, a proper balance must be made in order to not diminish the other completely. However, the balancing of projects (as of interests) will always entail tradeoffs.
97 Reisman, Craig, Park and Paulsson (n 74) 189.

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V. Conclusion

When we analyse a legal phenomenon through its function, we can identify many aspects that are seldom recognized through an analysis that fixates only on its concept. Moreover, when we take a purely *observational* approach to analyse a legal phenomenon, it only gets us as far as to identify certain social practices but comes short of identifying the normative purposes of the law.

Through a functional premise of international arbitration, we can assert that the existing legal theories of international arbitration fall short of identifying its underling values and its normative function. It is through an understanding of international arbitration as a *project* of world order or global governance that we can assert that international arbitration plays a much more meaningful and functional role than a mere mechanism for dispute resolution. This is so because it functions as an adjudicative project to protect, guarantee, and advance global values of international commerce and development. In this vein, looking at international arbitration as a *project* that plays a role in a systemic whole, we can depart from the idea that adjudication serves a single dispute resolution function, and rather assert that it has other functions such as the stabilization of normative expectations, law making, and functioning as a *project* 'of the value-based international community'.[98] Finally, the interaction international arbitration has with domestic legal systems is not a manifestation of its anchoring to a particular legal system, the tug-of-war for adjudicatory power or the mere recognition of an autonomous order, but rather the organic, evolutive and elastic realization of the *arbitration project* through a *transnational legal process*. It is by means of this *transnational legal process* that different domestic, international, public, and private actors interact in an iterative and dynamic process by means of which the *arbitral project* acquires meaning, relevance, and a normative purpose.

98 von Bogdandy and Venzke (n 16).

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Part 7: Objectivity and Interdisciplinary Perspectives of Economics and Literature

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§ 13 Economic Analysis of Law: Inherent Component of the Legal System

Peter Zickgraf[*]

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* See for a (slightly modified) German version of the article: Peter Zickgraf, 'Das rechtsökonomische Argument in der Wertungsjurisprudenz' [2021] Zeitschrift für die gesamte Privatrechtswissenschaft 482 ff.

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I. Introduction

The Economic Analysis of Law originated in the United States in the 1960s[1], building upon the intellectual foundations of legal realism.[2] The legal realists were skeptical that statutory law and legal precedents determined judicial decisions in a meaningful way[3]: 'Judicial judgments, like other judgments, doubtless, in most cases are worked out backward from conclusions tentatively formulated.'[4] In line with this view, Holmes had identified the law with a mere prediction of court decisions.[5] Moreover, legal realists had an instrumental and functional understanding of law, which regarded the law as a means to an end in order to achieve certain (policy) goals.[6] This notion is familiar to Heck's and Jhering's

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1 The starting points were the articles by Ronald Coase, 'The Problem of Social Cost' (1960) 3 Journ L & Econ 1 and Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 Yale L Journ 499.

2 Horst Eidenmüller, *Effizienz als Rechtsprinzip* (4th edn Mohr Siebeck 2015) 406 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 89 ff; Kristoffel Grechenig and Martin Gelter, 'Divergente Evolution des Rechtsdenkens – Von amerikanischer Rechtsökonomie und deutscher Dogmatik' (2008) 72 RabelsZ 513, 522 ff, 528 f (see also the English version: Kristoffel Grechenig and Martin Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism', (2008) 31 Hastings Int'l & Comp L Rev 295 ff); Christian Kirchner, 'The Difficult Reception of Law and Economics in Germany' (1991) 11 Int'l Rev Law & Econ 277, 281.

3 Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Colum L Rev 809, 821: 'In effect, (jurisprudence) is a special branch of the science of transcendental nonsense'; *Lochner v New York*, 198 US 45, 76 (1905) (Holmes, dissenting): 'general propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.'; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 407 f; Kristoffel Grechenig and Martin Gelter (n 2) 525 f.

4 Jerome Frank, *Law and the Modern Mind* (Smith 1970) 109.

5 Oliver W Holmes, 'Path of the Law' (1897) 10 Harv L Rev 457, 461: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.'

6 Karl Llewellyn, 'Some Realism About Realism – Responding to Dean Pound' (1931) 44 Harv L Rev 1222, 1223, 1230: 'They view rules, they view law, as means to an end; as only means to ends; as having meaning only insofar as they are means to ends.'; Holmes (n 5) 474: 'I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. (…) In the present state of political economy, indeed, we come again upon history on a larger scale, but there we are called on to

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'jurisprudence of interests' (*Interessenjurisprudenz*[7]).[8] Given such an understanding of the law and of legal reasoning, it is not surprising that there was a particular openness among legal realists to consider social science approaches – which Law & Economics is a part of – in determining the normative purposes of the law.[9] As a consequence, the Economic Analysis of Law was able to establish itself as a recognised theory of law in the US on this intellectual foundation.

In contrast, in continental Europe (especially in Germany), the notion of law as an independent system (*Systemdenken*) was and still is dominant.[10] Although the predominant methodological approach of the 'jurisprudence of values' (*Wertungsjurisprudenz*[11]) has long since detached itself from formalism (*Begriffsjurisprudenz*), an internal perspective is still being adopted in the process of finding solutions to legal questions, one which seeks to develop the answers primarily from the given system of legal principles.[12] In this process of legal reasoning, no pure legal positivism is being pursued, but rather the valuations of the law are inquired (meaning both the subjective valuations of the legislature and the objective values of the law itself), which then play a decisive role in the interpretation and further enhancement of the law by the courts (*Rechtsfortbildung*).[13] There are numerous studies on the historical, institutional and political

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consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose'; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 407 ff.

7 Philipp Heck, 'Gesetzesauslegung und Interessenjurisprudenz' (1914) 112 Archiv für die civilistische Praxis 1; Rudolf von Jhering, *Der Zweck im Recht*, volume 1 (Breitkopf und Härtel 1877) passim; Karl Llewellyn, 'A Realistic Jurisprudence – The Next Step' (1930) 30 Colum L Rev 431, 454 is making reference to *Jhering*.

8 Horst Eidenmüller, (n 2) *Effizienz als Rechtsprinzip* 408; Kristoffel Grechenig and Martin Gelter (n 2) 525.

9 Kristoffel Grechenig and Martin Gelter (n 2) 514 f, 529, 549 f; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 406.

10 Seminal Claus-Wilhelm Canaris, *Systemdenken und Systembegriff in der Jurisprudenz* (2nd edn Duncker & Humblot 1983); see on the historical development Kristoffel Grechenig and Martin Gelter (n 2) 514, 543 ff, 553 ff.

11 In essence, *Wertungsjurisprudenz* represents a middle ground approach between productional subjectivity and objectivity, each combined with applicational objectivity, see Philip M Bender 'Ways of Thinking about Objectivity' (§ 1), text to n 120–146.

12 Kristoffel Grechenig and Martin Gelter (n 2) 514, 543 ff, 553 ff; see also Alexander Hellgardt, *Regulierung durch Privatrecht*, (Mohr Siebeck 2016) 325 ff, 365 ff.

13 Karl Larenz, *Methodenlehre der Rechtswissenschaft*, (6th edn Springer 1991) 119 ff; Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd edn Springer

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background of the divergent developments in the US and Europe.[14] Therefore, these aspects shall not be the subject of this article. Rather, the focus of the present essay is to examine the theoretical consequences of this understanding of law with respect to the methodological prerequisites of an economic analysis of the law in the German legal system, which has the typical features of a continental European legal framework.

The methodological starting point of the article is the following: it needs to be substantiated that economic considerations constitute an inherent element of the current legal system in order to be of normative relevance. This undertaking is complicated by the fact that legal-economic reasoning is often regarded as non-legal,[15] and that, against this background, Law & Economics is scrutinised critically by some jurists.[16] The present essay takes the opposite view and attempts to demonstrate the manifold relevance of economic arguments within German and European law. This inquiry will lead to the following conclusion: in essence, there is no strong contrast between the 'strictly legal point of view' and the 'economic point of view'. Rather, the economic considerations of Law & Economics constitute an integral part of the European legal system(s) and can contribute significantly to its systematic, coherent and rational enhancement.

1991) 123 ff; Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, volume III (Mohr 1976) 405 ff.

14 See Kristoffel Grechenig and Martin Gelter (n 2) 513 ff; Kenneth Glenn Dau-Schmidt and Carmen L Brun, 'Lost in Translation: The Economic Analysis of Law in the United States and Europe' (2006) 44 Colum J Transnat'l L 602 ff; Ugo Mattei and Roberto Pardolesi, 'Law and economics in civil law countries: A comparative approach' (1991) 11 Int'l Rev Law & Econ 265 ff; Christian Kirchner (n 2) 281 ff; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 404 ff.

15 See Wolfgang Ernst, 'Gelehrtes Recht – Die Jurisprudenz aus der Sicht des Zivilrechtslehrers –' in Christoph Engel and Wolfgang Schön (eds), *Das Proprium der Rechtswissenschaft* (Mohr Siebeck 2007) 3, 17; Gerhard Wagner, 'Privatrechtsdogmatik und ökonomische Analyse' in Marietta Auer and others (eds), *Privatrechtsdogmatik im 21. Jahrhundert : Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag* (De Gruyter 2017) 281, 305 ('extralegal parameters'); Kristoffel Grechenig and Martin Gelter (n 2) 515, 556.

16 Karl-Heinz Fezer, 'Aspekte einer Rechtskritik an der economic analysis of law und am property rights approach' [1986] Juristenzeitung 817, 823 ('Economic legal analysis and liberal legal thinking are incompatible.'), 824 ('The economic theory of law is an aberration, which the law should guard against.'); Karl-Heinz Fezer, 'Nochmals: Kritik an der ökonomischen Analyse des Rechts' [1988] Juristenzeitung 223; Wolfgang Ernst (n 15) 17 ff, 24 ff, 29 f (open with regard to related fields of legal research outside of traditional jurisprudence); mediating Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* passim.

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II. Positive vs. Normative Economic Analysis of Law

With respect to the integration of economic findings into adjudication, a distinction must first be made between Positive and Normative Economic Analysis of Law.[17]

Positive Economic Analysis tries to explain the existing legal system, institutions and rules ('as the law is') from the perspective of economic theory;[18] it also analyses the actual consequences of legal rules, giving particular attention to the behaviour of human actors ('predict what will be').[19] In this respect, Positive Economic Analysis of Law is similar to an impact assessment (*Folgenermittlung*), which is known from conventional legal methodology.[20] Additionally, Positive Economic Analysis attempts to identify the most efficient rule for a given legal issue.[21]

In contrast, the Normative Economic Analysis of Law argues for a particular substance of the law, measuring the existing legal framework against the economic efficiency criterion.[22] It thus contains a normative

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17 See Richard Posner, *Economic Analysis of Law* (9th edn Wolters Kluwer 2014) 31; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 21; Florian Faust, 'Comparative Law and Economic Analysis of Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2nd edn Oxford University Press 2019) 826, 827 ff; Niels Petersen and Emanuel Towfigh, 'Ökonomik in der Rechtsiwssenschaft' in Emanuel Towfigh and Niels Petersen (eds), *Ökonomische Methoden im Recht* (2nd edn Mohr Siebeck 2017) § 1 para 6 ff; see also Gerhard Wagner (n 15) 283 ff.

18 See the definition of Richard Posner, 'Some Uses and Abuses of Economics in Law' (1979) 46 U Chi L Rev 281, 284 f; Gerhard Wagner (n 15) 283 f; Florian Faust (n 17) 827 f.

19 Richard Posner (n 18) 285; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 21; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 6; Claus Ott, 'Allokationseffizienz, Rechtsdogmatik und Rechtsprechung – die immanente ökonomische Rationalität des Zivilrechts' in Hans-Bernd Schäfer and Claus Ott (eds), *Allokationseffizienz in der Rechtsordnung* (Springer 1988) 25, 28 ff; Jochen Taupitz, 'Ökonomische Analyse und Haftungsrecht – Eine Zwischenbilanz' (1996) 196 Archiv für die civilistische Praxis 114, 121 f; Christian Kirchner (n 2) 287 f; Florian Faust (n 17) 828.

20 Gerhard Wagner (n 15) 309 f; see generally on the more empirical, but related, area of cost-benefit analysis: Cass Sunstein, 'The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and almost as many Answers)' (2014) 114 Colum L Rev 167 ff with further references.

21 Niels Petersen and Emanuel Towfigh (n 17) § 1 para 48.

22 Richard Posner (n 18) 285; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 21; Florian Faust (n 17) 830 f; see for the (compelling) broader concept of individuals' well-being: Louis Kaplow and Steven Shavell, 'Fairness versus Welfare' (2001) 114

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statement about 'what [the law] should be'.[23] Specifically, Normative Analysis examines legal rules to determine whether they meet the criteria of Pareto-efficiency[24] or Kaldor-Hicks-efficiency[25] and advocates that the legal system be oriented towards efficiency[26] (= *deontological or consequentialist objectivity*).[27]

However, the differentiation between positive and normative analysis must not obscure the fact that the two are closely related: after all, a consequential application of law (= positive analysis) is impossible without a normative evaluation of the consequences of different legal decisions (= normative analysis).[28] Indeed, an impact assessment always (at least implicitly) includes an impact evaluation (*Folgenbewertung*).[29] Nevertheless, Positive Economic Analysis of Law is much easier to integrate into legal reasoning, since it does not necessarily have a link to the efficiency criterion; rather, its findings can also be used if other legal ends are pursued instead of economic efficiency.[30]

Harv L Rev 961 ff; see for another novel approach of normative analysis beyond the preference maximization goal (ie efficiency): Hanoch Dagan and Roy Kreitner, 'Economic Analysis in Law' (2021) 38 Yale Journ Reg 566.

23 Richard Posner (n 18) 285; Claus Ott and Hans-Bernd Schäfer, 'Die ökonomische Analyse des Rechts – Irrweg oder Chance wissenschaftlicher Rechtserkenntnis?' [1988] Juristenzeitung 213, 215; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 21; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 8; Hanoch Dagan and Roy Kreitner (n 22) 568, 572.

24 See Richard Posner (n 17) 14; Hans-Bernd Schäfer and Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (6th edn Springer 2020) 13 f.

25 Nicholas Kaldor, 'Welfare Propositions of economics and interpersonal comparisons of utility' (1939) 49 Econ Journ 549; John Hicks, 'The foundations of welfare economics' (1939) 49 Econ Journ 696.

26 Niels Petersen and Emanuel Towfigh (n 17) § 1 para 48.

27 See Bender (n 11) (§ 1), text to n 33–42 (deontological objectivity), 43–52 (consequentialist objectivity).

28 Claus Ott (n 19) 31; Christian Kirchner (n 2) 287; Hans-Joachim Koch and Helmut Rüßmann, *Juristische Begründungslehre* (CH Beck 1982) 230.

29 See also Christian Kirchner (n 2) 287.

30 Gerhard Wagner (n 15) 309; Christian Kirchner (n 2) 287 f.

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III. Economic Analysis and the Legislative Process

The legislator's authority to incorporate economic considerations into the law and to pursue economic policy goals – such as efficiency – is largely undisputed.[31] This applies both in a positive and in a normative sense:

In a positive sense, the legislator can use the findings of Law & Economics to obtain a clearer picture of the actual consequences of a proposed statutory rule (eg the behaviour of the parties to be affected by the new rules).[32] The analysis of the factual consequences of a legal rule should typically be unavoidable for any legislator, since one can only evaluate on the basis of such an impact assessment whether the intended legislative goals can be achieved in reality with the selected regulatory tool.[33] The fact that the economic model of human behaviour might deviate from a supposed constitutionally predetermined image of man[34] does not prohibit the use of the (positive) economic model of human behaviour by the legislator. After all, the supposed image of man of the *Grundgesetz* does not serve to explain the actual behaviour of human actors and therefore, in contrast to the economic model of behaviour, it does not represent a positive but a normative model that is not suitable as an alternative to describe human behaviour.[35]

In a normative sense, the legislator can align the legal system or individual rules with economic efficiency.[36] This is due to the fact that, according to traditional (German) constitutional understanding, the democratically

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31 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 414 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 94 ff; Christian Kirchner (n 2) 286; Gerhard Wagner (n 15) 293 ff, 310; Thomas M J Möllers, *Juristische Methodenlehre* (2nd edn CH Beck 2019) § 6 para 135; critical with regard to a sole focus on the efficiency criterion Taupitz (n 19) 122 ff. However, such an exclusive relevance of the efficiency principle is not demanded at all, see the references in footnote 40.

32 Gisela Rühl, 'Ökonomische Analyse des Rechts' in Julian Krüper (ed), *Grundlagen des Rechts* (3rd edn Nomos 2017) § 11 para 17; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 7, 40 ff; Gerhard Wagner (n 15) 293 ff, 310; Hanoch Dagan and Roy Kreitner (n 22) 576 ff.

33 Gisela Rühl (n 32), § 11 para 17; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 7; Florian Faust (n 17) 845 f.

34 See the critique of Karl-Heinz Fezer (n 15) 822; Karl-Heinz Fezer (n 15) 224.

35 Convincing: Gisela Rühl (n 32) § 11 para 17; likewise Niels Petersen and Emanuel Towfigh (n 17) § 1, para 53.

36 Prevailing opinion, see Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 414 ff, 419 ff; Christian Kirchner (n 2) 286; Gisela Rühl (n 32) § 11 para 19; Gerhard Wagner (n 15) 293 ff.

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legitimised legislature is free to choose the policy objectives to be pursued[37] (= *productional subjectivity* as the starting point).[38] At the same time, however, it follows from this view that the legislature can also pursue other regulatory goals and can explicitly decide against taking the efficiency criterion into account.[39] In this regard, the Economic Analysis of Law cannot and does not want to make a claim that economic efficiency should be considered the sole normative criterion.[40] Thus, the legislator can, but does not have to pursue efficiency as one of several competing objectives.

IV. Economic Analysis and Adjudication

While the legislature's discretion to take economic considerations into account is largely uncontroversial, the legitimacy of incorporating economic reasoning into the interpretation of the law is the subject of a lively scholarly debate. Critical voices have raised two main objections against a consideration of Law & Economics-arguments in the course of an interpretation of the law: first, it was argued that courts did not have the necessary expertise to deal with such arguments; second, the critics claimed that the

37 Bundesverfassungsgericht BVerfGE 134, 242, 292 f. = NVwZ 2014, 211, 214 para 172; BVerfGE 121, 317, 350 = NJW 2008, 2409, 2412 para 103; NJW-RR 2016, 1349, 1352 para 63 f; Gerhard Wagner (n 15) 293 f.

38 See Bender (n 11) (§ 1), text to n 120–136. However, the (German) legislator is bound by fundamental rights (art 1–19 Grundgesetz) and the principle of proportionality (art 20(3) Grundgesetz), which ultimately means that the insights of the Positive Economic Analysis of Law (ie the factual consequences of rulemaking) cannot be ignored by the legislator (= productional objectivity as a corrective device, see Bender (n 11) (§ 1), text to n 137–146).

39 Gisela Rühl (n 32), § 11 para 19.

40 See Norbert Horn, 'Zur ökonomischen Rationalität des Privatrechts – Die privatrechtstheoretische Verwertbarkeit der ‚Economic Analysis of Law'' (1976) 176 Archiv für die civilistische Praxis 307, 332 f; Claus Ott and Hans-Bernd Schäfer (n 23) 214 ff; Gerhard Wagner (n 15) 313; Hans-Bernd Schäfer and Claus Ott (n 24) 44 f; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 5; Florian Faust (n 17) 831 f; Hanoch Dagan and Roy Kreitner (n 22) 572 ff. It should be pointed out, though, that the normative framework of Louis Kaplow and Steven Shavell (n 22) 968, 977 ff, 989 ff rests on individuals' well-being (which explicitly incorporates aspects of income distribution) as the sole relevant criterion. However, given the attention Kaplow and Shavell pay to distributional issues, there is no substantive disagreement between their approach and the view expressed here. Rather, the difference is only of a terminological nature.

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judges typically lacked the relevant information and were therefore not capable of considering the factual consequences properly.[41]

With respect to the first objection – lack of expertise – the following remarks need to be made: it is true that (European) judges typically do not have an economics degree or training in Law & Economics.[42] However, it should not be ignored in this context that the institutional framework has already changed quite a bit and will probably continue to change in favour of Law & Economics in the future:[43] after all, lectures on the Economic Analysis of Law are now offered at a number of (German) universities.[44] This means that there will be more and more judges with a basic understanding of the law's economic background in the near future. In addition, the judiciary can already draw on numerous academic publications that have dealt with various fields of German and European law from a Law & Economics perspective.[45] In this context, it is the task of legal scholars

41 Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 105 ff; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 398 ff, 427 ff, 429 ff; Wolfgang Ernst (n 15), 17 f.

42 Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 103 f.

43 The same finding as here Kristoffel Grechenig and Martin Gelter (n 2) 517 f.

44 More recently, the lecture 'Economic Analysis of Law' has been offered at the Humboldt University of Berlin. The University of Hamburg is home to a research institute on 'Law and Economics' and offers the option of a concentration in 'Economic Analysis of Law'. At the Goethe University in Frankfurt am Main there is an interdisciplinary 'Institute for Law & Finance'. The University of Mannheim offers a combined Law & Economics curriculum 'Corporate Lawyer' and the University of Bayreuth similarly offers an additional degree called 'Business Lawyer'; both curricula include economics courses. At least of anecdotal interest might be the author's own studies at the Ludwig Maximilian University of Munich, where the fundamentals of the Economic Analysis of Law were taught by Prof Eidenmüller, Prof Grigoleit and Prof Klöhn in various lectures ('Analytical Methods for Lawyers', 'European and International Business Law', 'Corporate Insolvency Law', 'Corporate Law', 'Capital Markets Law').

45 Selection of monographs: Thomas Ackermann, *Der Schutz des negativen Interesses* (Mohr Siebeck 2007); Horst Eidenmüller, *Unternehmenssanierung zwischen Markt und Gesetz* (Verlag Dr. Otto Schmidt 1999); Horst Eidenmüller, *Effizienz als Rechtsprinzip* (4th edn Mohr Siebeck 2015); Holger Fleischer, *Informationsasymmetrie im Vertragsrecht* (Beck 2001); Hans-Christoph Grigoleit, *Gesellschafterhaftung für interne Einflussnahme im Recht der GmbH* (Beck 2006); Lars Klöhn, *Kapitalmarkt, Spekulation und Behavioral Finance* (Duncker & Humblot 2006); Markus Ruffner, *Die ökonomischen Grundlagen eines Rechts der Publikumsgesellschaft* (Schulthess 2000); Tobias Tröger, *Arbeitsteilung und Vertrag* (Mohr Siebeck 2012). Text books: Hans-Bernd Schäfer and Claus Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (5th edn Springer 2012); Michael Adams, *Ökonomische Theorie des*

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to process the findings of neighbouring disciplines (eg economics) and to translate them into conventional legal terminology and categories in order to open up access to those findings for judges and lawyers.[46]

The second objection – insufficient information of the courts – is also not convincing. The criticism asserts that the information necessary to apply the models of the Economic Analysis of Law usually is not available and does not come to light in court proceedings.[47] However, this argument does not provide a strong objection: first of all, it should be noted that problems of ascertaining the relevant facts are not specific to economic arguments.[48] In this respect, the law is frequently content with approximate solutions that converge towards the optimal solution.[49] Moreover, the potential alternative of a non-formal consideration of the factual consequences must be considered, which does not represent a more rational form of decisionmaking.[50] In comparison, Economic Analysis offers a significant advantage: it makes clear to the judge on which aspects of the case the attention is to be directed.[51] Even if the optimal result is not achieved in the individual case, in the long run the judicial decisions will come closer and closer to the economically mandated result by applying a repeated trial-error-procedure.[52] Thus, if the theoretical findings of Law & Economics are taken into account by the courts, a procedurally secured rationality of court decisions will follow despite the limited information available to judges.

Yet, it must be admitted that both objections address important problems of a practical implementation of Law & Economics into the legal system.[53] But the conclusion from this insight cannot be to completely refrain from the consideration of factual consequences using Economic Analysis. The crucial point is the following: within the framework of teleological

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Rechts (2nd edn Peter Lang 2004); Hein Kötz and Gerhard Wagner, *Deliktsrecht* (14th edn Vahlen 2020).

46 Alexander Hellgardt (n 12) 404.

47 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 429 ff; see also on this Jochen Taupitz (n 19) 156 ff, 165.

48 Hans-Bernd Schäfer and Claus Ott (n 24) 230; Gerhard Wagner (n 15) 312 f.

49 Gerhard Wagner (n 15) 312 f; *Hein Kötz* 'Ziele des Haftungsrechts' in Jürgen Baur and others (eds), *Festschrift für Ernst Steindorff zum 70. Geburtstag: Am 13. März 1990* (De Gruyter 1990) 643, 649 f; Hans-Bernd Schäfer and Claus Ott (n 24) 230.

50 Claus Ott and Hans-Bernd Schäfer (n 23) 219.

51 Similar Hans-Joachim Koch and Helmut Rüßmann (n 28) 230.

52 See on tort liability: Hans-Bernd Schäfer and Claus Ott (n 24) 230 f, 237.

53 Advocates of Law & Economics also acknowledge these points, see for example Gerhard Wagner (n 15) 311.

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interpretation, the actual consequences of a specific interpretation must be taken into account anyway in order to adequately reflect the intended purpose of the law.[54] Therefore, such considerations are likely to take place in the judiciary anyway (at least implicitly).[55] Instead of a 'naive-intuitive' and concealed application of economic 'everyday theories'[56], Economic Analysis of Law can help to make the factual assumptions about the consequences of legal decisions that have been incorporated into the court decision transparent and embed them in a formal, theoretical framework which can be criticised in a rational and objective manner.[57] Therefore, Law & Economics can make a substantial contribution to a coherent interpretation and judicial enhancement of the law – in particular by further narrowing down the area of judicial discretion[58] – through a theoretical elaboration and disclosure of the relevant decisionmaking aspects.[59] It represents a major step forward on the way to a jurisprudence which is based on rationally justified and objectively verifiable conclusions (= promotion of *objectivity in adjudication*).[60]

Having made those general remarks on the methodological benefits and practical feasibility of Law & Economics reasoning within adjudication, the following sections shall be devoted to analysing the possible applications and limits of Law & Economics-arguments in the context of the interpretation (*Auslegung*) and the enhancement of the law (*Rechtsfortbildung*).

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54 Gerhard Wagner (n 15) 311; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 19; Marina Deckert, *Folgenorientierung in der Rechtsanwendung* (Beck 1995) 55; Gisela Rühl (n 32), § 11 para 18.

55 Gerhard Wagner (n 15) 306 ff; similar Claus Ott (n 19) 39 f, 44 ('The actual decision criteria remain largely in the dark.').

56 Gerhard Wagner (n 15) 297, 312.

57 Claus Ott (n 19) 39 f, 44; Christian Kirchner (n 2) 287 f; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 82 f; Wagner (n 15) 297, 312; see generally on the consideration legal decisions' consequences: Hans-Joachim Koch and Helmut Rüßmann (n 28) 230.

58 The narrowing of judicial discretion is a main goal of the jurisprudence of values (*Wertungsjurisprudenz*), see Franz Bydlinski (n 13) 131, 133, 135 f.

59 Christian Kirchner (n 2) 287 f.

60 See Bender (n 11) (§ 1), text to n 120–146.

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1. Interpretation of the law

The findings of the Economic Analysis of Law can be exploited within the teleological interpretation of the law. This mode of interpretation aims at interpreting a given legal rule in accordance with its purpose (*ratio legis*). A distinction must be made in this context as to whether there is a legislative purpose (*subjective-teleological* or *historical interpretation*) or whether the purpose of the particular rule has been developed in case law and jurisprudence (*objective-teleological interpretation*).

a. Subjective-teleological interpretation

The insights of Law & Economics can be relevant in the course of subjective-teleological (also called: historical) interpretation[61] (= *productional subjectivity* combined with *applicational objectivity*).[62] In this context, the legislative intent is the crucial factor. Insofar, three different cases need to be distinguished: (i) If the legislator explicitly rejects economic considerations when enacting a particular statute, the interpreter of the law must respect this legislative intent.[63] (ii) If the legislator pursues some policy objective, neither rejecting nor incorporating economic considerations, the findings of the (Positive) Economic Analysis of Law *can* be used in the course of historical interpretation as a means to predict human behaviour, inspiring the particular interpretation of the rule which best fits the legislative intent in terms of the behavioural consequences (see aa.).[64] (iii) If the legislator (at least implicitly) incorporates economic considerations or

61 See on the differing terminology: Hans-Joachim Koch and Helmut Rüßmann (n 28) 167; Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (3rd edn Springer 1995) 149 ff, 164; Karl Engisch, 'Einführung in das juristische Denken' (12th edn Verlag W. Kohlhammer 2018) 146; Hans Christoph Grigoleit, 'Das historische Argument in der geltendrechtlichen Privatrechtsdogmatik' (2008) 30 Zeitschrift für Neuere Rechtsgeschichte 259, 262 ff; Hans Christoph Grigoleit, 'Dogmatik – Methodik – Teleologik' in Marietta Auer and others (eds), *Privatrechtsdogmatik im 21. Jahrhundert : Festschrift für Claus-Wilhelm Canaris zum 80. Geburtstag* (De Gruyter 2017) 241, 247.

62 On this permutation, see Bender (n 11) (§ 1), text to n 120–136.

63 Claus Ott (n 19) 30, 43 f; Gerhard Wagner (n 15) 313.

64 Claus Ott and Hans-Bernd Schäfer (n 23) 214, 216 f; Christian Kirchner (n 2) 286 f; Jochen Taupitz (n 19) 121 f; Hans Christoph Grigoleit (n 61) 267 f; Gerhard Wagner (n 15) 297, 311 f; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 19; Florian Faust (n 17) 829 f.

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refers to efficiency considerations , the courts *must* help this 'policy of the law'[65] to become practically effective by interpreting it accordingly (see bb.).[66] This corresponds to the undisputed methodological approach of historical statutory interpretation in accordance with the intention of the legislator.[67] The obligation to take into account the intended purpose of the legislature stems from the constitutional duty of the courts to adhere to (positive) law and justice (art 20(3) *Grundgesetz*).[68]

aa. Positive Economic Analysis

Law & Economics-considerations *can* come into play if the legislator does not pursue the goal of economic efficiency but another policy objective. The Shareholder Rights Directive (Directive (EU) 2018/828) provides an example in which the regulatory objective pursued by the legislature is not efficiency (at least not explicitly) but which can be analysed against the background of the findings of Law & Economics, ie (economic) Contract Theory. Recital 28 of the Shareholder Rights Directive (Directive (EU) 2018/828) expressly recognises that remuneration represents a very important incentive mechanism for the conduct of directors:

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65 See for the term: Ernst Steindorff, 'Politik des Gesetzes als Auslegungsmaßstab im Wirtschaftsrecht', in Gotthard Paulus, Uwe Diederichsen and Claus-Wilhelm Canaris (eds), *Festschrift Larenz* (Beck 1973) 217 ff; in this particular context Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 116; see for a methodological classification of the term which simply describes the intention of the legislature: Karl *Larenz* and Claus-Wilhelm *Canaris* (n 61) 153.

66 Gerhard Wagner (n 15) 294 f; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 452; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 116 f; *Stefan Grundmann*, 'Methodenpluralismus als Aufgabe: Zur Legalität von ökonomischen und rechtsethischen Argumenten in Auslegung und Rechtsanwendung' (1997) 61 RabelsZ 423, 432, 434; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 19; Thomas M J Möllers (n 31) § 6, para. 133; see for the relevance of Economic Analysis of Law in the context of subjective-teleological interpretation also Jochen Taupitz (n 19) 127.

67 See Karl Larenz and Claus-Wilhelm Canaris (n 61) 138 f, 165.

68 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 452; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 116; Alexander Hellgardt (n 12) 398 f; Karl Larenz and Claus-Wilhelm Canaris (n 61) 138 f (especially 139: 'At this point methodological and constitutional considerations intertwine.').

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> Since remuneration is one of the key instruments for companies to align their interests and those of their directors and in view of the crucial role of directors in companies, it is important that the remuneration policy of companies is determined in an appropriate manner by competent bodies within the company and that shareholders have the possibility to express their views regarding the remuneration policy of the company.

The recital makes perfectly clear that the legislator implicitly based the remuneration rules on the findings of the principal agent theory.[69] The requirements of art 9a, b Shareholder Rights Directive can therefore be interpreted as a consequence of the findings of (economic) Contract Theory and can be better understood against this background.

In this instance, a subjective-teleological/historical interpretation, which tries to realise the ends intended by the legislator as well as possible, requires that the consequences of alternative potential interpretations be considered. In the course of such an impact analysis, the economic model of human behaviour can be used (= Positive Economic Analysis) to identify the interpretation that best meets the intended regulatory purpose of the legislator.[70] One will even have to argue that an interpretation geared to the legislator's intention inevitably requires such an impact analysis.[71]

bb. Normative Economic Analysis

Looking more closely at the final case (ie the legislator has made economic considerations), two different situations must be distinguished: *first*, it is possible that the legislature chooses economic efficiency as its legislative goal; *second*, the legislature may not refer explicitly to economic efficiency. However, it is sufficient if efficiency is the implicit regulatory objective.[72] In Environmental Liability Law (*Umwelthaftungsgesetz*), for example, the Ger-

69 See the seminal article by Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journ. Fin. Econ. 305 ff; see also Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Macmillan 1932), passim.

70 Claus Ott and Hans-Bernd Schäfer (n 23) 214, 216 f; Christian Kirchner (n 2) 287 f; Jochen Taupitz (n 19) 121 f; Gerhard Wagner (n 15) 297, 311 f; Niels Petersen and Emanuel Towfigh (n 17) § 1 para 19; Hanoch Dagan and Roy Kreitner (n 22) 576 ff. This also applies if the purpose of a rule is of an objective-teleological nature.

71 Gerhard Wagner (n 15) 297, 311 f.

72 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 452 ff; see also Stefan Grundmann (n 66) 434; Gisela Rühl (n 32), § 11 para 21.

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man legislator implicitly referred to the internalization of external effects by means of liability[73]:

> After all, the imposition of strict environmental liability on environmentally hazardous production processes tends to make the products and services concerned more expensive on the market: The entrepreneurs have to incorporate possible compensation payments for environmental damage in their cost accounting and try to pass these costs on to third parties via the (selling) price. In this way, environmentally hazardous production processes are pushed back and damage-preventing measures are taken where they are most cost-effective. Environmental liability law can thus contribute, via the price and market mechanism, to ensuring that scarce ecological resources are used as efficiently as possible.[74]

European capital markets law provides another illustrative example of Economic Analysis' relevance in the context of subjective-teleological interpretation. In Recital 2 of the Market Abuse Regulation (Regulation (EU) No 596/2014), the European legislator explicitly refers to the goal of an efficient financial market:

> An integrated, efficient and transparent financial market requires market integrity. The smooth functioning of securities markets and public confidence in markets are prerequisites for economic growth and wealth. Market abuse harms the integrity of financial markets and public confidence in securities and derivatives.

If one wants to enforce the prohibition of insider trading (art 14 Market Abuse Regulation) effectively in accordance with the regulatory objective of the legislator, one has to understand the legal concept of the 'insider information' (art 7 Market Abuse Regulation), which in turn requires expertise on the economic foundations of the capital market, ie an understanding of the basic concepts of modern capital market theory.[75]

b. Objective-teleological interpretation

Should the legislator not specify the ends that it is pursuing at all, the limits of subjective-teleological or historical interpretation are reached

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73 Gerhard Wagner (n 15) 295; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 453.

74 Deutscher Bundestag Drucksache 11/6454, 13.

75 See on this topic from the German legal literature: Lars Klöhn, 'Wertpapierhandelsrecht diesseits und jenseits des Informationaparadigmas' (2013) 177 Zeitschrift für das gesamte Handels- und Wirtschaftsrecht 349 ff; Lars Klöhn, *Kapitalmarkt, Spekulation und Behavioral Finance* (Duncker & Humblot 2006) 23 ff.

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and only an objective-teleological interpretation can be applied. Within this objective-teleological interpretation, economic arguments can play a role, even if the legislator has not made economic considerations (= *productional objectivity* combined with *applicational objectivity*).[76] Such economic arguments are particularly relevant in the concretisation of undefined legal terms and general legal concepts (*Generalklauseln*).[77] The academic discourse was highly influenced by *Eidenmüller*, who argued that economic efficiency is a relevant factor in the objective-teleological interpretation if it presents a methodologically permitted concretisation of the law ('*zulässige Gesetzeskonkretisierung*').[78] In which cases, however, this vague standard is met has thus far remained an unaddressed question in the legal literature. The only aspect that has been clarified is that economic arguments – as objective-teleological interpretation in general – must not contradict either the wording or the intention of the legislator.[79] In order to further elaborate on the topic, it is once again useful to distinguish between Positive and Normative Economic Analysis.

aa. Positive Economic Analysis

If an objective-teleological purpose of a legal rule is already established, which does not necessarily have to coincide with economic efficiency, the economic model of human behaviour can be used in the sense of a Positive Economic Analysis to identify the interpretation that best suits the objective goal of the rule.[80] In this way, the process of legal decisionmaking can be considerably rationalised.[81] And even if the intended purpose of a rule is thus far unsettled, such an impact analysis of different conceivable statutory interpretations can be carried out. The same arguments that have already been put forward in favour of the (Positive) Economic Analysis in general also apply in this context of objective-teleological interpretation.[82]

76 On this permutation, see Bender (n 11) (§ 1), text to n 137–146.
77 Thomas M J Möllers (n 31) § 6, para. 135; similar Niels Petersen and Emanuel Towfigh (n 17) § 1 para 31 ff.
78 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 452 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 117 ff; see also Stefan Grundmann (n 66) 442; Gisela Rühl (n 32), § 11 para 20.
79 Stefan Grundmann (n 66) 442; Gisela Rühl (n 32), § 11 para 20.
80 This need not be justified separately, see Stefan Grundmann (n 66) 442 f.
81 Niels Petersen and Emanuel Towfigh (n 17) § 1 para 19.
82 See above IV.

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The auxiliary function of Economic Analysis can be illustrated in the context of the so-called supplementary interpretation of contracts (*ergänzende Vertragsauslegung*)[83]: The Federal Court of Justice (*Bundesgerichtshof*) interprets § 157 of the German Civil Code (*Bürgerliches Gesetzbuch*) to the effect that 'when supplementing the content of the contract, it must be taken into account what the parties would have agreed upon in good faith as bona fide contractual partners if they had considered the case which they had not regulated in a reasonable balance of their interests'.[84] This standard is largely consistent with the approach of Law & Economics: therefore, unless the subjective intentions of the parties are different (= primacy of *productional subjectivity* combined with *applicational objectivity*)[85], the economic model of the complete contract[86] can be used, since it can be assumed that the parties would have wanted to conclude an efficient contract that maximises the welfare of both parties. In this way, the supplementary interpretation of contracts is placed on a clear theoretical-normative foundation, which enables rational and objective legal decision-making (= supplementary *productional objectivity* combined with *applicational objectivity*).[87]

The fact that Positive Economic Analysis can contribute considerably to the understanding of dogmatic figures is also shown by the example of the so-called deterrent function (*Präventionsfunktion*) of tort law liability.[88] The economic analysis of tort law has shown that tort liability provides behavioural incentives for (potential) injurers to avoid damages.[89] Different liability rules were examined with respect to their economic effects and legal solutions were identified that lead to an efficient level

83 Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 119 f.

84 Bundesgerichtshof NJW 2004, 2449; NJW 1994, 3287; NJW 1982, 2184, 2185; NJW 1953, 937.

85 On this permutation, see Bender (n 11) (§ 1), text to n 120–136.

86 Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 98 Yale L Journ 87 ff; Hans-Bernd Schäfer and Claus Ott (n 24) 479 ff.

87 On this permutation, see Bender (n 11) (§ 1), text to n 137–146.

88 Guido Calabresi, *The Costs of Accidents* (Yale University Press 1970) 68 ff; Victor Mataja, *Das Recht des Schadensersatzes vom Standpunkt der Nationalökonomie* (Duncker & Humblot 1888) 19 ff, passim; Hein Kötz (n 49) 645 ff; Jochen Taupitz (n 19) 138 ff; Gerhard Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe?' (2006) 206 Archiv für die civilistische Praxis 352, 451 ff; Hans-Bernd Schäfer and Claus Ott (n 24) 166 ff; Gerhard Wagner (n 15) 311 f.

89 See the references in footnote 88.

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of damages.[90] However, the latter shows particularly well that a certain degree of normative impact assessment (*Folgenbewertung*) is inherent in every form of positive impact analysis (*Folgenermittlung*).[91] Consequently, the Positive Economic Analysis of Law cannot be completely separated from the Normative Economic Analysis of Law, which will be the subject of the following discussion.

bb. Normative Economic Analysis

If one does not only wish to answer the question of the actual effects of a certain statutory interpretation, but to justify that such an interpretation, which leads to an efficient result, is preferable, one is conducting a Normative Economic Analysis. However, the statement, that a statutory interpretation in accordance with the efficiency criterion is legitimate if it presents a methodologically permitted concretisation of the law[92], leaves the relevant methodological requirements with regard to the normative authority of this interpretation completely unanswered.

The identification of the objective purpose of a legal rule with economic efficiency leads directly to the general – but largely unanswered – question on the possibility to rationally justify the (objective) purpose of a statutory rule.[93] It must not suffice in this respect that the interpreter of the law (eg a judge or legal scholar) simply determines the intended purpose herself and, as a result, places her own normative assessment into the legal rule.[94]

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90 Guido Calabresi (n 88) passim; Steven Shavell, *Economic Analysis of Accident Law* (Harvard University Press 1987) 5 ff, passim; William Landes and Richard Posner, *The Economic Structure of Tort Law* (Harvard University Press 1987) 54 ff, passim.

91 Hans-Joachim Koch and Helmut Rüßmann (n 28) 230 f; Claus Ott and Hans-Bernd Schäfer (n 23) 217.

92 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 452 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 117 ff; see also Stefan Grundmann (n 66) 442; Gisela Rühl (n 32), § 11 para 20.

93 Fundamental reflections on this largely unresolved question are given by Hans Christoph Grigoleit (n 61) 264 ff.

94 Like this the (distorted) description of the objective-teleological interpretation in Klaus Friedrich Röhl and Hans Christian Röhl, *Allgemeine Rechtslehre* (3rd edn Carl Heymanns 2008) 622; pointing out this danger Thomas MJ Möllers (n 31) § 5, para. 8. Frequently, however, the wording of a rule will give a first hint to the *ratio legis* and thus put a limit to an arbitrary interpretation, see Hans-Joachim Koch and Helmut Rüßmann (n 28) 170, 222.

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Not without good reason, it was pointed out that objective(-teleological) interpretation is in reality at risk to be ideologically coloured and thus to a certain degree arbitrary.[95] Indeed, it is necessary that the interpreter of the law justifies in a comprehensible manner why a particular purpose – in the present context: economic efficiency – should be decisive for the interpretation in a normative sense. In this respect, three situations can be distinguished:

(1) Existing interpretation of the statutory rule in case law and legal scholarship

First of all, there are legal rules that have already been the subject of court rulings and legal studies. In this case, illustrative material is available that can be used to infer the purpose of the rule, the *ratio legis*, inductively from the results found earlier.[96]

In order to identify the (objective) purpose of a rule with economic efficiency, it is therefore sufficient if the *ratio legis*, according to the current state of its interpretation in the judiciary and legal scholarship, objectively incorporates such economic considerations.[97] The legal rule must therefore be capable of being objectively explained – at least in the most part – using the findings of Law & Economics.[98] In methodological terms, this represents an inductive procedure for reconstructing the relevant (economic) 'values' that give the legal rule its normative justification and determine its interpretation. Ultimately, the aim is to show that, from an objective point of view, economic considerations underlie a particular rule or legal institution and are thus an immanent part of the legal system as its *ratio legis*.

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95 Klaus Friedrich Röhl and Hans Christian Röhl (n 94) 629, 631; Thomas MJ Möllers (n 31) § 5 para. 8, § 6 para. 60, 73, 75 with further references; but see also Hans Christoph Grigoleit (n 61) 269 ff.

96 See for this method: Karl Larenz and Claus-Wilhelm Canaris (n 61) 157; see also Hans Christoph Grigoleit (n 61) 261 f. This purpose of a rule can also be called the principle underlying the rule, see Karl Larenz and Claus-Wilhelm Canaris (n 61) 157. Regularly, however, the term 'principle' is associated with a meaning that extends beyond the individual legal rule, same as here Franz Bydlinski (n 13)

97 Same as here Claus Ott (n 19) 31 ff; Stefan Grundmann (n 66) 443 ff; similar Gerhard Wagner (n 15) 306 ff.

98 However, it should be pointed out that this inductive procedure contains a certain degree of subjective-teleological interpretation, since the intentions of the historical legislator have already been incorporated into the case law and the interpretation by legal scholarship, see Franz Bydlinski (n 13) 451.

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If this can be convincingly demonstrated, the findings of the Economic Analysis of Law can certainly be used as an auxiliary tool in the context of objective-teleological interpretation.

One will even have to go further: if the objective purpose of a legal rule is supported or justified by economic considerations (in particular: efficiency), the interpreter of such a provision *must* take this into account in the course of the interpretation and may not simply ignore it. In this respect, the same methodological rules apply as in the case of subjective-teleological (or historical) interpretation. This does not mean, however, that the efficient interpretation must necessarily be chosen, since the objective-teleological interpretation is only one method of interpretation and competing legal principles – such as distributive justice – can also influence the outcome of the interpretation.[99] Yet, in this case, the burden of normative justification shifts to those who wish to give preference to other 'values' or principles over efficiency.[100]

German case law on (pre-)contractual disclosure obligations may serve as an example, as these obligations can largely be explained by the desire to reduce information costs while simultaneously conserving the desirable incentives to generate (productive) information.[101] For example, the seller's obligation to disclose disadvantageous characteristics of the sold good[102] and the rejection of an obligation to disclose general market conditions[103] are largely consistent with the findings of the Economic Analysis of Law and can be coherently enhanced on the basis of its highly differentiated solutions.[104]

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99 In this case, however, it must also be justified that the allegedly competing legal principles are underlying the individual legal rule, see also Stefan Grundmann (n 66) 443.

100 Klaus Friedrich Röhl and Hans Christian Röhl (n 94) 648.

101 Holger Fleischer (n 45) 146 ff, 277 ff; Tobias Tröger (n 45) 279 ff.

102 Bundesgerichtshof NJW 1965, 34; Holger Fleischer (n 45) 286 ff.

103 Reichsgericht Zivilsachen 111, 223; Holger Fleischer (n 45) 325 ff.

104 See generally on (pre-)contractual disclosure obligations: Steven Shavell, 'Acquisition and Disclosure of Information Prior to Sale' (1994) 25 RAND Journ Econ 20 ff; Anthony Kronman, 'Mistake, Disclosure, Information, and the Law of Contracts' (1978) 7 Journ Leg Stud 1 ff; Jack Hirshleifer, 'The Private and Social Value of Information and the Reward to Inventive Activity' (1970) 61 Am Econ Rev 561 ff; Robert Cooter and Thomas Ulen, *Law and Economics* (6th edn Addison Wesley 2016) 354 ff; Richard Posner (n 17) 118 ff; Hein Kötz, 'Vertragliche Aufklärungspflichten: Eine rechtsökonomische Studie' in Jürgen Basedow, Klaus Hopt and Hein Kötz (eds), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (Mohr Siebeck 1998) 563 ff; Hans-Bernd Schäfer and Claus Ott (n 24) 625 ff; Hans-Bernd Schäfer, 'Ökonomische Analyse von Aufklärungspflichten' in

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The advantage of relying on an objective purpose of a legal rule, which was derived inductively, is that the true decision criteria (*rationes decidendi*) are revealed. As far as this *ratio legis* is of an economic nature, Law & Economics can thus make a significant contribution to a coherent enhancement of the law on a rationally verifiable basis.

(2) Non-existent interpretation of the statutory rule in case law and legal scholarship

If the inductive method for determining the objective purpose of the norm cannot be conducted because the rule is novel, the normative relevance of efficiency can only be justified by the fact that it is regarded as a legal principle relevant to the specific legal rule in question.[105] One must therefore inquire whether economic efficiency is to be regarded as a relevant legal principle within the particular set of statutory rules, the respective legal institutions (*Rechtsinstitut*) or an even wider field of the law (such as contracts, torts, civil law, criminal law etc).[106] However, it should be pointed out that this approach sticks to the intrinsic values of the law as well, since the legal principles are in turn inductively derived from the *rationes legis* of the existing legal provisions.[107] Thus, the – possibly economic – objective purpose of a legal rule is ultimately derived from the inner system of the law.[108]

Claus Ott and Hans-Bernd Schäfer (eds), *Ökonomische Probleme des Zivilrechts* (Springer 1991) 117 ff; Holger Fleischer (n 45) 146 ff, 277 ff; Tobias Tröger (n 45) 279 ff.

105 Karl Larenz, Richtiges Recht (Beck 1979) 26; Karl Larenz and Claus-Wilhelm Canaris (n 61) 157; see also Hans Christoph Grigoleit (n 61) 264.

106 See more precisely under IV. 2.

107 Claus-Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz* (2nd edn Duncker & Humblot 1983) 97 ff; Franz Bydlinski (n 13) 481 ff, 485 f, 490 f; Franz Bydlinski, *Fundamentale Rechtsgrundsätze* (Springer 1988) 124; Franz Bydlinski, System und Prinzipien des Privatrechts (Springer 1996) 68; Karl Larenz (n 105) 25 f; Karl Riesenhuber, *System und Prinzipien des Europäischen Vertragsrechts* (De Gruyter 2003) 18. See also IV. 2. A. bb.

108 See on the inner system of the law: Claus-Wilhelm Canaris (n 10) 88 ff, 91; see also Helmut Coing, *Juristische Methodenlehre* (De Gruyter 1972) 33.

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(3) Absence of legal principles

This leaves the – highly theoretical – case in which the wording, the legislative intent and the inner system of the law do not provide a clear answer for interpretation and, moreover, there is neither case-law on the provision in question, nor can a general legal principle be identified which could be used for an objective-teleological interpretation of the provision in question. In such a situation, the identification of the norm's purpose with the efficiency criterion can only be justified via rational, intersubjectively persuasive arguments.[109] Normative weight is therefore only given to such a *ratio legis* – which was taken as a premise at the outset – over time if it is subsequently approved in case law and/or legal scholarship because of the factually appropriate results obtained by its application or if it can be traced back to the 'idea of the law' (*Rechtsidee*) itself.[110] This is in fact the inverse of the above mentioned inductive process of obtaining the purpose of a particular legal rule.[111] In comparison to mere judicial discretion, however, a recourse to economic efficiency still appears to be preferable, since, at least in part, it offers an objectively verifiable method of applying the law. After all, efficiency considerations are based on a precise theoretical framework and clear assumptions. As a result, in this case there is the possibility, but not an obligation, to take efficiency considerations into account.

The latter two groups of objective-teleological interpretation are closely related to the enhancement of the law (*Rechtsfortbildung*).[112] The following section is therefore devoted to the relevance of Economic Analysis and economic considerations (especially efficiency) in that context.

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109 In such circumstances, the quality of the legal reasoning decisively influences the legitimacy of the proposed objective *ratio legis* (= objective purpose of the rule), cf generally on this: Hans Christoph Grigoleit (n 61) 247, 250, 252, 261 f; Hans Christoph Grigoleit (n 61) 264.

110 Claus-Wilhelm Canaris (n 107) 106 ff; Karl Larenz and Claus-Wilhelm Canaris (n 61) 241.

111 See above IV. 1. B. bb. (1) Similar procedures are known from the field the judicial enhancement of the law, which was sometimes carried out on the basis of a legal principle whose significance has only been recognised later, see Karl Larenz and Claus-Wilhelm Canaris (n 61) 232, 241.

112 Similar Gerhard Wagner (n 15) 304 who points to the existing continuum between (objective-)teleological interpretation and the enhancement of the law; see extensively under IV. 2.

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2. *Enhancement of the law*

If a legal question cannot be solved by interpreting the statutory rules, because there is a 'gap' (*Lücke*) in the law[113], the courts must enhance the law (*Rechtsfortbildung*). In the context of the enhancement *praeter legem*, which is of particular interest here, the judge in fact replaces the legislator and becomes involved in the making of new law. However, the prerequisites and limits of judicial enhancement of the law must be respected: the judge may not simply transform his own policy preferences into law via the judicial enhancement of the law[114] (= *applicational objectivity*).[115] Rather, the result found must be justified in a methodologically recognised manner.[116] In particular, the decision can be based on a legal principle inherent in the legal system.[117] In the context of the enhancement of the law, efficiency is therefore only of normative significance for the legal decision if it is recognised as a legal principle.[118] This question shall thus be investigated in the following section.

a. Legal principles

In order to improve the accessibility of the following arguments, it seems appropriate to make some general remarks on legal principles first.

aa. General features of legal principles

Principles represent the 'guiding ideas' of an existing or possible rule, without, however, being fit to be directly used for the legal assessment of

113 See on this prerequisite of judicial enhancement of the law Karl Larenz and Claus-Wilhelm Canaris (n 61) 187 ff.
114 Karl Larenz and Claus-Wilhelm Canaris (n 61) 247.
115 On applicational objectivity, see Bender (n 11) (§ 1), text to n 109–114, 120–146.
116 Bundesverfassungsgericht BverfGE 34, 269, 287; Karl Larenz and Claus-Wilhelm Canaris (n 61) 246 f; Hans-Martin Pawlowski, 'Einführung in die juristische Methodenlehre' (2nd edn Müller 2000) § 5 para 109, 126.
117 Karl Larenz and Claus-Wilhelm Canaris (n 61) 240 ff, 246; see also Wolfgang Ernst (n 15), 30.
118 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 459 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 126 ff; Stefan Grundmann (n 66) 442; Gerhard Wagner (n 15) 313 f.

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a specific case.[119] Rather, the latter requires the concretisation by further sub-principles and further specific individual value-judgements.[120] Principles acquire their status because of their systemic, principal significance for a particular area of law.[121] Statements about the importance and weight of a principle are therefore quite relative: a particular legal principle can be regarded as system-shaping for a certain sub-area of law, but need not be regarded as system-shaping for private law as a whole or the entire legal system.[122] Nevertheless, legal principles are an immanent component of the legal system. As values that justify the rules of the law, the principles form the 'depth structures of the law'.[123] It is also typical of legal principles that they can conflict with each other. In that case, this conflict must be resolved in such a way that the principle with the relatively greater weight (*dimension of weight*) is given preference.[124]

bb. Two ways of establishing legal principles: inference through induction and traceability to the idea of law

Principles of law can first be derived from the specific to the general by an inductive inference.[125] In this case the normative justification of a rule must be worked out, which gives the norm its substantive legal status.[126] In other words, the uncovering of a principle requires a regression to the

119 Karl Larenz (n 105) 23; Karl Larenz and Claus-Wilhelm Canaris (n 61) 240.

120 Claus-Wilhelm Canaris (n 10) 53, 57 f; see also Karl Larenz (n 105) 24; Karl Larenz and Claus-Wilhelm Canaris (n 61) 240.

121 Claus-Wilhelm Canaris (n 10) 58; Franz Bydlinski (n 13) 451 (the 'more general evaluations that underlie entire groups of rules and legal institutions').

122 Claus-Wilhelm Canaris (n 10) 47 f, 58.

123 Klaus Friedrich Röhl and Hans Christian Röhl (n 94) 283.

124 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 26; Claus-Wilhelm Canaris (n 10) 52 f; Robert Alexy, *Theorie der Grundrechte* (Suhrkamp 1986) 79; Robert Alexy, *Recht, Vernunft, Diskurs* (Suhrkamp 1995) 183, 218; similar Karl Larenz and Claus-Wilhelm Canaris (n 61) 303; Karl Larenz, 'Wegweiser zu richterlicher Rechtsschöpfung: Eine rechtsmethodologische Untersuchung' in Festschrift für Arthur Nikisch (Mohr 1958) 275, 301 ff.

125 Claus-Wilhelm Canaris (n 107) 97 ff; Franz Bydlinski (n 13) 481 ff, 485 f, 490 f; Franz Bydlinski (n 107), *Fundamentale Rechtsgrundsätze* 124; Franz Bydlinski (n 107) *System und Prinzipien des Privatrechts* 68; Karl Larenz (n 105) 25 f; Karl Riesenhuber (n 107) 18.

126 Karl Larenz (n 105) 26; also Franz Bydlinski (n 107) *System und Prinzipien des Privatrechts* 68.

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ratio legis.[127] In order to derive a principle from positive law, therefore, the teleological purposes of the norm must be examined in particular, although, in this respect, the wording, systematic considerations and the legislative materials are also important[128] (= *applicational objectivity* combined with implicit *productional subjectivity*).[129]

However, this inductive approach of establishing a legal principle is not the only methodologically legitimate way to do so: subsidiarily, legal principles can also be based on the idea of law (*Rechtsidee*) itself.[130] Those principles are concretisations of the idea of law in the form of substantive legal considerations[131] (= *applicational objectivity* combined with *productional objectivity*).[132] Since those principles, which can be traced to the idea of law, are relatively vague, ie cannot be directly applied, and the legislator is not necessarily bound by such principles (= primacy of *productional subjectivity*)[133], they must be made more specific in accordance with the valuations and values of the positive legal order.[134] Typically, a principle of this kind is a legal discovery in the context of a specific case, which is then put into concrete terms and consolidated into a principle by means of further cases.[135] The normative authority of the principle can be justified by tracing it to the idea of law (*Rechtsidee*).[136]

Now that the essential characteristics and different ways of establishing legal principles have been clarified, the question can be examined as to whether efficiency can be recognised as such a legal principle.

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127 Karl Larenz and Claus-Wilhelm Canaris (n 61) 240 f; Franz Bydlinski (n 13) 485; similar Claus-Wilhelm Canaris (n 10) 91; Karl Larenz (n 105) 26.

128 Karl Larenz and Claus-Wilhelm Canaris (n 61) 302; Franz Bydlinski (n 13) 256; Karl Riesenhuber (n 107) 18; see also Klaus Friedrich Röhl and Hans Christian Röhl (n 94) 283 (inference through systematic interpretation).

129 On that permutation, see Bender (n 11) (§ 1), text to n 120–136.

130 Claus-Wilhelm Canaris (n 107) 97, 106 ff; Karl Larenz and Claus-Wilhelm Canaris (n 61) 302; simlilar Franz Bydlinski (n 13) 486 ff and Franz Bydlinski (n 107) *System und Prinzipien des Privatrechts* 69.

131 Karl Larenz (n 124) 304; Karl Larenz and Claus-Wilhelm Canaris (n 61) 302.

132 On that permutation, see Bender (n 11) (§ 1), text to n 137–146.

133 On that possibility, see Bender (n 11) (§ 1), text in between n 139 and 140.

134 Claus-Wilhelm Canaris (n 107) 113 f; Franz Bydlinski (n 13) 488 f; Karl Riesenhuber (n 107) 18 f.

135 Claus-Wilhelm Canaris (n 107) 106 f; Karl Larenz and Claus-Wilhelm Canaris (n 61) 241, 302.

136 Claus-Wilhelm Canaris (n 107) 107 ff, 113 f.

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b. Efficiency as a legal principle

Again, *Eidenmüller* has significantly influenced the German debate and argued that efficiency can only be recognised as a legal principle if the practice of the courts (i) objectively coincides with economic considerations and (ii) this conformity is subjectively intended by the courts (so-called *identity thesis*).[137] Furthermore, although efficiency could be taken into account under these circumstances, it does not have to be taken into account (so-called *legitimation thesis*).[138]

However, even the *identity thesis* seems questionable in two ways: Firstly, in a code law system, unlike a case-law system, legal principles do not primarily and solely result from court decisions, but from those considerations and values that underlie the legal rules themselves (see aa. (1)). Of course, the state of case law also plays a decisive role in this process, but not as the primary starting point. Secondly, it is doubtful whether recognition of efficiency as a legal principle depends on the courts' awareness of efficiency as the basis for their decisions (see aa. (2)). Finally, it shall be shown that the debate has thus far completely ignored the link between efficiency and the idea of law (see bb.).

aa. Inductive Inference

(1) Positive law

According to what has previously been stated, the substantive justification of the various statutory rules, legal institutions and fields of law must be inductively elaborated in order to establish a legal principle.[139] At this point, not all civil law institutions can be examined for their underlying efficiency considerations. In any case, one should refrain from generalisations and carefully substantiate the relevance of efficiency as a legal principle for the particular field of law in question via comprehensive research.[140] In recent years, however, it has become increasingly clear that many legal institutions can be justified by efficiency considerations in a

137 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 459 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 126 ff.

138 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 476 ff.

139 See above IV. 2. a. bb. In this specific context Claus Ott (n 19) 31.

140 cf generally Alexander Hellgardt (n 12) 418.

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compelling way.[141] It can therefore be argued that efficiency is at least a legal principle of the law of obligations and property law.[142] Even the thesis that efficiency is a principle underlying the entire civil law seems reasonable.[143] However, there is one important caveat to be noted: the further the legal principle in question moves away from the particular rules in question, for example because it is regarded as a principle that applies to entire areas of the law, the more it must be aligned to the legal values of the specific area of law in which it is to be applied in order to avoid contradictions to the positive legal order and the legislator's intent.[144]

(2) Legal precedent

Regarding the current state of the positive law and legal system of a code law system, not only the 'law in the books', but also the 'law in action'[145], as interpreted by the courts, plays a significant role. Thus, it is recognised in general that in order to justify a legal principle, it can be argued that the principle underlies a generally accepted case law.[146] In this respect, it is methodologically quite correct that the literature also refers to the current state of case law to answer the question whether efficiency can be qualified as a legal principle.[147] First of all, it is certainly true that an objective conformity of the case law with the principle of efficiency is required.[148] This corresponds to the methodological procedure

141 See Claus Ott (n 19) 28 ff, 33 ff; see also generally Richard Posner (n 17) passim; Hans-Bernd Schäfer and Claus Ott (n 24) passim.

142 In contract law it is sometimes even regarded as the central legal principle, see Gerhard Wagner (n 15) 314 ff. Furthermore, efficiency certainly is a legal principle in areas of the law which are primarily concerned with economic activity and/or markets (eg corporate law, capital markets law, antitrust law etc).

143 Gerhard Wagner (n 15) 308, 313 f; critical Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 124.

144 Claus-Wilhelm Canaris (n 107) 108, 113 f.

145 See Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 Am L Rev 12.

146 Karl Larenz and Claus-Wilhelm Canaris (n 61) 241: 'In many cases, the demonstration that they [ie the principles], although unrecognised, have already formed the basis of previous case-law, contributes to this.'

147 Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 126 ff; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 459 ff, 467 ff; Claus Ott (n 19) 28 ff.

148 General opinion: Claus Ott (n 19) 28 ff, 31, 33 ff; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 468 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzge-

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of inductively deriving a legal principle from the positive legal system. It must therefore be examined whether the results of interpretation found by case law can be justified in objective terms (essentially) by efficiency considerations. The establishment of efficiency as a legal principle requires that not only an apparent coincidence of the results, but also a correlation of the underlying evaluations leading to the results can be worked out by means of comprehensive analyses.[149]

However, it seems questionable whether it is necessary that the courts also subjectively base their decisions on efficiency considerations.[150] If this strict standard was applied, it would be unlikely that efficiency could be considered a legal principle: so far, there has been no explicit reliance of judicial decisions on the Economic Analysis of Law or economic theories in Germany (at least in the core areas of civil law).[151] However some judgements do at least contain reasoning that corresponds to efficiency considerations in objective terms.[152]

Against this background, it can be attempted to show that there are often implicit and unconscious decision bases that control human behaviour and legal decisions (so-called 'cryptotypes') and that the efficiency criterion is such a cryptotype that implicitly underlies judicial decisions as an unconscious and intuitive decision maxim.[153]

Although this line of reasoning appears to be convincing, it is not necessary. Rather, it seems sufficient to draw a comparison with the methodological rules of interpretation: with respect to the interpretation of statutory law it is well recognised that, in the absence of legislative guidelines concerning the purpose of a rule, its sense is to be determined objectively

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bung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 126 ff; Gerhard Wagner (n 15) 306 ff, 308.

149 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 470 f.

150 Ronald Dworkin, 'Hard Cases' (1975) 88 Harv L Rev 1057, 1074 f; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 130 ff; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 472 ff, 474 ff; different opinion Claus Ott (n 19) 31 ff, 40, 42 f; mediating Gerhard Wagner (n 15) 306 ff.

151 Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 101 f, 131; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 467 ff; Jochen Taupitz (n 19) 120; Claus Ott (n 19) 39.

152 Hein Kötz (n 49) 650 f; Jochen Taupitz (n 18) 121; Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 471 f.

153 Gerhard Wagner (n 15) 306 ff with reference to Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 Am J Comp L 343, 384 ff; similar already Claus Ott (n 19) 39 f.

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(objective-teleological interpretation). There is no reason to abandon those methodological rules with regard to judicial decisions. Rather, for the sake of a uniform methodological approach, it must again suffice that the interpretation does not contradict the wording and the explicit motives of the judgement.

Apart from these limitations, however, a judgement can very well be wiser than its author.[154] With regard to the inductive inference of efficiency as a legal principle from case law, it is therefore not necessary that the judges subjectively wanted to base their decision on the efficiency criterion. Rather, it is sufficient for the decisions to be objectively consistent with the efficiency criterion in order for it to be inductively derived as a legal principle from case law.

Reference has already been made to the case law on contractual disclosure obligations and the supplementary interpretation of contracts, which, from an objective point of view, largely correspond to the insights of Law & Economics.[155]

bb. Traceability to the idea of law

However, inductive inference is only one possible way of establishing a legal principle. As an alternative, it is also legitimate to initially take efficiency as a mere working hypothesis because of the substantive appropriateness of the results obtained by its application, to specify it in several cases, and to justify it as a legal principle only afterwards by tracing it back to the idea of law.[156] The legal literature has thus far not taken into account this possibility of establishing efficiency as a legal principle.

The idea of law is typically related to justice and is defined by the three fundamental legal principles of equality (*Gleichheit*), legal certainty

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154 See for the objective statutory interpretation: Josef Kohler, 'Ueber die Interpretation von Gesetzen' (1886) 13 Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart 1, 40: 'the code of law can be more far-sighted than its authors'; see also Gustav Radbruch, *Rechtsphilosophie* (8th edn Koehler 1973) 207: 'The interpreter may understand the law better than its creators understood it; the law may be wiser than its authors (...)'.

155 See above IV. 1. b. aa. and IV. 1. b. bb. (1)

156 Claus-Wilhelm Canaris (n 107) 106 ff; Karl Larenz and Claus-Wilhelm Canaris (n 61) 241; similar also Franz Bydlinski (n 13) 486 ff. This corresponds to the objective-teleological interpretation in the absence of legal values and principles relevant to the case, see above IV. 1. b. bb. (3)

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(*Rechtssicherheit*) and practicability or functionality (*Zweckmäßigkeit*).[157] Of particular interest in this context is functionality.[158] After all, functionality contains a concept that can be described as the 'economic principle' in the sense that the ends sought by a rule should be pursued with the means that require the least effort.[159] In this context, *Bydlinski* has explicitly emphasised the potential value of the Economic Analysis of Law for assessing the functionality of legal rules.[160] Against this background, economic efficiency represents a formal-technical transposition of the fundamental principle of functionality that follows from the idea of law.[161] There is another aspect to the idea of law: the waste of scarce goods – more generally, inefficiency – is likely to prove unfair in a general sense and is also largely perceived as such by people.[162]

What follows from the above findings? For the purpose of the law's enhancement, efficiency can initially be taken as a mere working hypothesis and be applied provisionally.[163] However, efficiency only acquires normative weight through subsequent recognition and traceability to the idea of law in accordance with the values and considerations of the positive law.[164] Yet, the acquisition of normative weight should be possible particularly often in the case of efficiency due to its immediate proximity to the idea of law (ie functionality). If a judicial enhancement of the law is based on

157 Gustav Radbruch (n 154) 119 ff, 164 ff; Franz Bydlinski (n 13) 325 ff; slightly different Karl Larenz (n 105) 33 ff, who focuses only on legal peace and justice but rejects functionality.

158 See Gustav Radbruch (n 154) 142 ff; Franz Bydlinski (n 13) 330 ff.

159 Franz Bydlinski (n 13) 330.

160 Franz Bydlinski (n 13) 331.

161 Although, according to traditional legal understanding, there may be certain differences between the 'economic principle' of functionality (ie the ends-means relation which makes no normative statement on the ends that are to be sought) and economic efficiency (ie the normative goal of Pareto- or Kaldor/Hicks-efficiency) (see on this Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 55 ff), the latter legitimately adds the substantive criterion of economic (or better: social) welfare as a normative goal to the idea of law. After all, the (peaceful) functioning of society and law itself rests upon material prerequisites (similar Rudolf von Jhering (n 7) 434 ff, who identifies the purpose of the law with 'safeguarding the living conditions of society'). Against this background, the efficiency criterion is perfectly consistent with functionality and the idea of law, because it aims at preserving and fostering the economic preconditions of society and the law.

162 Stefan Grundmann (n 66) 442.

163 Similarly Gerhard Wagner (n 15) 313 f.

164 However, once efficiency is recognised as a legal principle of the field of law in question, one does not have to trace it back to the idea of law in future cases.

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efficiency, care must be taken not only to ensure that it can be traced back to the idea of law in positive terms, but also that it does not contradict the positive legal system in negative terms.[165] As long as a connection of efficiency to the idea of law has not (yet) been convincingly demonstrated in a particular field of law, there is initially only the possibility, but not the obligation, of taking efficiency into account in the course of the enhancement of the law. However, this changes once efficiency is recognised as a legal principle in the relevant area of the law.[166] Again, when compared to mere judicial discretion, a recourse to efficiency seems to be preferable since this approach at least partly offers an objectively verifiable method of justifying a legal decision with reference to one of the most fundamental legal principles (ie functionality).

c. Efficiency as the normative basis of an enhancement of the law

Finally, a few remarks are to be made on the actual enhancement of the law with reference to efficiency as the normative basis. Some argued that even if efficiency is to be recognised as a legal principle, the courts *may* merely take it into account, but *do not have to* do so (so-called *legitimation thesis*).[167] The following should be said about this view: once efficiency has been recognised as a legal principle, it *must* at least be taken into account like any other recognised legal principle. Anything else would amount to an unacceptable and unjustified discrimination against the efficiency criterion. This does not mean, however, that the individual court decision necessarily needs to be in line with efficiency. The representatives of Law & Economics themselves no longer postulate that efficiency is the only relevant normative principle.[168] Besides, it already follows from the methodological classification of efficiency as a legal principle that there can be conflicts with other principles in individual cases.[169] In the context

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165 See generally on this Franz Bydlinski (n 13) 488, 490; Claus-Wilhelm Canaris (n 107) 108, 113 f; same finding also Karl Larenz and Claus-Wilhelm Canaris (n 61) 241.

166 See on the obligation to take efficiency into account under IV. 2. c.; different opinion Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 476 ff.

167 Horst Eidenmüller (n 2) *Effizienz als Rechtsprinzip* 476 ff; Horst Eidenmüller, 'Rechtsanwendung, Gesetzgebung und ökonomische Analyse' (1997) 197 Archiv für die civilistische Praxis 80, 134.

168 Gerhard Wagner (n 15) 313; Hanoch Dagan and Roy Kreitner (n 22) 572 ff.

169 Ronald Dworkin (n 124) 26; Claus-Wilhelm Canaris (n 10) 52 f; Robert Alexy (n 124) *Theorie der Grundrechte* 79; Robert Alexy (n 124) *Recht, Vernunft, Diskurs*

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of resolving these conflicts, preference can easily be given to another legal principle – for example, distributive justice[170] – but such an outcome must be justified just as much as if the decision is in favour of efficiency and at the expense of other legal principles.[171] In any case, efficiency must be taken into account when deciding the case if it is a recognised legal principle in the area of law in question.

V. Conclusion

To sum things up: economic considerations are of considerable importance in a Code Law legal systems like the German and European ones. Thus, a sharp contrast between the 'strictly legal point of view'[172] and the 'economic point of view' could not be found upon closer examination.[173] The implicit incorporation of economic arguments is not surprising, considering that the Economic Analysis of Law often only formalises and specifies those arguments that have already been exchanged in jurisprudence and can thus be labelled as *economic common sense*.[174] Since the overall economic frameworks in the US and Europe are comparable at least in their basic structure, the economic considerations in the individual fields of (civil) law are likely to be largely identical. This is especially true of highly business- and market-oriented areas of law (such as corporate law, capital markets law or antitrust law). In this respect, comparative legal scholarship has already shown that, for example, the basic structure of corporate law is largely similar on both sides of the Atlantic and even

183, 218; similar Karl Larenz and Claus-Wilhelm Canaris (n 61) 303; Karl Larenz (n 124) 301 ff.

170 Critical on the efficiency criterion because of its lack to take distributional justice into account: Karl-Heinz Fezer (n 16) 823 f; see on this Claus Ott and Hans-Bernd Schäfer (n 23) 215, 219 ff. In the normative framework of Kaplow and Shavell (n 22) 968, 976 ff, 989 ff there is no such conflict, since it (correctly) includes distributional considerations; see also Hanoch Dagan and Roy Kreitner (n 22) 579 f who also argue for an inclusion of distributive justice as a normative criterion into economic analysis.

171 Even stronger in favour of the efficiency criterion Klaus Friedrich Röhl and Hans Christian Röhl (n 94) 648.

172 Wolfgang Ernst (n 15) 15 ff.

173 Gerhard Wagner (n 15) 305.

174 Gerhard Wagner (n 15) 281 f; Jeffrey Harrison, 'The Influence of Law and Economics Scholarship on Contract Law: Impressions Twenty-Five Years Later', (2012) 68 NYU Ann Surv Am L 1, 6.

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globally.[175] The reason for this similarity is probably to be found in the comparable economic issues that every legal system has to deal with.[176]

Thus, for Law & Economics in continental Europe (especially in Germany), it follows that it is relevant to the legal system in a variety of ways. The findings of the Economic Analysis of Law may be taken into account in methodological terms. Such an approach can contribute to the systematic coherence of the law by uncovering the true decision-making criteria and examining them formally and analytically for their persuasive power. The insights of Law & Economics should therefore be used by the various actors within the legal system.

175 See Reinier Kraakman and others, *The Anatomy of Corporate Law* (3rd edn Oxford University Press 2017) passim.

176 Edward Rock, 'Corporate Law Doctrine and the Legacy of American Legal Realism' (2015) 163 U Penn L Rev 2019, 2048, 2053.

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§ 14 From the Furies to 'Off with Their Heads': The Complex Inter-Relation between Law and Power in the Legal-Literary Canon

Emilia Jocelyn-Holt[*]

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I. Introduction

What is the relation between law and power? Philosophers and legal theorists have argued either that law limits power or that law is an instrument of power, many a times presenting these as two contradictory options. This article addresses the issue from a Law and Literature perspective- It suggests that a worthwhile approximation to an answer to this question can be found in poems, short stories, plays and novels, which illustrate the association between the two. It proposes that literature shows us how the relation between law and power is complex and ambivalent. The

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works to be discussed here teach us that while law controls power, it is also its source of legitimization. Paradoxically, when law is present in literary works, it is sometimes portrayed as an instrument of power[1]. This is because the aspects of power in the law may become prevalent and used against the individual. Therefore, law cannot be understood without power.

Literature is a good place to ask ourselves how law and power relate. In novels, short stories, plays and poems the reader can encounter the tension between law and power in a way that is particularly revealing. In this paper, this will be analysed through three literary texts: Aeschylus' trilogy *The Oresteia*, Lewis Carroll children's story *Alice's Adventures in Wonderland* and Franz Kafka's unfinished novel *The Trial.* Each of these highlights a different aspect of the multi-faceted relation between law and power. These texts have been chosen because they question law as an institution, as the expression of a social order, rather than addressing how a statue, rule or norm fails in a particular case. That is why, even though these literary texts correspond to different ages, jurisdictions, languages and political models, all three tackle the broader problem of the relation between law and power.

The paper begins by analysing *Oresteia*, in which Aeschylus presents us a world without law, where power is unregulated. In the play, law is created in order to replace vengeance and stop the eternal cycle of violence. Law becomes the instrument by which power is limited, controlled and regulated. At the same time, the Greek tragedian illustrates how power is the origin of law, making force and violence part of its foundation.

Once law has been established, the next issue to be tackled is understanding the complex relation between law and power in the daily practice of the law. To answer this, the paper analyses *Alice's Adventures in Wonderland*. In Lewis Carroll's children story, law turns out to be the language of power. In the text, there is a clear warning: the aspects of power in the law can become dominant, making it as dangerous as the uncontrolled power that exists before law prevails.

Finally, the paper analyses how law and power in modern law interact through Kafka's *The Trial*. In this unfinished novel, law is taken over by power, and is converted into its instrument. Law no longer controls

1 For Menke this same paradox is present in the relation between law and violence. While law seems to be the opposite of violence, ending revenge, it is also considered a kind of violence. Christoph Menke, 'Law and Violence' (2010) 22 Law & Literature 1.

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power but is instead abused by authorities. Citizens cannot understand the system, though they becomes dependent on it. In their eyes, law becomes an illegitimate form of violence.

In this way, by analysing the *Oresteia*, *Alice's Adventures in Wonderland* and *The Trial*, the multifaceted relation between law and power can be better understood. Law is not only the tool by which power is controlled, nor merely an instrument by which power can express itself. While power is the origin of law, its legitimation source, at the same time law is created to control power. Furthermore, law is the language of power and can be misused by authorities against the individual. In that sense, law can be transformed into a tool as dangerous as uncontrolled power. Literature teaches us that these complex relations between law and power can operate simultaneously.

II. The Oresteia: Law as the Institutionalization of Power

Can we imagine a world without law? This is a question that authors have asked themselves in various ways. Many novels, short stories and plays have portrayed groups of people without orderly society nor rules that allow them to constitute themselves as a community. These literary texts portray the world without law or place their stories in geographical spaces law cannot reach (such as woods or deserted islands). Such stories are particularly relevant to developing a better understanding of the relation between power and law, as it shows how power would act without any constraint.

Perhaps one of the most important texts to depict a world without law and its consequences is Aeschylus' trilogy, *The Oresteia*. In it, the Greek tragedian tells the story of Agamemnon after the Trojan war. Having left for Troy ten years earlier, Agamemnon returns, victorious, to his home, realm and his wife Clytemnestra. She is furious with her husband, who before leaving for Troy had sacrificed their daughter Iphigenia in order to have favourable winds for his voyage. During his absence, Clytemnestra ruled the kingdom, and has not only been planning her revenge, but has also taken a lover, Aegisthus. Clytemnestra waits for an opportune moment and slays Agamemnon with a sword. She defends herself, claiming she has done no more than take justice for her daughter Iphigenia's sacrifice. A few years pass, and Orestes, the son of Clytemnestra and Agamemnon, returns from exile and meets his sister Electra. Together they plot to kill their mother and Aegisthus. Finally, Orestes murders them, avenging his father's death. As Clytemnestra does not have any

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blood relative willing to pursue revenge for her murder, the Furies, the goddesses of vengeance, take on that role and follow Orestes through his exile. While the Furies hunt Orestes, Apollo, who had persuaded him to kill Clytemnestra, protects him. Orestes arrives in Athens, where he asks Athena for protection and aid in resolving the issue with the Furies, who accept her jurisdiction. Athena decides to create a permanent court, the Areopagus, which will decide this particular case and all future disputes. The trial begins and Orestes confesses that he killed his mother in order to avenge Agamemnon's murder. Apollo appears as a witness and says that the act that he asked Orestes to do was just. Athena requests that the judges vote and declares that if the ballots come out even, Orestes will be acquitted, the same idea that would become the Roman *in dubio pro reo* principle[2]. This indeed occurs, with Orestes and the Furies receiving the same number of votes, meaning Orestes is acquitted[3]. The Furies are enraged with the outcome and feel that the old laws have been trespassed. Athena persuades them to accept the decision and transforms them from Furies into Eumenides, protectors of Athens' prosperity.

Traditionally, this play has been interpreted as marking the transition from a system based on revenge for resolving disputes to a rational, orderly and institutional manner of attaining justice and maintaining peace[4]. In this sense, the creation of the Areopagus court represents a huge step in Western law, as it promises an end to the eternal cycle of revenge and conflicts can be resolved in front of an impartial judge. Under this interpretation, the play is a celebration of this evolution, showing Athenians

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2 Theodore Ziolkowski, *The Mirror of Justice. Literary Reflections of Legal Crises* (Princeton University Press 2003) 36.

3 There have been different interpretations in this regard. For some, it is Athena's vote that makes the result equal on each side, and Athena votes again in order to acquit Orestes. In that case it is Athena's interference that saves Orestes. For others, there was a tie in the result and Athena's vote is added only once the result is known. Delfim F Leão, 'The Legal Horizon of the Oresteia: The Crime of Homicide and the Founding of the Areopagus' in Edward M Harris, Delfim F Leão and PJ Rhodes (eds), *Law and Drama in Ancient Greece* (Bloomsbury 2013) 53.

4 Similar interpretations of this trilogy as the transformation of a revenge system into a rational impartial system of adjudication of justice can be found in James Boyd White, *Heracles' Bow. Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press 1985) ch 8. Telling stories in the law and in ordinary life. The Oresteia and 'Noon Wine'; Richard Posner, *Law and Literature* (Third Edition, Harvard University Press 2009) 86 onwards; Paul Gewirtz, 'Aeschylus' Law' (1988) 101 Harvard Law Review 1043; Ziolkowski (n 2) ch 2. The Birth of Justice from the Spirit of Tragedy; CW MacLeod, 'Politics and the Oresteia' (1982) 102 The Journal of Hellenic Studies 124.

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the importance of the creation of impartial courts. In fact, the audience would have recognized in the depiction of the Areopagus all the characteristics of what they understood of as a court[5].

Even though the *Oresteia* shows us the creation of the Areopagus and the first murder trial in Athens, it is really a metaphor for the birth of law[6]. Of course, as Theodore Ziolkowski has explained, it is not that the Greeks did not have rules, but rather that they had a prelegal society in which acts such as homicide were considered a personal matter that did not concern the community[7]. What has been transcended is the private manner of resolving conflicts, according to which each person has to take justice into their own hands, which gave rise to an endless cycle of violence. This alternative is represented by the Furies, the deities of revenge. Instead, a social system is born, through which the community resolves conflicts that arise among its members. It is through the Areopagus that problems will now be confronted, by means of an impartial jury of citizens. Deeds such as homicide are no longer a private matter, but a preoccupation of the community as a whole. In this context, law not only replaces vengeance but also puts an end to violence. Therefore, the Furies have to be persuaded to abandon their vicious ways and are integrated into the new order, in which they will occupy a different role. As Ziolkowski has argued, 'Aeschylus regarded the establishment of legal institutions as the very foundation of civilized society'[8] [9].

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5 To see the similarities between the Athenian courts and Aeschylus depiction of the Areopagus, see Alan H Sommerstein, 'Oreste's Trial and Athenian Homicide Procedure' in Edward M Harris, Delfim F Leão and PJ Rhodes (eds), *Law and Drama in Ancient Greece* (Bloomsbury 2013); Leão (n 3).

6 For example, 'Further, Aeschylus has excluded from his trial scene all the specific features of procedure on the Areopagus; the court thus becomes in our play the representative of law as a whole, and all the more because it is judging the first murder-case of all time.' MacLeod (n 4) 127–128.

7 Ziolkowski (n 2) 20.

8 ibid 33.

9 law, is utterly misleading." For some scholars the notion of vengeance is not abandoned in the new order, nor is the Court of the Areopagus different to violence. See Hugh Lloyd-Jones, *The Justice of Zeus* (Second Edition, University of California Press 1983) 94; Maria Aristodemou, *Law and Literature. Journeys from Her to Eternity* (Oxford University Press 2000) ch 3. Theatre as woman re-playing the word: towards the triumph of the flesh in Aeschylus Oresteia; DD Raphael, *Concepts of Justice* (Oxford University Press 2004) ch 3. Aeschylus' Oresteia: The development of

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Another aspect of the *Oresteia* that should not be ignored is the role that power plays in the trilogy. The *Oresteia*, like other tragedies, does not tell the story of an ordinary person, but is instead interested in narrating the life and actions of highborn characters and divinities. Agamemnon and Clytemnestra are the king and queen of Mycenae. Behind their revenge story we also find the issue of the legitimacy of power. When Agamemnon leaves for the war, Clytemnestra stays in power:

> Leader: we've come, Clytemnestra. We respect your power. Right it is to honour the warlord's woman once he leaves the throne.[10]

However, when Agamemnon returns, the queen will no longer rule. Therefore, when Clytemnestra kills her husband, she not only avenges her daughter Iphigenia, but also becomes the reigning queen. As she explains to Aegisthus in the final words of the first play:

> Clytaemnestra: Let them howl – they're impotent. You and I have power now. We will set the house in order once for all.[11]

Likewise, not only has Orestes been exiled and deprived of the possibility of defending or mourning his father, but he has also been robbed of his throne. Had Clytemnestra been punished according to custom for the murder of her husband, she would have had to face exile and Orestes would have succeeded his father. This is why, when Orestes murders his mother, he not only avenges his father, but he also regains his throne.

> Orestes: Father, king, no royal death you died – give me the power now to rule our house.[12]

Viewed from this perspective, the Areopagus' decision becomes even more important. Not only are they deciding between Orestes and the Furies, but they are judging whether Orestes is the legitimate king of Mycenae. Orestes' legitimacy depends on the fact that he is acquitted. He knows this and when he is cleared of the charge of murder he says:

> Orestes: O Pallas Athena – you, you save my house! I was shorn of the fatherland but you reclaim it for me (…).[13]

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development of justice; David Cohen, 'The Theodicy of Aeschylus: Justice and Tyranny in the "Oresteia"' (1986) 33 Greece & Rome 129.

10 Aeschylus, *The Oresteia. Agamemnon, The Libation Bearers, The Eumenides* (Robert Fagles tr, Penguin Books 1979) 112.

11 ibid 172.

12 ibid 198.

13 ibid 265.

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Clearly, an important message of the *Oresteia* is that power is institutionalized through law as a form of legitimate violence.

Furthermore, the relation between law and power is even more complex when one analyses the creation of the Areopagus as the Athenian court for all future disputes. It is crucial to clarify that the foundation of this court is an act of power, in this case a divine command. Athena uses her authority to create the Areopagus. Even though Athena persuades Orestes and the Furies that granting jurisdiction to this court is the best alternative, and convinces them to accept its decision, still she does so from a position of divine authority[14]. Because of this, for Paul Gewirtz, *The Oresteia* shows how violence is present in the foundation of law[15]. The legal system may replace a barbaric method of resolving conflicts, but it is still a violent procedure[16] that has force in its base[17]. Athena replaces the terror of the goddesses of revenge with fear of law. Moreover, as Maria Aristodemou has argued, in the end the issue between Orestes and the Furies is not actually resolved through the court, but through Athena's authority and the creation of the rule of the *indubio pro reo*. Given that the trial ends in a deadlock, the fact that one position prevails over the other means it is ultimately an issue of power and politics[18]. For Aeschylus division is unavoidably present in the origin of law, and it is only through power that it can be resolved. From the creation of law onwards, it will be law's power, its violence, that will resolve divisions in society.

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14 For Lloyd-Jones, what has been understood as Athena using persuasive language to convince the Furies is actually a mixture of threads and bribery. Lloyd-Jones (n 9) 92. Another interpretation is given by Manderson, who proposes that Athena's role in the courtroom is of the jurisprudent. She uses her persuasive skills to advance a certain view of the law, a non-legalistic one, by which not all cases are the same, so that in each the parties have to be heard and the circumstances understood. The Furies, in contrast, would represent the most legalistic of all characters in the trilogy. In this context, Athena's persuasive language is pedagogical, not threatening. Athena would not use her authority and does not impose a judgement. In that sense, law would be more persuasive than violent. Desmond Manderson, 'Athena's Way: The Jurisprudence of the Oresteia' (2019) 15 Law, Culture and the Humanities 253.

15 The idea that the origin of law is violence is also present in philosophers such as Walter Benjamin. Walter Benjamin, 'Critique of Violence' in Peter Demetz (ed), Walter Benjamin, *Reflections. Essays, Aphorisms, Autobiographical Writings* (Mariner Books 2019).

16 Gewirtz (n 4).

17 Cohen (n 9).

18 Aristodemou (n 9) ch 3. Theatre as woman re-playing the word: towards the triumph of the flesh in Aeschylus Oresteia.

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To better understand the relation between law and power in this context, it is worth considering the incorporation of the Furies into the legal system. One possible interpretation is that Athena completely transforms the nature of these mythological creatures. They have to leave violence behind in order to be integrated. Vengeance is completely abandoned. This explains why they are re-named: they are no longer Furies, but Eumenides. This explanation fits the notion that *The Oresteia* depicts the transformation of a violent system of revenge into the rationality of law and order. On another possible reading, the Furies are accepted into law but do not necessarily change their nature. This would mean that law is not exclusively rational, but also incorporates forms of institutionalized violence and revenge[19]. In Gewirtz's terms, the furies bring fear into the law and make it an intrinsic part of the new system[20].

This interpretation is particularly relevant to understanding the relation between law and power. Legitimate violence and fear are part of the legal system, as law transforms and institutionalizes them into power. Before the Furies were included in the new order, they were violent beings that took justice into their own hands. Now, because they are part of a legitimate legal system, they are agents of the courts[21], they have the power to assist it, while they are regulated and limited in a determinate jurisdiction and competence. In this sense, law comes to control, limit and regulate power.

The Oresteia teaches us valuable lessons on the complex relation between law and power when the former first comes into being. In that moment, power is institutionalized as a form of legitimate violence. At the same time, law is the instrument that will control and limit it. Moreover, power is also the source of law, making force and violence part of its foundation.

19 The idea that law is a form of violence is also present in philosophers such as Walter Benjamin. Moreover, legal theorists such as Robert Cover have also studied the relation between law and violence, highlighting the importance of violence for law, making law a form of violence. Benjamin (n 15); Robert Cover, 'Violence and the Word' in Martha Minow, Michael Ryan and Austin Serat (eds), *Narrative, Violence and the Law. The Essays of Robert Cover* (The University of Michigan Press 2001).

20 Gewirtz (n 4).

21 Ziolkowski (n 2) 36.

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III. Alice's Adventures in Wonderland: Law as the Language of Power

Once courts are created and law is institutionalized, one should ask what we can learn about the relation between law and power in the daily practice of law. In that context, it is relevant to emphasize that different authors have insisted on how law is a very particular kind of language: the language of power. For instance, James Boyd White has advocated for an understanding of law as an art, as a specific form of language that law students need to learn to speak and write. Moreover, he suggests that it is a special kind of language: the language of power[22]. For the *Law as Literature* perspective, *imperium* is what actually distinguishes law from other forms of literary expression: law has power, while literature lacks it[23].

Likewise, it is worth noting Robert Cover's suggestion that the words of the law need and presuppose violence. The texts that judges produce need a whole structure of violence to make them stand. In that sense, interpretation becomes a practical endeavor by which threats and deeds of violence are generated in an effective way. Through secondary rules they become reality, as they transform words into acts. In this way, legal interpretation is incomplete without forms of violence that sustain it and make all actors comply[24].

Who best illustrates how law is or can become a language of power is the Queen of Hearts in *Alice's Adventures in Wonderland*. In Lewis Carroll's children story, law is constantly present while Alice follows a White Rabbit down his rabbit hole and arrives in Wonderland, where she meets the Cheshire Cat, the Mad Hatter, the March Hare and the Queen of Hearts, among others. Wonderland is filled with rules, most of them absurd and illogical for Alice[25]. As the story develops, the reader realizes that this is a peculiar juridical system in which power and law become one, law is converted into the language of power. Carroll presents us with a satire of

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22 See, for example, James Boyd White, 'The Cultural Background of The Legal Imagination' in Austin Sarat, Cathrine O Frank Frank and Matthew Anderson (eds), *Teaching Law and Literature.* (The Modern Language Association of America 2011) 33.

23 See, for example, Robin West, 'Literature, Culture and Law at Duke University' in Austin Sarat, Cathrine O Frank and Matthew Anderson (eds), *Teaching Law and Literature* (The Modern Language Association of America 2011) 101.

24 Cover (n 19).

25 For a reading of Wonderland as a legal system and its portrayal of the rule of law see: Mary Liston, 'The Rule of Law Through the Looking Glass' (2009) 21 Law & Literature 42; Catherine Siemann, 'Curiouser and Curiouser: Law in the Alice Books' (2012) 24 Law & Literature 430.

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the English judicial system of his time. Law is embodied in the Queen of Hearts, who, as the law-giver, will go around her realm and condemn people to execution. 'Off with his head', 'off with her head' and 'off with their heads' are probably the most repeated phrases in the book. We even hear them before we see her; every once in a while, the rumour that she has condemned someone reaches us. Once we get to meet her, we will hear it constantly. Almost every character that Alice encounters will be sentenced at least once.

Perhaps the closest theoretical framework to the Wonderland world is that described in the legal positivism of Jeremy Bentham and John Austin: law becomes a command given by the sovereign to his subjects that has a sanction in case that it is not followed[26]. In Wonderland, everyone seems to fail to comply with the Queen's sometimes impossible commands, which explains why there are so many convictions. This produces terror in the subjects, as the reader can clearly see in the gardeners who are painting the white roses red because they are afraid that the Queen will notice that the flowers are of a different colour than the ones she had chosen. This distress is predictable, as in this world, there appears to be only one sanction: 'off with their heads'. In this way, for the Wonderland subjects, law is nothing more than the verbalization of the Queen's power. Even though power has been institutionalized and expresses itself through law, it has not been necessarily controlled. Instead, power has been concentrated in the monarch, who can act discretionally. Hence, law's design includes the potentially arbitrary and abusive use of power.

Interestingly enough, the Queen's sanctions, her instructions of execution, are not actually fulfilled. Alice suggests that if they were, there would be no subjects nor realm left; the Queen would have killed all of them by the end of the game of croquet. The characters that Alice meets are all terrified of the Queen, they recognize her words as law and they all seem to think that they could be executed by her command, but this never happens. In the Gryphon's words:

> 'It's all her fancy, that: they never execute nobody, you know.'[27]

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26 Bentham's and Austin's theories were written during the first half of the XIX century. In fact, Austin's 'The Province of Jurisprudence Determined' became influential only after its second edition, which was published in 1861, just two years before Lewis Carroll published *Alice's Adventures in Wonderland*.

27 Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking-Glass* (Barnes & Noble Classics 2004) 108.

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As the story develops, the reader realizes what is happening: when the Queen condemns her subject to execution, the King of Hearts, who has at least as much power as law-giver as his wife, reverses each and every one of her sentences.

> As they walked off together, Alice heard the King say in a low voice, to the company generally, 'you are all pardoned'.[28]

While no one is executed, the Queen is lied to, so that she thinks her commands have been complied with. Since in Wonderland law is a language of power, the Queen's orders end up not being executed because each time the King deprives her of her power. As the King of Hearts takes away her authority, her words, her commands, loose their law status. In this way, the King removes the *imperium* from the Queen's words, transforming her legal commands into mere utterances.

One should not be surprised, then, that in this context courts become senseless. Exactly what most worried Aeschylus, the institutionalization of courts, is now depicted as absurd. This is illustrated in the trial scene in the end of *Alice's Adventures in Wonderland*. The Knave of Hearts is accused by the Queen of Hearts of stealing her tarts. She takes him to court, where her husband, the King of Hearts, is the not-so-impartial judge. The trial also features a jury composed of different animals who do not know how to act nor what they should be doing. The trial is absurd from start to finish. The White Rabbit, who acts as court's trumpeter and herald, tries to give it a certain order and logic. While he attempts to preserve or create the idea of due process, no one really cares about respecting the procedures. The King of Hearts, the judge, wants the jury's verdict right after the accusation, without any evidence or defence, he also threatens thrice to execute one of the witnesses:

> 'Give your evidence' (…) 'and don't be nervous, or I'll have you executed on the spot.'[29]
> 'Give your evidence,' the King repeated angrily, 'or I'll have you executed, whether you're nervous or not.'[30]
> 'You *must* remember,' remarked the King, 'or I'll have you executed.'[31]

28 ibid 107.
29 ibid 129.
30 ibid.
31 ibid 130.

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At the same time, the evidence that is presented is interpreted in an illogical way:

> 'If you didn't sign it [the letter presented as evidence]' said the King, 'that only makes the matter worse. You *must* have meant some mischief, or else you'd have signed your name like an honest man.'[32]

Meanwhile, the Queen, the plaintiff, threatens the audience in the Court:

> 'Collar that Dormouse!' (…) 'Behead that Dormouse! Turn that Dormouse out of court! Suppress him! Pinch him! Off with his whiskers!'[33]

The Queen even wants the King to sentence before the jury has stated their verdict:

> 'Sentence first- verdict afterwards.'[34]

The absurd reaches its peak when Alice, called up as a witness, is sentenced to death by the plaintiff, the Queen of Hearts.

> 'Stuff and nonsense!' said Alice loudly. 'The idea of having the sentence first!'
> 'Hold your tongue!' said the Queen turning purple.
> 'I won't!' said Alice.
> 'Off with her head!' the Queen shouted at the top of her voice. Nobody moved.[35]

In this trial not only do we see how any notion of due process is destroyed, but once again the assimilation of law and power is complete. The fact that the Queen of Hearts convicts Alice while acting as plaintiff demonstrates this. Worst of all, Alice was not even accused of stealing the tarts, but called to the trial as a witness. Perhaps the best evidence that law is only a form of power is metaphorically represented in Alice's reaction to her conviction. A few minutes before she is called to give her evidence, Alice feels that she is starting to grow back to her normal size. When she is accused of stealing the Queen's tarts, she has regained her natural height, and realizes that she is not part of the jurisdiction of Wonderland. Alice understands that she is not one of the Queen's subjects, and that as such the Queen, who now looks small and insignificant, has no power over her. As the Queen loses power, she lacks any jurisdiction over Alice. Her commands, her norms, have no effect over Alice, who can defend herself from the Queen:

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32 ibid 138.
33 ibid 132.
34 ibid 140.
35 ibid.

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> 'Off with her head!' the Queen shouted at the top of her voice. Nobody moved.
> 'Who cares for *you*?' said Alice (she had grown to her full size by this time)
> 'You are nothing but a pack of cards!'[36]

In this way, as Alice understands her freedom from the Queen's power and the jurisdiction of Wonderland, the spell is broken and she is able to leave this kingdom and return home. As Alice denies the Queen's power over her, the entire legal system of Wonderland loses its efficacy. In that sense Alice is privileged, since she is able to escape the jurisdiction that assimilates power with law. According to Ian Ward, this is the ultimate security that the story has, the events of the story are placed within a dream, we know that Alice lives in our world and in the end, she is restored to it[37]. The spell can be broken. Alice is lucky, but many other literary characters do not share her good fortune.

IV. The Trial: Law as the Instrument of Power

Is the assimilation of law and power possible in modern law? Or is this a phenomenon that expires with the end of the absolute monarchy and the creation of the modern state? In order to answer these questions, Franz Kafka's unfinished novel, *The Trial* is worth examining. While the portrayal of law is just one of the many possibilities that the story opens up for interpretation, this paper focuses on those relevant aspects of the novel to analyse the complex relation between law and power in a modern scenario. As we move from Lewis Carroll's portrayal of a dream world which one can ultimately control to the Kafkian day nightmare from which it is impossible to escape, it is worth noting that both the fairy tale and the tragedy depict the same problem. Like Lewis Carroll, Kafka illustrates the relation between law and power through his works, but he does it with a different cast of characters. Power is no longer represented in an absolute monarch, like the Queen of Hearts of *Alice's Adventures in Wonderland*[38]. Kafka addresses a new form of authority that appeared and was deepening during the twentieth century: the bureaucracy. Like us, Joseph K. no longer faces a power centralized in a particular person, but

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36 ibid.

37 Ian Ward, *Law and Literature. Possibilities and Perspectives* (Cambridge University Press 1995) 102.

38 For a brief comparison of *Alice's Adventures in Wonderland* and *The Trial* see Posner (n 4) 182.

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a hierarchical organization. We have left Wonderland and now face the particularities of the twentieth century. As W.H. Auden proposed, Kafka represents the spirit of our ages. Similarly, in Harold Bloom's view, he is the most canonical writer of our century[39]. This suggests that Kafka's work may be the best place to analyse the relation between power and modern law.

The Trial tells the story of Joseph K., a bank official who wakes up one day to be notified that he has been arrested and will be prosecuted in a criminal trial for an unspecified charge. As the story unravels, this particular court system reveals its strangest characteristics: it operates in attics, in secretive forms, neither the investigation nor the accusation is public, and its procedures and laws are completely mysterious. K. will meet various characters throughout the story that relate in one way or another to the court. As much as he tries to understand the system, each time it becomes more cryptic. Each step he takes seems to show worse aspects of this strange court. For example, he will learn from Titorelli, the court's official painter, that an acquittal is not really a viable option in this system, he does not know of even one case in which this had been the result. Given this fact, he recommends that K. considers which of the other options he prefers: *apparent acquittal* or *protraction*. In the case of apparent acquittal, one must get a letter signed by many judges which states the innocence of the individual.

> '(…) When you are acquitted in this sense, it means the charge against you is dropped for the moment but continues to hover over you, and can be reinstated the moment an order comes from above. (…) Someday – quite unexpectedly – some judge or other takes a closer look at the file, realizes that the case is still active, and orders an immediate arrest. I'm assuming here that a long time has passed between the apparent acquittal and the new arrest; that's possible, and I know of such cases; but it is equally possible that the acquitted individual leaves the court, returns home, and finds agents already there, waiting to arrest him again. Then of course his life as a free man is over.' 'And the trial begins all over again?' K. asked, almost incredulously. 'Of course,' said the painter, 'the trial begins all over again, but it is again possible, just as before, to secure an apparent acquittal.'[40]

39 Harold Bloom, *The Western Canon. The Books and School of the Ages* (Riverhead Books 1995) 416, 424.

40 Franz Kafka, *The Trial* (Breon Mitchell tr, Schocken Books 1998) 158–159.

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The second alternative is *protraction*:

> '(…) Protraction is when the trial is constantly kept at the lowest stage. To accomplish this the defendant and his helper, in particular his helper, must remain in constant personal contact with the court. (…) You can't let the trial out of your sight; you have to visit the relevant judge at regular intervals, and any extra chance you get as well, and try to keep him as well disposed as possible in all ways; if you don't know the judge personally, you have to try to influence him through judges you do know, although you still don't dare dispense with the direct conferences. If nothing is omitted in this respect, you can be sufficiently assured that the trial will never progress beyond its initial stage. The trial doesn't end of course, but the defendant is almost as safe from a conviction as he would be as a free man. (…)'[41]

Sadly, the reader can see that there is no real escape from the court's world; once one is under its control there is no way out. Finally, K. will be executed without ever even knowing what he was accused of or being heard by the court.

> Where was the judge he'd never seen? Where was the high court he'd never reached?[42]

These are some of K.'s last thoughts.

Is *The Trial* really about law? Some scholars, such as Richard Posner, have questioned this idea. For him, centring the novel around the idea of law is misleading, since Kafka is portraying many other metaphysical issues of the modern world and the individual[43]. Moreover, it seems that the atrocities and the absurdities that the reader sees in the novel cannot be law. The story illustrates a system more similar to totalitarian states than those in which the rule of law prevails[44]. In effect Posner is arguing that *the Trial* is not really about law because Kafka's depiction does not fit his own understanding of what law should be, his particular view of it as a judge and legal scholar[45].

This article follows Theodore Ziolkowski's view, according to which Kafka's works *are* about law; perhaps not exclusively so, but the legal system has a central role in them. Although Kafka was a lawyer, he worked

41 ibid 160.
42 ibid 231.
43 Posner (n 4) 170 onwards.
44 ibid 184.
45 Patrick J Glen, 'Franz Kafka, Lawrence Joseph, and the Possibilities of Jurisprudential Literature' (2011) 21 Southern California Interdisciplinary Law Journal 47, 50.

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as an insurance officer for the Worker's Accident Insurance Institute. He was a lawyer-bureaucrat: he knew the worst of those two worlds. In any case, Kafka was directly involved with law for more than twenty years and this is reflected in his texts[46]. In that sense, Ziolkowski suggests that the novel must be read as a burlesque parody of familiar legal procedures through which Kafka is talking about the modern crisis of law. Moreover, he is advocating for the protection of the individual through clear rules[47].

In *The Trial*, law has been taken over by power. It is the same situation as in *Alice's Adventures in Wonderland*; law has become only an instrument of power. The difference is that this time there is no monarch or specific authority one can recognize. Instead, power is situated in a highly complex organization which the common citizen cannot penetrate or understand. Moreover, neither K. nor the reader will encounter a judge. We are confronted with the court bureaucracy, an institution in which power is dispersed. It is not clear who is taking decisions, which makes accountability an impossible goal. Furthermore, the citizen, who cannot understand this complex organization, will become completely dependent on it. No aspect of his or her life will be free from this institution. Law is used by some larger system in order to control its subjects' lives entirely.

In the case of *The Trial*, we see the tragedy that can unfold if law becomes only an expression of power. One of the worse aspects of this in the novel is that the citizen never knows who is responsible for what is happening. Power cannot be checked by any form of accountability. In fact, every person that is part of the organization abuses his or her small portion of power. Meanwhile, the citizen has no individual rights against this misuse of power.

Another relevant aspect of the novel has been the interpretation that *The Trial* shows the terrible effects that the juridical system can have when the citizen does not understand the complex machinery that modern law is[48]. In H.L.A. Hart's terms, Kafka shows us the external point of view[49]. This would mean that it is not necessary that the legal system K. confronts is completely absurd; it is just that he does not understand it. Interestingly

46 To see the connection between Kafka's own cases and his novels and stories see Reza Banakar, 'In Search of Heimat: A Note on Franz Kafka's Concept of Law' (2010) 22 Law & Literature 463.

47 Ziolkowski (n 2) ch chapter 11. The Modern Crisis of Law.

48 See for example Glen (n 45); Banakar (n 46).

49 For the distinction Hart makes between the external and the internal point of view of law see HLA Hart, *The Concept of Law* (Third Edition, Oxford University Press 2012) 88–91.

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enough, Kafka does not portray the internal point of view. The reader never gets to see how the system is understood in the inside, we only know that for some characters all this seems logical. *The Trial* is a novel that is centred on the external point of view, on how the citizen perceives law adjudication.

In that case, Kafka's warning is absolutely clear: even though law may seem very coherent and rational to lawyers, legislators and judges, for the citizen it may appear only as a manifestation of power. While for some, the legal system is a rational system to resolve conflicts, for most it is a nightmare. The individual becomes powerless in front of this organization and has no defence of his own rights. Law is not only absurd for the common man, but also violent.

An important characteristic of Kafka's portrayal is that in this legal system justice and law are completely separated[50]. As the citizen looks to the law seeking justice, the law responds that this is not its objective. As the citizen hopes the law will defend him or herself, there will be no answer. K.'s first reaction to having representatives of the court in his room is to turn to law for protection:

> What sort of men were they? What were they talking about? What office did they represent? After all, K. lived in a state governed by law, there was universal peace, all statutes were in force; who dared assault him in his own lodgings?[51]

In *The Trial*, the legal system is so powerful that it creates an all-encompassing reality for the citizen. It seems that even legal rules have disappeared from Kafka's world: there is only the application of a mysterious law that may or may not even exist. At the same time, the citizen feels lost and oppressed under an arbitrary system that relies on secret rules and procedures. Worst of all, as the citizen does not understand the law, power is no longer a legitimate form of violence, just pure violence. For example, the reader tends to assume that K. was innocent, but this is not necessarily the case. Kafka, in one of his diaries, refers to his own character as 'the guilty one'[52]. However, even assuming K. is guilty, and the legal system proceeds in a valid way, the reader would still feel that the protagonist is subject

50 For Banakar, this paradox of modern law is natural due to the way law strives towards generality and universality while justice requires the recognition of singularity and specificity. Banakar (n 46) 480.

51 Kafka (n 40) 6.

52 Roberto Buonamano, 'Kafka and Legal Critique' (2016) 25 Griffith Law Review 581, 584.

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to power and force. If power and law are completely assimilated in the modern state, and the citizen is completely deprived of its understanding of it, it seems that law becomes only an illegitimate form of violence.

V. Conclusion

What is the relation between law and power? From the analysis of three literary works, we can conclude that it is a multifaceted and highly complex interrelationship. In some texts, such as Aeschylus' trilogy *The Oresteia*, which is a metaphor of the birth of law, we saw how law replaces vengeance and breaks the eternal cycle of violence. The solution to the problem of vengeance, violence and unchecked power was law. In that context, power is institutionalized by law since it is recognized as a form of legitimate violence. At the same time, law is the instrument by which power is limited, controlled and regulated. Paradoxically, while law institutionalizes power, the latter is also the origin of law, making force and violence part of its foundation.

Once this highly complex relation between power and law in the birth of law has been analysed, we asked for the connection between them in the daily practice of law. As we analysed *Alice's Adventures in Wonderland* and *The Trial* we concluded that law is not always able to stand as an instrument that controls power. The relation between law and power is as complicated as ever. To start with, it was claimed that law has sometimes been understood as a language of power. In the case of Lewis Carroll's children's story, law becomes little more than the verbalization of the Queen's power. At the same time, in a world in which power and law are completely assimilated, the legal system becomes an absurdity. Because Alice refuses to accept the jurisdiction of Wonderland, she is able to escape it. K., sadly, will not be as lucky.

Finally, through an examination of Kafka's unfinished novel *The Trial*, the dangers of understanding modern law as a form of power were analysed. In the story, law is taken over by power and the former becomes the latter's instrument through a hierarchical and bureaucratic organization. Just like in *Alice's Adventures in Wonderland*, law no longer constrains power, but it is abused by the authorities. This has a dangerous effect: the citizen cannot understand the system, but he or she will become completely dependent on it. For the citizen, law is only an illegitimate form of violence. In this way, in *The Trial*, we have left the rule of law and have returned to the world of tragedy.

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We can conclude that by analysing the *Oresteia*, *Alice's Adventures in Wonderland* and *The Trial*, the multifaceted relation between law and power can be better understood. Law is not only the tool by which power is controlled, nor merely an instrument by which power can express itself. While power is the origin of law, its legitimation source, at the same time law is created to control power. Furthermore, law is the language of power and can be misused by authorities against the individual. In that sense, law can be transformed into a tool as dangerous as uncontrolled power. Literature teaches us that these complex relations between law and power can operate simultaneously.

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Part 8: Structural Objectivity

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§ 15 Metaphors Lawyers Live by: Cognitive Linguistics and the Challenge for Pursuing Objectivity in Legal Reasoning

*Jan-Erik Schirmer**

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I. Introduction

Six years ago, Fabian Richter Reuschle was just another civil judge at the District Court of Stuttgart, Germany. Like most of his colleagues, he routinely dissolved disputes between neighbours and businesses. Only occasionally he acted outside his chambers to speak at conferences or to publish in law journals. Reuschle was what most people would consider a good judge – impartial, fair, and out of the limelight.

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* This text would not have been possible without the immense help of Anne Schäfer. Danke. All remaining errors are my own, of course.

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Today, many argue that Reuschle is not a good judge. He plays a rather prominent role in the legal aftermath of Dieselgate, the emissions scandal involving Volkswagen and other German car manufacturers. Attorneys describe him as 'ruthless' and 'obsessed', newspapers report about his 'war' against the car industry.[1] Even some of his colleagues think that Reuschle went too far. Two years ago, in the arguably biggest case of his professional career, a class action against VW brought by its shareholders, he was barred from the bench. The superordinate judges of the Higher District Court worried that Reuschle was prejudiced because things with Volkswagen got personal: like many other German customers, Reuschle's wife sued VW, claiming compensation for the family car, a 'clean diesel' that turned out to be everything but clean.[2]

Although Reuschle's story is an extreme example, there are most likely some more. To date, more than 10 million Volkswagen cars are registered in Germany, which adds up to roughly 1/8 of the country's population.[3] Since nothing suggests that car preferences of German judges differ substantially from those of the general population, it is highly plausible that 'Reuschle-like scenarios' – that is, a judge or a judge's family member owning a 'not-so-clean' diesel and maybe even suing the car manufacturer – are a quite common phenomenon. When asked off the record, attorneys representing Volkswagen claim that a case is as good as lost if the judge owns a VW, let alone a diesel. Although this is (at best) anecdotal evidence and robust empirical studies are yet to be carried out, the mere probable existence of more 'Reuschle-like scenarios' points to one of the most fundamental problems in legal theory: can legal reasoning be objective? Or is objectivity a myth because legal reasoning is carried out by humans with individual backgrounds and values – and different cars in their driveway?

Of course, this question has been addressed many times. It could be argued that instead of readdressing it we should just pick a side.[4] Following

1 Klaus Köster, 'Schwerer Rüffel für den Stuttgarter Dieselrichter' Stuttgarter Nachrichten (Stuttgart, 2 July 2020) <https://www.stuttgarter-nachrichten.de/inhalt.dieselskandal-schwerer-rueffel-fuer-den-stuttgarter-dieselrichter.8ecd577a-92a7-4483-ac53-aad94bfd5e87.html> accessed 26 October 2020.

2 See archyde, 'Judge against judge – the diesel dispute in Stuttgart escalates' (Düsseldorf, 9 January 2020) <https://www.archyde.com/judge-against-judge-the-diesel-dispute-in-stuttgart-escalates/> accessed 26 October 2020.

3 See Kraftfahrtbundesamt, 'Anzahl der in Deutschland zugelassenen Pkw der Marke Volkswagen von 2006 bis 2020' <https://de.statista.com/statistik/daten/studie/456681/umfrage/vw-pkw-bestand-in-deutschland/> accessed 26 October 2020.

4 For an overview, see Philip M Bender, 'Ways of Thinking about Objectivity' (§ 1), especially under II.

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Ronald Dworkin and his defence of applicational objectivity, one could emphasize legal principles and the Herculean judge who will find the one right answer eventually.[5] Correspondingly, one could go with the Habermasian approach or any other similar discourse theory, claiming that legal procedure, the very structure of the discourse in a courtroom, guarantees the most objective outcome possible.[6] Viewed from a sociological perspective, one could call upon Talcott Parsons and Niklas Luhmann to argue that objectivity is a highly idealistic, yet necessary concept to stabilize normative expectations.[7] And if one is more sceptic, the path of psychology or behavioural economics sounds promising, as it contends that any judgment is far from objective and at best a result of peer group pressure or a relaxing lunch break.[8]

In this paper, I will approach the concept of objectivity from an overlapping, yet fresh perspective: cognitive linguistics.[9] More precisely, I will focus on the role of metaphors in legal reasoning.[10] As I shall explain in

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5 Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977).

6 Jürgen Habermas, *Faktizität und Geltung* (7th edn, Suhrkamp 2019), for an English summary see Jürgen Habermas, 'Paradigms of Law' (1995) 17 Cardozo L Rev 771; combining principle-theory and discourse-theory Robert Alexy, *Theorie der Grundrechte* (Nomos 1985), for an English summary see Robert Alexy, 'On the Structure of Legal Principles' (2000) 13 Ratio Juris 294.

7 Talcott Parsons, 'Law as an Intellectual Stepchild' (1977) 47 Sociological Inquiry 11; Niklas Luhmann, *Law as a Social System* (Oxford University Press 2004); a related approach is the expressive theory, see Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 U Pa L Rev 2021.

8 Chris Guthrie, Jeffrey J Rachlinski, and Andrew J Wistrich, 'Inside the Judicial Mind' (2001) 86 Cornell L Rev 777; Chris Guthrie, Jeffrey J Rachlinski, and Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 Cornell L Rev 1; Richard A Posner, *How Judges Think* (Harvard University Press 2010); Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous factors in judicial decisions' (2011) 108 Proceedings of the National Academy of Sciences 6889.

9 Following the taxonomy presented in the introductory chapter of this book, one could speak of an example of structural objectivity, see Bender, 'Ways of Thinking about Objectivity' (n 4), under IV, especially text to n 310–312 ('thought-structures').

10 So far legal research has paid little attention to the role of metaphors in law. But see the important contributions by Haig A Bosmajian, *Metaphor and Reason in Judicial Opinions (SIU Press 1992)*; Thomas W Joo, 'Contract, Property, and the Role of Metaphor in Corporations Law' (2001) 35 UC Davis L Rev 779; Linda L Berger, 'What Is the Sound of a Corporation Speaking – How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law' (2004) 2 J Ass'n Legal Writing Directors 169; Daniel Damler, *Konzern und Moderne* (Vittorio Klostermann 2016); Jörg Michael Schindler, *Rechtsmetaphorologie – Ausblick auf*

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detail, cognitive linguistics claims that metaphors are pervasive in our daily thoughts and actions. Metaphors such as 'time is money' help us to understand an abstract concept ('time') in terms of another, more familiar concept ('money'). But there is a catch, the feedback-effect. By perceiving time as if it was a scarce resource that can be 'invested' or 'saved', this metaphor systematically hides that time can be conceptualized differently. In this sense, metaphors can be self-fulfilling prophecies. A metaphor forces us to focus only on the aspects it highlights and leads us to regard its derivations as being true.[11] This has potentially wide-ranging consequences for the idea of objectivity. Although professional communication is mostly regarded as a pure technical enterprise, metaphors are also present in legal theory and doctrine. And with that comes the feedback-effect: while metaphors certainly help to understand abstract legal concepts, they highlight certain legal arguments and simultaneously hide others. What follows from this feedback structure appears intuitively convincing, almost natural, and provokes significantly less pressure for any justification. Consequently, what falls outside of the feedback structure causes irritation and demands an explanation.

To develop my argument, I will use German court decisions on Dieselgate as examples, namely tort claims of car purchasers seeking compensation from Volkswagen.[12] Relying mostly on media reports, the plaintiffs argue that VW engineers, with management's backing, developed so-called defeat devices to disguise the emission levels under normal driving conditions and, therefore, the Volkswagen corporation inflicted an 'intentional damage contrary to public policy' (section 826 German Civil Code). In the beginning, these claims were generally rejected because the plaintiffs were unable to prove their case – according to the courts they failed to deliver enough facts to show that the management actually knew of the defeat devices. Today, however, almost all plaintiffs are granted compensation.[13] This is not due to an improvement of factual knowledge on the plaintiff's side but to doctrinal innovation, which slowly shifted the burden of proof

eine Metaphorologie der Grundrechte (Duncker & Humblot 2016); M Hanne and R Weisberg (eds), *Narrative and Metaphor in the Law* (Cambridge University Press 2018).

11 George Lakoff and Mark Johnson, *Metaphors We Live By* (1980).

12 For a prior publication in German see Jan-Erik Schirmer and Philipp Pauschinger, 'Im Griff der Metapher – Eine (andere) Geschichte von juristischer Person und Dieselskandal' (2020) 220 Archiv für die civilistische Praxis 211.

13 See Marc-Philippe Weller, Jana Smela, and Victor Habrich, 'Abgasskandal – Ansprüche der Autokäufer auf dem Prüfstand' (2019) 74 JuristenZeitung 1015.

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from the purchaser to the car manufacturer. Three landmark cases of the Higher Regional Courts of Braunschweig, Karlsruhe, and Koblenz are representative of this change. While the Braunschweig court burdened the plaintiff and rejected her claim as too vague, the courts in Karlsruhe and Koblenz considered the media reports provided as sufficient evidence and argued that Volkswagen, in turn, was obliged (and failed) to refute the allegations brought against them.[14]

As I will show, these contrasting approaches regarding the burden of proof – Braunschweig relying on the plaintiff, Karlsruhe and Koblenz relying on Volkswagen as the defendant – can be understood as metaphorical feedback-effects. Disparate, almost contradictory conceptual metaphors of the legal person work in the background. While the courts in Koblenz and Karlsruhe use the personification metaphor to grasp the Volkswagen corporation, the judges in Braunschweig rely on the network metaphor. By doing so, the shift of the burden of proof is highlighted in the first case and hidden in the latter. Because the inner thought process of other humans is concealed from the outside gaze, – based on the personification metaphor – it seems almost natural to oblige Volkswagen to refute the plaintiff's allegations and prove that its management really did not know what happened. In contrast, a network reveals its internal structure straight away, intuitively making it feel more convincing to leave the burden of proof with the plaintiff and to demand more than vague media reports.

This does not suggest, of course, that the judgments on Dieselgate can be explained entirely with feedback-effects, and certainly not that courts always judge based on metaphors. It does suggest, however, that metaphors matter. Because metaphors are present in legal reasoning, special attention should be paid to the feedback-effect. Just because a legal argument reflects metaphorical feedback, it does not make it wrong. But as natural as it may seem, that does not yet make the argument correct.

II. Dieselgate in German Courts

Even up until today, German courts are busy unravelling the Volkswagen emissions scandal. Judges have to cope with a variety of legal problems, some, such as the liability towards shareholders under capital market and securities law, haven't even been litigated yet. One central aspect, however,

14 OLG Braunschweig (7 U 134/17) BeckRS 2019, 2737; OLG Koblenz (5 U 1318/18) BeckRS 2019, 11148; OLG Karlsruhe (17 U 160/18) BeckRS 2019, 14948.

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has been solved for the most part: Volkswagen's liability towards car purchasers. Contrary to Volkswagen's approach in North America, that is, creating a claims fund and paying its customers a substantial lumpsum compensation, German customers are forced to rely on the courts to receive any compensation. In the beginning, customers did so by suing their respective retailers under sales law. The plaintiffs argued that the car they bought malfunctioned by emitting more nitrogen oxides, owing to installed defeat devices, than (impliedly) agreed upon in their respective sales contracts. This strategy, however, predominantly failed. In Germany, just like in other EU-countries, the seller has the right of supplementary performance (section 439 German Civil Code). The seller gets a second chance if the sold item is defective – the buyer may only demand compensation (ie expectation remedy) after the seller fails to replace or repair the item. This came in handy for the Volkswagen retailers. In order to prevent compensation, the retailers simply had to deinstall the defeat devices (which they eventually did). And since the courts found that the customers did not deliver enough facts to prove that the retailers were aware of Volkswagen's Dieselgate plot, their second line of argumentation, alleging that the retailers knew about the defeat devices and, thus, should still compensate them, did not go through.[15]

1. Three judgments, two and a half opinions, one issue

The customers, consequently, turned directly to Volkswagen. At first glance, their prospects looked even dimmer, though. The customers bought the cars from independent retailers and had no contractual relationship with Volkswagen. Thus, tort law was the only remaining option. Tort liability in Germany is limited to the violation of specific rights and interests such as property, health, or life.[16] In the customers' case, none of these were violated. By purchasing a 'not-so-clean diesel' the customers suffered a pure financial loss.

Stringent requirements must be met to compensate such a loss. One such option is claiming to have suffered an 'intentional damage contrary to public policy' (section 826 German Civil Code). However, this is par-

15 For more details see Thomas Riehm and Lukas Lindner, '"Dieselgate" and Consumer Law: Repercussions of the Volkswagen scandal in Germany' [2017] Journal of European Consumer and Market Law 39.

16 See generally Basil S Markesinis, John Bell, and André Janssen, *German Law of Torts: A Comparative Treatise* (5th edn, Hart Publishing 2019) 37, 88–105.

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ticularly hard since the plaintiff has to prove that the defendant acted not only intentionally but *also* immorally.[17] Making matters worse, when going against a corporation it is not sufficient to show that any employee acted intentionally and immorally. Under German tort law, corporations are only liable if a 'representative' of its (higher) management commits a tort which is then attributed to the corporation (*Zurechnung*).[18] Concerning Dieselgate, the car purchasers, therefore, not only had to demonstrate that installing defeat devices was immoral but that members of the management body acted with intent, that is, approving the actions of the engineers involved.

Taking this into account, it comes as no surprise that the plaintiffs failed in court for a long time. The February 2019 decision by the Higher Regional Court of Braunschweig represents this struggle perfectly. The plaintiff argued that a high ranking Volkswagen engineer, the head of 'Volkswagen type testing', obtained an operating licence for the 'clean-diesels' by deceiving the authorities about the correct installation of the defeat devices – and all this with the management's approval, expressly with that of the then chairman of the board, Martin Winterkorn. The Braunschweig court, however, did not concede. According to the judges, naming the engineer did not suffice because he could not be considered the corporation's representative; and while Winterkorn truly was a representative, the plaintiff's accusations were unsubstantial. By basing her argument solely on press reports about Winterkorn's involvement in Dieselgate, the plaintiff failed to pinpoint a 'concrete action/omission by the chairman of the board'.[19]

But this strict approach only persisted for a few months. In June and July, respectively, the Higher Regional Courts of Koblenz and Karlsruhe ruled it highly implausible for no one within the management to have known about what went on. Although in principle, it was still the plaintiff's job to show (and, if necessary, prove) a representative's involvement in the development of the defeat devices, the courts granted some relief. The plaintiff, the Koblenz court stressed, 'only has publicly available sources at [her] disposal'.[20] Thus, delivering facts on specific actions and operational procedures was simply too high of a demand; 'a more profound substantiation [by the plaintiff]' as the Karlsruhe court put it, '[is]

17 See generally ibid 78–82.
18 See generally ibid 126–127.
19 OLG Braunschweig (n 14) para 167 [this and all following quotations by the Higher Regional Courts are my translations, JES].
20 OLG Koblenz (n 14) para 155.

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not possible'.[21] Instead, to contest the plaintiff's allegations, the defendant, ie Volkswagen, must 'inquire adequate information from within its own divisions' (Koblenz).[22] Volkswagen, as a legal person, has the 'duty to obtain the necessary information from individuals who acted under its guidance, supervision, or responsibility' (Karlsruhe).[23] Claiming on a global scale that no one within the management knew wasn't enough because otherwise 'the corporation could simply free itself from any liability by deferring to the alleged failure of other individuals' (Koblenz).[24] And because Volkswagen did not bring any such information to the table, the corporation, according to the Koblenz court, did not fulfill its secondary burden to refute the plaintiff's allegations properly (*sekundäre Darlegungslast*) – respectively, in the different, yet substantially similar words of the judges in Karlsruhe, Volkswagen conceded the plaintiff's allegations (*Geständnisfiktion* – section 138(3) German Civil Procedure Code).[25] This still stands today: in May 2020, the Federal Court of Justice, Germany's highest court in the system of ordinary jurisdiction, upheld the Koblenz and Karlsruhe decisions.[26]

2. *Core question: burden of proof*

The decisive discrepancy is, therefore, not one of facts, but one of normative valuation: while the judges in Braunschweig saw it as the plaintiff's responsibility to provide detailed information about the happenings, the courts in Koblenz and Karlsruhe left it to Volkswagen to refute the plaintiff's accusations.[27]

How to explain this discrepancy? Why does one court leave the burden of proof with the plaintiff, while two others, for the most part, shift it over to Volkswagen? Of course, a variety of reasons immediately come to mind. Different judges preside over the cases; diverse legal opinions are essentially ingrained in the juridical DNA; Wolfsburg, Volkswagen's

21 OLG Karlsruhe (n 14) para 112.
22 OLG Koblenz (n 14) para 55.
23 OLG Karlsruhe (n 14) para 116.
24 OLG Koblenz (n 14) para 57.
25 See generally Peter L Murray and Rolf H Stürner, *German Civil Justice* (Carolina Academic Press 2004) 156–163.
26 BGH (VI ZR 252/19) BeckRS 2020, 10555.
27 See also Weller, Smela, and Habrich, 'Abgasskandal – Ansprüche der Autokäufer auf dem Prüfstand' (n 13) 1022–23.

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hometown, is located near Braunschweig, not Koblenz or Karlsruhe, etc. But as important as all these factors may be, I believe that a more profound factor plays a decisive role – one that up to this point has been largely underestimated in the legal discourse. As I will try to demonstrate in the following passages, different conceptual metaphors of the legal person are clandestinely at work. The resulting different ascriptions of the burden of proof can be understood as metaphorical feedback-effects.

III. Cognitive Metaphor Theory

What is meant by conceptual metaphors and metaphorical feedback-effects? I draw upon the leading linguistic approach coined by George Lakoff and Mark Johnson, the so-called cognitive metaphor theory.[28] This theory regards itself as an alternative to traditional apprehensions that conceive metaphors as mere stylistic tools. The difference is best explained by an example: while reading this article you might be wondering whether doing so is a wise investment or simply a waste of your time (I hope the former is the case). Either way, your line of thought would be metaphoric in nature. In a literal sense, only limited resources (especially money) can be 'invested' or 'wasted'. The fact that everyone still understands the implication, is, according to the traditional approach, a result of metaphors reflecting pre-existent similarities. Without explicitly emphasizing this, a phenomenon – in this case, time – is not described by its real, literal meaning, but rather with aspects of a phenomenon, which are different in content, but nevertheless inherently similar – in this case, money. In short, the words 'investment' and 'waste' are used figuratively in order to express the conduct of time in a more concise and elegant manner.[29]

The approach paved by the cognitive metaphor theory delves deeper. It stipulates that metaphors are not just rhetorical flourishes, but rather fulfill a fundamental function in understanding complex ideas through simpler terms. Metaphors such as 'time is money' help us to understand an abstract conceptual domain ('time') through expressions of another, more familiar conceptual domain ('money'). The conceptual framework for dealing with money, which has been coherently organized by shared perceptual experi-

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28 Lakoff and Johnson, *Metaphors We Live By* (n 11). For (to some extent) similar approaches by Kant, Weinrich, and namely Blumenberg see Schindler, *Rechtsmetaphorologie – Ausblick auf eine Metaphorologie der Grundrechte* (n 10) 46–87.

29 The classic example for this view is Aristotle, see Samuel R Levin, 'Aristotle's Theory of Metaphor' [1982] Philosophy & Rhetoric 24.

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ences, is projected onto the obscure concept of time. With this, we are able to understand time in terms of money; the conceptual metaphor allows for sub-categorizations and derivations. Because our everyday experience with money taught us that it can be 'wasted' or 'sensibly invested', time can thus also be 'wasted' or 'sensibly invested'. And for the same reason we can also 'save', 'give away', or simply 'have' time.[30]

1. *Metaphorical feedback-effect*

But this feedback-effect has a catch. Inevitably, certain aspects are highlighted while others are hidden. In a way, we get caught in the metaphor's undertow: time is not an abundant commodity, but first and foremost 'valuable' and should 'not be wasted'.[31] The cognitive metaphor theory stipulates that this is not due to unalterable pre-existent similarities but is more a result of specific cultural associations. Time is not money, not even similar to money – the similarity is created by the metaphor, it essentially *arises* as its consequence.[32] This shaping power is the key feature of the theory. Metaphors play an essential role in how we understand reality and what we consider to be real – we actually perceive and act in accordance with the metaphors.[33] If we structured time by means of a different conceptual metaphor, new realities would be created and as a result, completely different aspects would be highlighted and/or hidden. If, for example, the conceptual metaphor were to be 'time is a cycle', it would not have provoked the association of whether or not you were 'wasting your time' with this text.

2. *Some empirical evidence*

Although the cognitive metaphor theory should first and foremost be understood as an epistemological hypothesis, experiments substantiate its

30 Lakoff and Johnson, *Metaphors We Live By* (n 11) 7–10. Another example is the conceptual metaphor 'argument is war' ('He attacked every weak point in my argument.'; 'His criticisms were right on target.'), ibid 3–6.

31 ibid 10–13, 87–96.

32 ibid 215: 'The similarities arise as a *result* of conceptual metaphors and thus must be considered similarities of *interactional*, rather than inherent, properties.'

33 Cognitive metaphor theory can thus be associated with constructivist epistemic approaches, see ibid 156–184, 226–7.

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claim. Psychologists from Stanford University set-up a particularly memorable trial: two experimental groups were presented with a scenario of a small town that recently exhibits rising crime rates. The participants were provided with identical statistical evidence – however, one group received a written introduction describing the rise of crime rates as a beast attacking the city, while the other group received a text depicting the crime toll as a virus. Both groups were then asked to propose possible countermeasures against the rise of criminal activities. The first group predominantly advocated for repressive measures (stricter prosecution, harsher punishments), while the majority of the second group favoured preventive measures (social reforms, fighting poverty). Both propositions were justified with the (identical) crime statistics. The trial-subjects did not even consider that the respective metaphorical portrayals of crime – 'hunt down' beasts, 'prevent' viruses from spreading – could precipitate different propositions. And this effect, observable irrespective of any political affiliations or socio-economic factors, did not necessitate a richly illustrated story – a single word sufficed to trigger the conceptual metaphor and its respective feedback-effect.[34]

IV. Dieselgate Metaphors: Of People and Networks

Against this background, let us get back to the decisions of the Higher Regional Courts of Braunschweig, Koblenz, and Karlsruhe and take a closer look at the respective justification patterns. By doing so, two distinctive conceptual metaphors with considerably different feedback-effects will come to light: the personification metaphor on the one hand and the network metaphor on the other.

1. Personification metaphor

Before the Higher Regional Courts of Koblenz and Karlsruhe address any questions concerning the burden of proof, both courts start exploring tortious conduct, ie whether the defendant acted intentionally and contrary to public policy. The Koblenz court finds that 'the defendant's deceptive course of action' aimed in two directions: on one hand, the defendant 'deluded' the authorities to believe that the vehicle was tested under real

34 See Paul H Thibodeau and Lera Boroditsky, 'Metaphors We Think With: The Role of Metaphor in Reasoning' (2011) 6 PloS ONE e16782, e16782.

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driving conditions, thus 'obtaining [its operating licence] through deception'[35]. On the other hand, customers that 'did not have an insight into the technical processes' were also deceived.[36] All this is considered contrary to public policy, as the defendant had acted 'largely in pure pursuit of profit' and 'calculatedly exploited' the guilelessness of the customers.[37] Finally, the judges also assume wilful intent. The impending revocation of the operating licence after the discovery of the illegal defeat devices 'must have been clear to the defendant and was clear', because 'the defendant's behaviour after the discovery cannot be understood otherwise.'[38] The Karlsruhe court takes the same line. The defendant deceived because the vehicles 'were circulated with the fraudulently obtained type approval' and exploited 'the customers' trust in the Volkswagen corporation'.[39] Plus, no one could doubt the defendant's preponderant motives ('greed').[40]

Regardless of whether or not one shares these assessments, the courts' statements intuitively appear understandable and coherent. Even if we don't know all the details (or even doubt the stipulated facts), we at least understand what the courts are getting at when speaking of 'deceit', 'greed', and the 'customers' [disappointed] trust in the Volkswagen corporation'. However, this is anything but self-explanatory. The defendant is not a human being with motives, preferences, or necessities. The defendant is a legal person. Strictly speaking, the Volkswagen corporation cannot 'delude', 'deceive', or 'exploit trust' any more than one cannot literally 'save' or 'invest' time.[41]

This is where the cognitive metaphor theory comes into play. The judge's reasoning feels so natural to us because it coherently follows a conceptual metaphor. Although Volkswagen is not a human being, we treat it as such in our everyday language. The corporation is personified. We naturally talk about buying a car from Volkswagen, get it repaired by Volkswagen, and end up complaining about Volkswagen's sloppy work. There is, from the cognitive metaphor theory's point of view, a simple reason for this: a 'corporation' is an abstract, rather puzzling conceptual domain that we understand with the help of a very familiar conceptual

35 OLG Koblenz (n 14) para 30–1, 18.
36 ibid para 33.
37 ibid para 45, 40.
38 ibid para 49.
39 OLG Karlsruhe (n 14) para 94.
40 OLG Karlsruhe (n 14), para 89, 110.
41 See generally Jan-Erik Schirmer, *Das Körperschaftsdelikt* (Mohr Siebeck 2015), 131–206.

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domain.[42] For this, we use the most basic perceptual experience of all: interacting with other people. By virtue of the metaphor, 'the corporation is a person', we make use of human categories to cope and interact with corporations intuitively. Seen this way, it is only logical that Volkswagen can 'sell', 'repair', or 'work sloppily'. But since humans can also 'lie' and 'cheat', the metaphorical feedback-effect reaches even further. Volkswagen can also 'delude', 'deceive', or 'exploit trust'.[43]

a. The corporation is a different person

However, this does not yet answer the *Gretchenfrage*: why does it apparently cause so little irritation to speak of 'deception' or 'calculated exploitation', when we actually don't know for sure what happened within the Volkswagen corporation? Indeed, whether the development of the defeat devices was arranged or simply tolerated by the management, continues to be unclear.[44] This does not seem to play a major role in the eyes of the public, though – even if we are still missing details about the internal operations and responsibilities, it is apparently clear that *Volkswagen* did 'lie and defraud'.[45] How does that fit together?

In my opinion, the personification metaphor's feedback-effect also delivers a plausible explanation for this. As the general public is just not part of the corporation, it is perceived as if it were a *different* person. Other persons are outside us, we view them from an external perspective. What Lakoff and Johnson call the 'in-out orientation' is a typical feature of this: we know from experiencing our own physicality that people have their own inner world with distinctive motivations, goals, and needs. But because this inner world is bounded by the surface of our skins and

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42 Lakoff and Johnson, *Metaphors We Live By* (n 11) 25–34. For the cultural-historical background of the personification metaphor see Daniel Damler, *Rechtsästhetik* (Duncker & Humblot 2016), 61–123.

43 This feedback-effect can also be observed in many US Supreme Court decisions preceding the famous and highly debated *Citizen United* case concerning corporate free speech, see Adam Winkler, *We the Corporations* (Liveright Publishing 2018).

44 See Sören Amelang and Benjamin Wehrmann, , '"Dieselgate" – a timeline of the car emissions fraud scandal in Germany' < https://www.cleanenergywire.org/factsheets/dieselgate-timeline-car-emissions-fraud-scandal-germany> accessed 26 October 2020.

45 Mentioned by the German chancellor Angela Merkel at a party summit in October 2018.

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detached from the rest of the world, we experience *other* people only as different physical wholes.[46] If another person, let's call her Mary, knocks over a vase by moving her arm, we automatically assume that her inner world-mechanisms lead to external behaviour. Disregarding obvious situations where our experience dictates a diverging understanding (eg Mary being a toddler or Mary being pushed), it is up to Mary to instruct the outside world why our perception doesn't do her inner world justice – maybe because she was frightened or just didn't see the vase. Although the legal assessment might be more complex, the everyday perception is quite clear: what manifests itself as a person's external behaviour is initially deemed to be the overall result of inner mechanisms. We ask others 'what they were thinking' because we simply 'cannot see inside them'.[47]

b. The inner structure stays hidden

Hence, the personification metaphor highlights the congruence of externally perceptible behaviour and inner mechanisms. That does not mean, of course, that a divergence is impossible. But because any divergence of the inner processes and external apprehensions is systematically hidden in the conceptual metaphor, it falls outside its feedback-effect and thus calls for legitimization. The situation compares to us 'having abundant time'. This statement does not coherently follow from the conceptual metaphor 'time is money', which we use to structure time as a scarce commodity, and will, therefore, regularly incite questions regarding the underlying reasons: Good for you, how did you do that?, How can you afford that?, etc. While the statement 'my time is limited' as a metaphorical feedback seems normal and doesn't require any further justification, the statement 'having abundant time' strays from the metaphorical structure and thus demands an explanation and justification.[48]

Taking this into account, it is hardly surprising that the Higher Regional Courts of Koblenz and Karlsruhe essentially place the burden of proof on Volkswagen. Because both courts conceptualize Volkswagen by

46 Lakoff and Johnson, *Metaphors We Live By* (n 11), 29–32, 56–60.

47 ibid 75: 'Here the STATE (desperation, loneliness, etc.) is viewed as a container, and the act or event is viewed as an object that emerges from the container. The CAUSATION is viewed as the EMERGENCE of the EVENT from the STATE.'

48 ibid 172–175. For the changed (in fact, reversed) approach to time among the elites and its impact on society see Daniel Markovits, *The Meritocracy Trap* (Penguin UK 2019) 77–110.

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virtue of the personification metaphor, the placement of the burden of proof correlates to a coherent, almost innate metaphorical feedback. If we conjecture external behaviour and internal human mechanisms as congruent, it appears evident that '[g]iven the sheer number and quality of manipulated vehicles (...) it can be ruled out that the head of the development department had no prior knowledge of the manipulations'[49]. And just as we automatically presume a moving arm to be a deliberate action, it initially seems plausible that the exhaust-manipulation was 'predetermined by a strategic decision [on the management level]'.[50] One can hardly demand the plaintiff to deliver details on specific actions and operational procedures because, just as with another person, she 'has no extensive insight into the decision-making structures of the defendant'[51]. As an outsider she merely has access to externally manifested occurrences, the plaintiff 'only has publicly available sources at [her] disposal, a more profound substantiation [is] not possible'[52]. Instead, it is up to Volkswagen to 'inquire adequate information from within its own divisions'.[53] Just as we can't look into another person's head, '[the] defendant – and she alone – (...) can construe the decision-making processes that led to the use of the software.'[54]

In other words, the courts project the human 'in-out orientation' onto Volkswagen. The inner world stays hidden away from us, we perceive the internal corporate happenings as manifestations of a physical whole – just as Volkswagen sells or repairs vehicles it manipulated the emission software. Thus, Volkswagen would have to explain why our extrinsic perception does not coincide with its inner world – all because Volkswagen is best at 'listening to itself' and 'sharing its thoughts'.

2. *Network metaphor*

Let us now compare and contrast this to the justification pattern of the Higher Regional Court of Braunschweig. Its judges dive straight in. Volkswagen, 'as a legal person, cannot commit an offence'.[55] The only possible

49 OLG Koblenz (n 14) para 53.
50 OLG Karlsruhe (n 14) para 87.
51 OLG Koblenz (n 14) para 54.
52 OLG Karlsruhe (n 14) para 112.
53 OLG Koblenz (n 14) para 55.
54 OLG Koblenz (n 14) para 62.
55 OLG Braunschweig (n 14) para 149.

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way of holding Volkswagen liable for any inflicted damages would be by attribution, that is, by treating offences committed by its representatives as if they were Volkswagen's. But for attribution only those individuals, who 'were assigned executive or other significant, essential [sc representative] positions in the legal entity' could be considered – and this just was not the case with the 'head of type testing', who was brought forward by the plaintiff.[56] Besides, even if this individual could be considered a representative in the light of the law, the 'position as "head of type testing" alone does not allow (…) definitive conclusions regarding his knowledge.'[57] They would require detailed knowledge of explicit production processes, but 'the "head of type testing" does not necessarily have to be an engineer or [involved] in the installation of the software (…).'[58] To summarize, the plaintiff's pleading failed to point to a 'concrete action/omission', and even if one wanted to focus on 'an approval by Martin Winterkorn [sc the then CEO of VW]' for installing the defeat devices, 'this action or omission could not be considered contrary to public policy [anyway].'[59]

Compared to the Koblenz and Karlsruhe courts, the chain of thought is thus inverted. It does not start with the question of whether the deception by Volkswagen was contrary to public policy and then 'additionally' concerns itself with deliberating matters of attribution.[60] Rather the Higher Regional Court of Braunschweig begins with questions of attribution and only later contemplates whether the representatives' behaviour could be classified as contrary to public policy.

Another prominent difference sticks out. Contrary to the justification patterns of the Higher Regional Courts of Koblenz and Karlsruhe, the judges in Braunschweig do not structure Volkswagen by virtue of the personification metaphor. Even though the court repeatedly refers to Volkswagen as a 'legal person', Volkswagen is not – apart from the use of the technical term – metaphorically conceptualized as *another person*. It is not called into question whether Volkswagen 'deceived', 'led them to believe' something, or 'exploited the customers' trust'. Rather, from the get-go, the court made it clear that Volkswagen is merely a legal construct: the plaintiff's allegation of Volkswagen committing an offence has never had

56 ibid.
57 ibid para 161.
58 ibid.
59 ibid para 168-9.
60 OLG Karlsruhe (n 14) para 108: 'The liability of a legal person (…) *also* presupposes that a "constitutionally appointed representative" (…) has committed the objective and subjective requirements of a tort' [emphasis added, JES].

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any merit because a corporation cannot in and of itself deceive.[61] The court's focus always laid on internal corporate processes – how did the decision-making actually work, 'which concrete action/omission' can be pointed out, and were the relevant people assigned 'significant, essential positions'?[62]

a. The corporation is a network

Therefore, in the Higher Regional Court of Braunschweig's ruling Volkswagen appears as a complex structure for which a tortuous liability can only be upheld if the plaintiff can describe the internal procedures in detail and name specifically who knew what at a certain point in time. Even if the court does not explicitly mention this, its approach is reminiscent of the *nexus of contracts theory's* conceptual metaphor. Here the corporation is not grasped as another person, rather it is understood as a conglomerate of contracts and attributive relationships – 'the corporation is a network'.[63] This induces completely different feedback. Aspects that the personification metaphor highlighted – liveliness, manifested behaviour, bound physicality – are now hidden. Even the perception as a stable whole is rattled, as networks represent diminutive, multidimensional relationships with amorphous, protractible conjunctions.[64] In contrast to the personification metaphor, it incipiently lacks the 'in-out orientation'. There is no overall external appearance that hides the inner mechanisms – even from afront, a network always remains a network, always manifesting its complex internal structure.[65] When conceptualized as a network, even from outside view one immediately sees the individual intersections and attributive relationships.

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61 OLG Braunschweig (n 14) para 149.

62 ibid.

63 Fundamentally Michael C Jensen and William H Meckling, 'Theory of the firm: Managerial behavior, agency costs and ownership structure' (1976) 3 Journal of financial economics 305.

64 See Johanna Braun, *Leitbilder im Recht* (Mohr Siebeck 2015) 139–155; generally, Gunther Teubner, *Networks as Connected Contracts* (Hart Publishing 2011).

65 Jensen and Meckling, 'Theory of the firm: Managerial behavior, agency costs and ownership structure' (n 62) 311: 'Viewed this way, it makes little or no sense to try to distinguish those things which are "inside" the firm (or any other organization) from those things that are "outside" of it.'

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b. The inner structure is revealed

So, if the defendant is understood as a network and the plaintiff wants to hold it liable, it only seems consequent to ask her to identify the connections that liability would be based on and to point out a 'concrete action/omission'.[66] When the inner world is not concealed from the outside gaze, the plaintiff can very well take 'extensive insight into the decision-making structures'.[67] Within the metaphorical structure of the network metaphor, demanding details about the corporation's internal interconnections appears plausible since the 'head of type testing' really doesn't have to be 'an engineer or [involved] in the installation of the software (…).'[68] Just as it seems far less self-evident for the plaintiff to rely 'only (…) [on] publicly available sources'.[69] Because if it is not a matter of looking into Volkswagen, but of finding connections within a network, then it is not '[t]he defendant – and she alone – (...) [that] can construe the decision-making processes that led to the use of the software.'[70]

Thus, the attributes that the personification metaphor highlights are hidden within the conceptual structure of the network metaphor. If the inner structure of a network is revealed anyway, it feels incoherent to help the plaintiff out with a redistribution of the burden of proof.[71] Of course, this doesn't definitively preclude shifting the burden of proof onto the legal person. But from the cognitive metaphor theory's perspective, it comes as no surprise that the Higher Regional Court of Braunschweig did not even consider it. Because the metaphors' respective feedback-effect does not cover this reassignment of the burden of proof, it strays from the conceptual structure – and thus needs a different, more profound string of arguments to be highlighted and justified.

66 OLG Braunschweig (n 14) para 169.
67 Contrary to OLG Koblenz (n 14) para 54.
68 OLG Braunschweig (n 14) para 161.
69 Contrary to OLG Karlsruhe (n 14) para 112.
70 Contrary to OLG Koblenz (n 14) para 62.
71 The US Supreme Court's argument for corporate free speech in the famous *Citizen United* case – piercing the corporate veil and, therefore, viewing the corporation as a mere association of its constitutionally protected shareholders – can be considered another example of this logic, see Winkler, *We the Corporations* (n 43) 324–76.

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V. How to Deal with Metaphors?

What does this tell us? In any case, it does not mean that the respective metaphorical feedback-effects found in the justification patterns of the Higher Regional Courts of Braunschweig, Koblenz, and Karlsruhe are solely responsible for the different outcomes, and definitely does not mean that judges exclusively base their decisions on metaphors. To be clear, valid reasons for shifting the burden of proof onto Volkswagen and for leaving it to the plaintiff exist. I by no means intend to deny that the court decisions are rationally plausible and legally justifiable. But they are reflections of conceptual metaphors as well. And the justification patterns expressly coincide with the feedback of their respective metaphor. Neither more nor any less.

1. Come to stay

Should we, therefore, for the sake of objectivity, ban all metaphors from legal discourse? Various voices demanded this in the past.[72] Yet according to the cognitive metaphor theory, this is illusory. At its core, the theory asserts that metaphorical concepts are deeply rooted in human thinking and understanding – one cannot simply switch them off, we 'live by metaphors'.[73] And not just in our everyday lives, but everywhere. Even professional communication such as legal theory and doctrine is susceptible to it.[74] Therefore, it is no contradiction that even this text entails several metaphors. Sooner or later metaphors always come into play – especially when talking of highly abstract constructs like the legal person.[75] Admittedly, jurists have close to no difficulty when dealing with legal persons on a regular basis. One must only look at the written law if one wants to know whether the executive or supervisory board is in charge, for example. And even in the absence of clear legal rules, case law and legal

72 For various examples see Schindler, *Rechtsmetaphorologie – Ausblick auf eine Metaphorologie der Grundrechte* (n 10), 113–8.

73 Lakoff and Johnson, *Metaphors We Live By* (n 11) 3–6.

74 ibid 218–22.

75 See Bosmajian, *Metaphor and Reason in Judicial Opinions* (n 10), 49: 'Nonliteral language is often needed to explain the abstraction (…) that cannot be conveyed as effectively and persuasively through literal language.' With an emphasis on the legal person Berger, 'What Is the Sound of a Corporation Speaking – How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law' (n 10) 178–80.

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theory created practicable doctrines.[76] But as the rulings in Braunschweig, Koblenz, and Karlsruhe demonstrated, one needs a rudimentary understanding of what a legal person exactly *is* to answer new or fundamental questions – and that's when metaphors factor in. This would hold true even if one were to apply one of the many theories of the legal person. Although they are obviously devised ambitiously and carefully substantiated, these theories – like most academic theories[77] – also build upon powerful metaphors.

This is far from new, of course. Otto von Gierke, arguably one of leading 19th-century theorists of the 'nature' of legal persons, emphasized the role of metaphors more than one hundred years ago. In order to better explain his concept of legal personality, he consciously drew a parallel to the individual human being. 'Like the single organism [sc like a single human]', he elucidated in his famous speech on the nature of corporations, 'we perceive the social whole as a living being.' This 'imagery', as he calls it, 'is used partly for the sake of clarity and partly due to lingual necessity. All intellectual progress was achieved with the help of imagery. Even our most abstract concepts are made through imagery.'[78] Newer approaches, especially the nexus of contracts theory, work no differently. Indeed, the theory's conceptual metaphor is deliberately chosen to contrast. By using the network metaphor, Michael Jensen and William Meckling, who put forth the theory in the 1970s, wanted to emphasize 'that the personalization of the firm (…) is seriously misleading. The firm is not an individual.'[79] What many rightfully celebrated as a theoretical revolution is thus also a metaphoric revolution. As Lewis A. Kornhauser accurately comments, 'in some sense, the revolution has simply replaced one legal metaphor (…) with another legal metaphor, the nexus of contracts.'[80]

76 Emphasizing this 'domain of legalist reasoning' Posner, *How Judges Think* (n 10) 174–203.

77 Lakoff and Johnson, *Metaphors We Live By* (n 11) 18–9, 218–22.

78 Otto von Gierke, *Das Wesen der menschlichen Verbände* (Duncker & Humblot 1902) 16 [my translation, JES].

79 Jensen and Meckling, *Theory of the firm: Managerial behavior, agency costs and ownership structure* (n 62) 311.

80 Lewis A Kornhauser, 'The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel' (1989) 89 Columbia Law Review 1449, 1449.

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2. Metaphors matter

Yet if the legal person and other legal concepts are, and to some extent must be, coined by metaphors, then we should always be beware of the feedback-effect. As we have seen with respect to the burden of proof, the conceptual metaphors systematically highlight certain aspects and hide others. What follows intuitively appears convincing, almost natural, and provokes significantly less pressure for any justification. Consequently, what falls outside of the feedback structure causes irritation and demands an explanation.[81] Chad M. Oldfather rightfully warned: 'A reader who finds that a particular metaphor aptly captures a doctrine (…) will be likely in the future to think of the doctrine in terms of the metaphor. Even a metaphor that has no virtue apart from being memorable can increase the impact of an opinion.'[82]

This would not be much of an issue (or could largely be ignored), as long as the solution to specific legal issues can be derived from the conceptual metaphor – in other words: as long as the right answer coherently follows from the respective legal theory's axiom. But this assumption in and of itself must be, at least from a methodological point of view, called into question. Although coherent theories are, of course, important stabilizing factors for the pursuit of objectivity,[83] they should not be the exclusive factor in finding an adequate solution for the issue at hand. With respect to our problem of the burden of proof: from my point of view, neither a specific theory of the legal person nor a corresponding conceptual metaphor is suitable or even capable to ratiocinate whether the customers or Volkswagen should bear the burden of proof. Even when merely arguing doctrinally (or formalistically, if you like), it is essential to carefully balance the aspects of legal personality *and* the law of evidence.[84] If done so, one of the answers found by the Higher Regional Courts might

81 With regard to the corporate speech doctrine in the USA see Berger, 'What Is the Sound of a Corporation Speaking – How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law' (n 10) 186–190.

82 Chad M Oldfather, 'The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions' (1994) 27 Conn L Rev 17, 22.

83 Hans Christoph Grigoleit, 'Subjectivism, Objectivism, and Intuitionism in Legal Reasoning: Avoiding the Pseudos' (§ 2) (statement 12).

84 Additionally, private law doctrine should also be responsive to extra legal considerations (economical, ethical, sociological, etc), see Gunther Teubner, *Law as an Autopoietic System* (Blackwell Publishers 1993) 64–99; Hanoch Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press 2013) 104–28.

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actually come to exist. But this answer should still be sensitive to the fact that when one deals with legal persons, powerful metaphors are at play, and that their respective feedback are initially just that: feedback. In and of themselves they carry no normative value.

Of course, put that way the statement is banal. But – and this is my main point – it is only a banality because it is a result of 'reflective self-reflection' (*reflektierte Selbstreflexion*).[85] The risk of getting caught in the metaphor's undertow can be significantly reduced when one is aware of its power. A jurist's pursuit of reasoning as objectively as possible – regardless of her being a judge or scholar – should entail keeping the important insights of the cognitive metaphor theory in mind.[86] Again, this is not new. Even though our understanding of the feedback-effect was not as developed back then as it is now, many jurists of the last century had the right intuition. As early as 1927, Justice Benjamin N. Cardozo warned that '[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it'.[87] And even more than two decades before him, Otto von Gierke captured the role of metaphors in law perfectly. 'In [legal] academia, we can make use of images as long as we remain cautious and don't take the image as fact.'[88]

85 Braun, *Leitbilder im Recht* (n 63) 199.

86 Similar Berger, 'What Is the Sound of a Corporation Speaking – How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law' (n 10) 205: 'An awareness of the cognitive power of metaphor, and of other methods of understanding one thing "in terms of" or "as" another, will help lawyers uncover the narratives, metaphors, and analogies that underlie much legal reasoning.'

87 *Berkey v Third Avenue Railway* 244 NY 602 (1927).

88 von Gierke, *Das Wesen der menschlichen Verbände* (n 78) 16 [my translation, JES]

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§ 16 The Citizenship Duality

Alvin Padilla-Babilonia[*]

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I. Introduction

Citizenship is a contested concept full of irresolvable contradictions. On the one hand, citizenship embodies a commitment to equality and full membership in a political community.[1] Under the 'Marshallian paradigm', based on T.H. Marshall's classic *Citizenship and Social Class*, all citizens should be entitled to civil, political and social rights to become equal

* Special thanks to Philip Bender, Samuel Moyn, Aziz Rana, the participants of the Munich Young Scholars Conference (October 2020), and the members of the doctoral colloquium at Yale Law School (September 2021).

1 TH Marshall, 'Citizenship and Social Class' in TH Marshall and Tom Bottomore, *Citizenship and Social Class* (Pluto Press 1992 [1950]).

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members. This is the standard account of citizenship; one that conceptualizes it as a source of rights and full membership. On the other extreme, however, citizenship is also a tool to facilitate governability and to homogenize diverse populations. Citizenship, then, is not only a source of rights, but also an instrument of power; an 'institution of domination *and* empowerment'.[2]

Because of this duality, citizenship is a fertile ground for exploring the topic of this book: the relationship between law, objectivity, and power. In particular, this chapter will examine the dialectical relationship between citizenship as a source of rights and full membership, and citizenship as an instrument of power. This categorization is not new and has parallels in social theory and legal scholarship.[3] What is often overlooked, however, is what 'order and meaning' can be found within these two seemingly contradictory sides of citizenship.[4] Here, the focus on their structural relationship, will illustrate how the idea of full citizenship can both undermine and reproduce the power dynamics and social inequalities between individuals and states. This citizenship duality will be revealed through the relationship between citizenship and colonialism in the United States of America.

This chapter will proceed in three parts. The first two parts sketch the historical foundations of these two conceptions of citizenship and illustrate their presence in the formation of the nation-state. Part I examines how citizenship, since its birth as a political concept in Ancient Greece, has been tied to notions of equality, rights and membership. It was not

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2 Engin F Isin, 'Citizenship in Flux: The Figure of the Activist Citizen' (2009) 29 Subjectivity 367, 371.

3 Ediberto Román uses the concepts of 'citizenship dialectic' and 'duality' to describe the coexistence of full citizenship and exclusionary citizenship. While similar, my focus here is how the discourse of full citizenship and citizenship as an instrument of power, which goes beyond its exclusionary character, can be mutually self-reinforcing. *See* Ediberto Román, 'The Citizenship Dialectic' (2006) 20 Georgetown Immigration LJ 557, 562 (2005). For a recent dialectical argument on how citizenship is both emancipatory and oppressive, see Christiaan Boonen, 'Étienne Balibar On the Dialectic of Universal Citizenship' (2021) 0 Phil & Soc Crit 1.

4 See Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harv L Rev 1685, 1712 ('The method I have adopted in place of contextualization might be called, in, a loose sense, dialectical or structuralist or historicist or the method of contradictions. One of its premises is that the experience of unresolvable conflict among our own values and ways of understanding the world is here to stay… But … there is order and meaning to be discovered even within the sense of contradiction.').

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until the 1950s, however, that T.H. Marshall first canonized the idea that citizenship guarantees certain civil, political and social rights that are crucial for full and equal membership in a community. Ironically, while the 'Marshallian paradigm' gained much notoriety throughout the second half of the twentieth century, during this time citizenship as a source of rights was also challenged on two grounds. First, because of the proliferation of international and human rights agreements, the creation of supranational governments, and globalization and transnational movement, personhood and residence, rather than citizenship, became the key source of rights. Second, it was apparent that formal citizenship coexisted with discrimination on the basis of race, gender, class, and ethnicity. Despite the rhetorical popularity of citizenship as a source of rights, the ideal of full citizenship lived rather comfortably alongside forms of second-class citizenship.

According to the discourse of full citizenship, unequal membership based on gender and race is eventually superseded by the rhetorical strength of citizenship as a source of rights and equality. Yet since Roman times, full and unequal citizenship are co-constitutive of each other and legal citizenship has been used as an instrument of power to facilitate governing diverse populations and territories. Part II explores the historical basis of this conception of citizenship. It also provides different examples of how nation-states use citizenship as an instrument of power. As with Part I, Part II concludes with two challenges to the power-dimension of citizenship. First, while states might impose citizenship with certain policy objectives in mind, because citizenship is 'performed' and a tool for 'claims-making', individuals can reclaim their citizenship and assert their right to full citizenship.[5] Second, if pushed to the limit, the idea of citizenship as a mere instrument—exemplified by external citizenship and investor citizenship—could lead to the devaluation of the concept of citizenship, limiting its ability to work as an instrument of power.

The third and final part applies these concepts to two case studies in order to illustrate how both sides of citizenship interact and reinforce one another. Accordingly, Part III examines the dual nature of citizenship for the Indigenous peoples and territories of the United States of America, such as Puerto Rico. For these groups, U.S. citizenship is 'just another tool of the conqueror' contributing to 'Native disappearance', and a 'crucial element in the reproduction of American hegemony among the Puerto Rican

5 Isin (n 2) 370; Irene Bloemraad, 'Theorising the Power of Citizenship as Claims-Making' (2018) 44 J Ethnic & Mig Stud 4.

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population'.[6] While citizenship functioned as an instrument of power to erase their collective identity, citizenship was reclaimed by Native Americans and Puerto Ricans as a symbolic reference for claims for more rights and equal membership. Through this process, citizenship transformed the political identity of these groups; from one based on collective identity and self-determination to one grounded on national identity and individual rights. By reclaiming citizenship, Native Americans and territorians strived to undermine the unequal membership. However, they also reinforced the power relation between state and community by providing one final step toward the erasure of their distinct political identity. In that regard, the 'Americanization' imposed by citizenship as an instrument of power was fortified, not diminished, by the discourse of citizenship as a source of equal and full membership.

II. Citizenship as a Source of Rights and Full Membership

Citizenship, as a concept, is known for its indeterminacy and multiplicity.[7] The word 'citizenship' is used as synonymous with nationality, to describe the members with political rights, as the highest normative ideal within a society, or simply as the freedom to leave and return. Moreover, citizenship creates a bond between a state and its members that produces legal duties and demands. These duties include the duty to pay taxes, serve in the military, and obey the law, among others.[8] Common usage of the term usually does not distinguish between these and many other meanings. My focus on rights and power does not aim to 'split' citizenship into two elements or to provide a complete descriptive account of citizenship, but rather to showcase how they reinforce one another. As these genealogies will illustrate, neither full and equal citizenship nor citizenship as an instrument of power respond exclusively to one of the three main

6 Stephen Kantrowitz, 'White Supremacy, Settler Colonialism, and the Two Citizenships of the Fourteenth Amendment' (2020) 10 J Civ War Era 29, 31, 45; Efrén Rivera Ramos, *The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico* (APA 2001) 145.

7 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP 1995).

8 Richard Bellamy, 'A Duty-Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights' (2015) 21 Eur LJ 558.

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citizenship traditions: republicanism, liberalism, and ethno-nationalism.[9] Instead, both concepts – which can take multiple and contradictory shapes – borrow from each of these citizenship traditions.[10]

1. *Historical foundations*

Citizenship as a source of rights and full membership has a long history. In Ancient Greece the citizen was, according to Aristotle, the 'one who both rules and is ruled'.[11] Citizenship meant active participation in the political community. The citizen acted according to the best interests of the public realm (*polis*), instead of his economic self-interest or the private realm (*oikos*). This republican tradition of citizenship, which can also be described as political citizenship, equated citizenship with political activity, through voting and holding public office.[12] Because of the importance of the economic independence of the citizen for political participation, republican citizenship was premised on the exclusion of women and slaves. Accordingly, this classical conception of citizenship was not only republican, but also ascriptive, in ways that anticipate the ethno-national conception of citizenship based on common ancestors, race, language and religion, to the exclusion of others who do not share these traits. A republican conception of citizenship, therefore, went hand-in-hand with ascriptive notions. Citizens were full members of the community, but only by limiting citizenship to a select few.

While closely identified with the city-state of Ancient Greece, this republican citizenship is not tied to any one form of political organization. It started with the Greek city-state, then transformed itself during the Roman Empire, until finally becoming a key component of the nation-state in modern times.[13] In fact, it was during Roman times that republican

9 Kenneth A Stahl, *Local Citizenship in a Global Age* (CUP 2020) 21. *See also* Rogers M Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (Yale UP 1997) 3.

10 See Michael Mann, 'Ruling Class Strategies and Citizenship' (1987) 21 Soc 339, 340 (discussing other citizenship traditions beyond liberalism, republicanism and ethno-nationalism).

11 JGA Pocock, 'The Ideal of Citizenship Since Classical Times' in Ronald Beiner (ed), *Theorizing Citizenship* (SUNY Press 1995) 29, 30–31.

12 Christian Joppke, 'The Instrumental Turn of Citizenship' (2019) 45 J Ethnic & Mig Stud 858.

13 Linda Bosniak, 'Citizenship Denationalized' (2000) 7 Ind J Glob L Stud 447, 472–473.

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citizenship came to be associated with institutional forms – the rule of law, separation of powers, representative democracy – that outlasted the Romans.[14] During this process, however, the republican model was soon supplemented by a legal model of citizenship, also referred to as liberal citizenship, which conceptualized citizenship as a source of rights.[15] This liberal conception came along as political communities became more 'populous, diverse, and geographically dispersed', in contrast with the city-state of Ancient Greece.[16] Citizens were granted certain rights and benefits that were denied to noncitizens, among them, the right to marry another citizen, to pay lower taxes, and to trade.[17] For the liberal ideal of citizenship, conceptualized later on by John Locke, citizenship was synonymous with the protection of natural rights, among them, the right to private property, rather than civic participation.[18] Protection of the private sphere and economic self-interest became the central theme of liberal citizenship. In addition to individual rights, liberalism also emphasized equality under the law. This idea of equality eventually led to the elimination of property qualifications for voting, which were previously defended on the republican grounds that landless people were not independent.

While the republican tradition emphasized political membership, the liberal tradition focused on rights. Both traditions capture crucial elements of citizenship as a source of rights and full membership. A third tradition – ethno-nationalism – intensified the ascriptive notions that previously precluded certain groups from republican and liberal citizenship. After the international recognition of nation-states after the Peace of Westphalia of 1648, citizenship coupled together nation and state without presupposing neither rights nor political participation.[19] Instead, citizenship worked as an 'international filing system, a mechanism for allocating persons to states',[20] which was mutually recognized by other states.[21] Through the establishment of nation-states, citizenship policies became internally

14 Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1999) 284-285; Peter Riesenberg, *Citizenship in the Western Tradition* (U North Carolina 1992) 56–57.
15 Joppke (n 12) 860.
16 Stahl (n 9) 24.
17 Derek Heater, *A Brief History of Citizenship* (New York UP 2004) 31.
18 Stahl (n 9) 24.
19 Rainer Bauböck, 'Genuine Links and Useful Passports: Evaluating Strategic Uses of Citizenship' (2019) 45 J Ethnic & Mig Stud 1015.
20 Rogers Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard UP 1992) 31.
21 Bauböck (n 19).

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inclusive, while externally exclusive.[22] As a final step in this history, the two nation-states that followed the American and the French Revolutions reconceptualized citizenship, 'based on the principles of fundamental legal equality among members of a political community'.[23] The modern discourse of citizenship as a source of rights and full and equal memberships was, therefore, shaped by each of these traditions and historical developments.

2. *Social and legal scholarship*

Despite the ubiquity of citizenship as a source of rights and full membership, citizenship as a subject was only addressed 'peripherally in classic social theory'.[24] This omission in contemporary scholarship ended with the publication of *Citizenship and Social Class*, by British sociologist T.H. Marshall. Marshall's essay, which began as a series of lectures at Cambridge, makes two main contributions to the idea of full citizenship. First, Marshall equates citizenship with 'full membership' in a community, and 'the principle of equality'.[25] Second, Marshall broke down citizenship into three parts or elements – civil, political, and social rights – each corresponding to a century of English history from the eighteenth to the twentieth century. The eighteenth century saw the development of civil rights, those 'necessary for individual freedom – liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice'.[26] Meanwhile, political rights, such as voting or holding public office, were expanded in the nineteenth century by extending the franchise beyond property owners. This century of political rights culminated with the Act of 1918, which abolished property qualifications for men, and enfranchised certain women. Finally, Marshall associates the twentieth century with the rise of social rights, among them, the right to economic welfare, security, and the right to education.

While this tripartite interpretation of citizenship has become conventional in scholarship, Marshall was the first to thoroughly link these rights with the concept of citizenship by studying their consecutive development

22 Brubaker (n 20).
23 Dieter Gosewinkel, 'Introduction: Neither East nor West' (2009) 16 Eur Rev History 499.
24 Christian Joppke, *Citizenship and Immigration* (Polity 2010) 9.
25 Marshall (n 1) 6, 8.
26 ibid 8.

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in English history. Political rights were first seen as the embodiments of citizenship. Later on, social rights, especially education, were considered more significant and as preconditions for the true exercise of political rights. Today, Marshall's paradigm still dominates public discourse, as we can see by the desire to add cultural, economic, sexual and ecological rights to the canonical civil, political and social rights.[27]

Marshall made famous the idea of citizenship as a source of rights and full membership. Soon after, the term 'citizenship' became increasingly important as a way to conceptualize rights and the principle of equality among the members of a political community. In his dissenting opinion in *Perez v. Brownell*, Chief Justice Warren stated that '[c]itizenship is man's basic right for it is nothing less than the right to have rights'.[28] This idea of citizenship as the 'right to have rights' was famously popularized by Hannah Arendt,[29] and is still one of the most common articulations of citizenship.[30] In the American context, for instance, Charles Black derived the various rights recognized by the Warren Court—to vote on equal terms, to be treated fairly, to a private life—from a structural conception of American citizenship.[31] This tradition of equating citizenship with full and equal membership continued with scholars such as Kenneth Karst and Judith Shklar.[32]

3. *Challenges to citizenship as a source of rights and full membership*

The Marshallian tradition of citizenship faces challenges from two sides. On one hand, the advent of international human rights, supranational citizenship, globalization and transnational movement, blurred the line

27 Bosniak (n 13) 464.
28 356 US 44, 64 (1958).
29 Hannah Arendt, *The Origins of Totalitarianism* (rev edn, Harcourt 1976) 296. For stateless persons, in particular, the right to citizenship means the right to be part of a political community.
30 Margaret R Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (CUP 2008).
31 Charles L Black, 'The Unfinished Business of the Warren Court' (1970) 46 Wash L Rev 3, 8–10.
32 Kenneth L Karst, *Belonging to America: Equal Citizenship and the Constitution* (Yale UP 1989); Judith N Shklar, *American Citizenship: The Quest for Inclusion* (Harvard UP 1991).

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between citizens and noncitizens, especially as it relates to rights.[33] On the other side, formal citizenship itself is not enough to guarantee equal membership in a political community, as it is shown by the current and historical treatment of women, racial and ethnic minorities, indigenous and LGBTQ communities, among many others. Accordingly, the discourse of citizenship as a source of rights and full membership masked the many limitations of citizenship to address social inequality.

a. Non-exclusiveness

Today, holding legal citizenship is increasingly less important for the enjoyment of the traditional rights of citizenship, among them, protection by the state, and political, social and economic rights. Because of international human rights, regional and supranational citizenship, residence and personhood are often more important than citizenship for access to rights. Although the degree to which personhood has displaced citizenship as a source of rights is often overstated,[34] '[h]uman rights have come to provide a vocabulary for making moral claims'.[35] Since the 1970s, human rights have fundamentally transformed our self-perception as rights-bearing individuals.[36] This has led Yasemin Soysal and David Jacobson to assert that we are currently experiencing a 'post-national citizenship'.[37]

When international human rights are not self-enforcing, states often provide noncitizens civil and social rights, and even local voting rights. Without explicitly invoking international human rights, constitutional courts often refuse to use the noncitizen status as a basis to deny access to important social rights, such as education. For example, the Supreme Court of the United States struck down a state law that denied education to noncitizens.[38] The decision recognizes that education is a necessary precondition to become an equal member, as Marshall once stated, but refused to limit that right to legal citizens.

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33 Jo Shaw, *The People in Question: Citizens and Constitutions in Uncertain Times* (Bristol UP 2020) 151.

34 Joppke (n 24) 22.

35 Bosniak (n 13) 468.

36 Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard UP 2010) 106.

37 Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago UP 1994) 12; David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (John Hopkins UP 1996).

38 *Plyler v Doe*, 457 US 202 (1982).

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Even noncitizen voting rights are defended as part of the commitment to 'global human rights norms'.[39] In fact, a few states, like Chile, New Zealand and Uruguay, recognize national voting rights for noncitizens, regardless of their openness or perceptions of immigrants.[40] Moreover, many states recognize regional or local voting rights. Finally, while some federal systems (e.g. Germany and Austria) forbid state governments from recognizing state voting rights to noncitizens, others (e.g. United States and Switzerland) allow the regional governments (state and cantonal) to decide —an important example of the regional and local spheres of citizenship.[41]

In addition to international human rights, supranational organizations, such as the European Union, have also transformed the meaning of citizenship. While European citizenship seems to operate under the Marshallian paradigm of articulating citizenship as the source of rights, it also challenges the exclusive claim of nation-states of defining their citizenry and their corresponding rights. One of the most significant examples is the right of European citizens to vote and run for office in the municipal elections of the Member-State in which they reside, regardless of whether they are national citizens.[42] Moreover, EU passports allows EU citizens to enter and return to any of the Member States, one of the key features of national citizenship. In this regard, European citizenship has often displaced national citizenship as the main source of rights and membership.

b. Not enough

But the non-exclusiveness of national citizenship is not the only threat to the Marshallian paradigm. Legal citizenship often does not carry rights or full and equal membership in a political community. Instead, citizens only hold a *second-class citizenship* where they are denied rights and equality. For Iris Marion Young, second-class citizenship is the consequence of the 'universality of citizenship', under which equality only means sameness and homogeneity.[43] This leads to 'cultural assimilation', which can mean

39 Jamin B Raskin, 'Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage' (1993) 141 U Pa L Rev 1391, 1457.

40 Cristina M Rodríguez, 'Noncitizen Voting and the Extraconstitutional Construction of the Polity' (2010) 8 I•CON 30, 49.

41 ibid; Shaw (n 33) 41–42.

42 Article 40 of the Charter of Fundamental Rights of the European Union.

43 Iris Marion Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 Eth 250, 255.

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the alteration or elimination of a group's identity.[44] Rather than measure women, gender, and ethnic minorities against the White male 'universal' citizen, polities should adopt the concept of *differentiated citizenship* to 'realize the inclusion and participation of everyone in full citizenship'.[45] Moreover, Young argued that if the proponents of the expansion of citizenship ignore how citizenship enforces sameness, they will 'implicitly support the same exclusions and homogeneity'.[46] In other words, claims of full citizenship could perpetuate, rather than disrupt, the use of citizenship as an instrument of power.

The United States of America provides one of the better-known examples of how second class-citizenship coexisted with the rhetoric of full citizenship. The Fourteenth Amendment to the U.S. Constitution was adopted to compel the states to obey the Bill of Rights and 'protect all rights of citizens'.[47] Soon after, however, the Supreme Court denied any prospect of equalitarian citizenship. First, it denied that the Amendment, through its privileges or immunities of the national citizens, provided any source of rights against the states.[48] Then it decided that, even though women were U.S. citizens since the founding, they did not possess the right to vote.[49] Most famously, cases like *Plessy v. Ferguson* and *Giles v. Harris* denied African Americans full equal status, rendering the Fourteenth Amendment essentially meaningless for black emancipation.[50]

This second-class citizenship status is in no way limited to the United States. For example, the American model of second-class citizenship influenced the Nuremberg Laws enacted by Nazi Germany in 1935.[51] Likewise, in Australia, 'legal citizenship status has not always accorded full and equal membership rights, as the position of the Aboriginal people illustrates'.[52] Even though indigenous Australians were formal citizens, they 'were denied the most basic rights of citizenship, such as voting and

44 ibid 272.
45 ibid 250–251.
46 ibid 251.
47 Michael K Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Duke UP 1986) 15.
48 Slaughter-House Cases, 83 US (16 Wall) 36 (1873).
49 Minor v Happersett, 88 US (21 Wall) 162 (1875).
50 163 US 537 (1896); 189 US 475 (1903).
51 James Q Whitman, *Hitler's American Model: The United States and the Making of Nazi Race Law* (Princeton UP 2018) 37–43.
52 Kim Rubenstein & Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 (2) Ind J Glob L Stud 519, 523.

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travel'.[53] Unfortunately, this pattern of second-class citizenship is still common in many democracies. Today, Indigenous Australians, residents of British Overseas Territories, and Muslims in India are excluded from full and equal citizenship.[54] The non-exclusiveness of state-based citizenship and its willingness to coexist with other forms of inequality challenge the Marshallian idea that national citizenship is the source of rights and that it means full and equal membership in a community.

III. Citizenship as Instrument of Power

Post-national and transnational understandings of citizenship pose a challenge to state-based citizenship as a source of rights and full membership. Moreover, the rhetoric of full citizenship comes up short in tackling racial, gender, ethnic and class inequalities. Are these forms of second-class citizenship inconsistent with the truer understanding of citizenship as a source of rights and full membership? Or do they reveal how citizenship can be an instrument of power because it can mask those inequalities? As with the previous section, the objective here is not to essentialize citizenship as only a source of rights and an instrument of power. Instead, this analysis of the historical foundations, scholarship and challenges of citizenship as an instrument of power aims to illustrate how these two notions often reinforce one another in political discourse, as will become clearer with the examples of the third and final part.

1. Historical foundations

The historical foundations of citizenship as an instrument of power parallels the development of citizenship as a source of rights and full membership. As mentioned above, political citizenship, the human as *zoon politikon*, was limited to a very few adult males who would participate actively in political life in Ancient Greece or the Roman Republic. Meanwhile, legal citizenship, the human as *legalis homo*, extended far and wide, but did not carry the expectation that all citizens participate collectively in ruling each other. Under these circumstances, a citizen could not rule, if to rule 'meant determining what the law of the community should be; there

53 ibid.
54 Shaw (n 33) 143, 164–165, 215–216.

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was no assembly of all mankind'.[55] Instead, the citizen was the member of a community of laws, the one who, as the bearer of 'rights' – most importantly, the right to property – was 'constituted by them'.[56]

The idea of citizenship as an instrument of power owes much to this legal conception of citizenship. The Roman expansion of the fourth century BC was not the sole result of Rome's military power; while 'not sufficiently stressed by modern scholars', Rome's growth owes as much to 'remarkable development of legal mechanisms and techniques'.[57] Chief among these is the creation, for the first time in history, of 'a kind of second class or semi-citizenship'.[58] More than two thousand years before European empires elaborated similar schemes, Rome extended Roman citizenship during their conquests.[59] For instance, the residents of the conquered city of Tusculum 'were offered full Roman citizenship while maintaining their own municipal form of government'.[60] In 338 BC, however, the residents of other cities, such as Latium and Campania, were granted a form of second-class citizenship.[61] They were citizens with civil rights (such as, the right to trade or to marry a Roman), but without political rights, such as the right to vote or hold office. This *civitas sine suffragio*, or citizenship without the vote, 'hollowed out the very essence of the *civitas*'.[62] It seemed to contradict the very notion of citizenship as full membership in a political community.

Instead, Roman legal citizenship redefined the concept of citizenship to legitimize Roman rule and facilitate governability.[63] Rather than a one-size-fits-all approach, this citizenship was 'imperial, universal, and multiform'.[64] The decision to grant forms of second-class citizenship vis-à-vis full citizenship was just one of the ways the law was used as an instrument of power. While full citizenship was granted to groups that shared 'a strong, cultural, linguistic, and most likely legal affinity with Rome,' it was denied those peoples 'more distant from Rome both geographically

55 Pocock (n 11) 38.
56 ibid 44.
57 Luigi Capogrossi Colognesi, *Law and Power in the Making of the Roman Commonwealth* (CUP 2014) 97.
58 Heater (n 17) 33.
59 ibid.
60 ibid.
61 Capogrossi Colognesi (n 57) 122–123.
62 ibid.
63 Elizabeth F Cohen, *Semi-Citizenship in Democratic Politics* (CUP 2009) 106.
64 Pocock (n 11) 37.

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and culturally'.[65] Roman legal citizenship, therefore, was an instrument of power, of forced assimilation, that was eventually reproduced by the modern nation-state.

2. *Social and legal scholarship*

While often overlooked, the idea that citizenship is an instrument of power, rather than a source of full membership, lies latent in classical sociological theory. In *On the Jewish Question*, Karl Marx associates citizenship with the 'sophistry of the political state itself'.[66] For Marx, as understood by Jeffrey C. Isaac, citizenship conceals class inequalities and 'elevates' the alienated individual, but without providing 'real and effective equality'.[67] Echoing Marx one hundred years later, T.H. Marshall asserts that 'citizenship has itself become, in certain respects, the architect of legitimate social inequality'.[68] However, according to Marshall, citizenship also embodies equality and social rights aimed at redressing the inequalities of capitalism. This ambiguity suggests that, for Marshall, citizenship simultaneously masks and rectifies class inequalities; functioning as both an instrument of power and a source of rights.

Following Marx, Michael Mann views citizenship policies – among them, decisions regarding civil, political or social rights – as 'ruling class strategies' and 'concessions' to ameliorate social conflict.[69] Mann presents a more complex picture under which citizenship rights need not follow Marshall's evolutionary process. While Nazi Germany and the Soviet Union provided social rights without civil or real political rights, the United States recognized civil and political rights, but without meaningful social rights. For Bryan S. Turner, however, Mann presents a view of citizenship strategies from above that ignores 'any analysis of citizenship from below'.[70] The idea of 'rights as privileges handed down from above in return of pragmatic cooperation', must be contrasted with the idea of 'rights

65 Capogrossi Colognesi (n 57) 104.
66 Karl Marx, 'On the Jewish Question' in Michael W Foley and Virginia Ann Hodgkinson (eds), *The Civil Society Reader* (New England UP 2009) 103.
67 Jeffrey C Isaac, 'The Lion's Skin of Politics: Marx on Republicanism' (1990) 22 Polity 461, 476.
68 TH Marshall (n 1) 7.
69 Mann (n 10) 340.
70 Bryan S Turner, 'Outline of a Theory of Citizenship' (1990) 24 Soc 189, 199.

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as the outcome of radical struggle by subordinate groups for benefits'.[71] Social movements, moreover, contribute to the 'expansion of citizenship from below'.[72] In contrast to Marx and Mann, for Turner, 'citizenship does not have a unitary character,'[73] it can be both—a ruling strategy from above and a source of rights from below.

Both Mann and Turner, however, agree on the historically contingent nature of citizenship. Whereas for some time citizenship signified belonging to a city (a fact emphasized by Max Weber in *The City*) it was later reconceptualized in terms of nationality.[74] Nationality provided an answer to the question of how to provide unity and solidarity once the scale of citizenship moved from the city to the state. Nationality was one of the two solutions – the other being citizenship as human identity – given by Durkheim when he examined how states were to survive the decline of religion, in itself a source of integration.[75] Recognizing the links between citizenship and nationhood, Rogers Brubaker described citizenship law as 'an instrument of social closure'.[76] Through formal citizenship, states assert the exclusive claim to define who is a member within its borders. In that sense, citizenship is both 'internally inclusive' and 'externally exclusive'.[77] The resulting citizenry is usually conceived as a nation that is enclosed within a territory.[78]

Despite its legal significance, then, citizenship 'is not simply a legal formula', but 'an increasingly salient social and cultural fact'.[79] As we have seen in our earlier example, Roman citizenship played a central role in the process of 'Romanization' and eventual elimination of earlier Italian traditions and cultures. According to Rogers Smith, citizenship laws 'proclaim the existence of a political 'people' and designate who those persons are as a people, in ways that often become integral to individuals' senses of

71 ibid.
72 ibid 200.
73 ibid 201.
74 Étienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton UP 2004) 37.
75 Bryan S Turner, 'Contemporary problems in the theory of citizenship' in Bryan S Turner (ed), *Citizenship and Social Theory* (Sage 1993); Joppke (n 12) 858–859. *See also* Emile Durkheim, *Professional Ethics and Civil Morals* (rev edn, Routledge 1992).
76 Brubaker (n 20) 21.
77 ibid 72.
78 ibid 21–22.
79 ibid (n 20) 22.

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identity as well'.[80] As such, citizenship policies contribute to our 'stories of peoplehood'.[81] Moreover, through citizenship promotion, nation-states 'resolve and foreclose debates about the legitimate right of the state to rule over all of the citizens and territory of the state'.[82]

3. *Mapping citizenship law as an instrument of power*

Because of the identity dimension of citizenship, changes in citizenship law should impact 'belongingness' described by Michael Walzer as 'not merely the sense, but the practical reality, of being at home in (this part of) the social world'.[83] Because of the individual need for belongingness, through citizenship policies nation-states can use citizenship as an instrument of power. Citizenship policies include the three essential elements of formal citizenship law: acquisition, relinquishment, and rights derived from citizenship.[84] Since the rights component of citizenship was already discussed, this section focuses on the rules for acquiring and relinquishing citizenship, and how they influence belongingness and serve as instruments of power.

The rules of acquiring citizenship include the process of naturalization for noncitizens, and also birthright citizenship through either birthplace (*jus soli*), parentage (*jus sanguinis*), or both. Naturalization policies function as a 'gatekeeper'.[85] While the elimination of ethnic and racial restrictions for naturalization is part of the de-ethnicization of citizenship, probity and self-sufficiency tests could serve as a subterfuge for the exclusion of certain groups.[86] Naturalization rules – residence requirements, language proficiency, knowledge of civic culture – compel noncitizens to assimilate or

80 Smith (n 9) 31.
81 Rogers M Smith, *Political Peoplehood* (Chicago UP 2015) 2.
82 Will Kymlicka, 'Multicultural citizenship within multination states' (2011) 11(3) Ethnicities 281, 287.
83 Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books 1983) 106.
84 Roger M Smith, 'The Unresolved Constitutional Issues of Puerto Rican Citizenship' (2017) 29 Centro Journal 56, 58.
85 Liav Orgad, 'Naturalization', in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 337.
86 Christian Joppke, 'Citizenship between De- and Re-Ethnicization' (2003) 44 (3) Eur J of Soc 429; Shaw (n 33) 55.

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acculturate themselves to the primary group before becoming a citizen.[87] Moreover, many states still distinguish between birthright and naturalized citizenship, with lesser protections and rights for the latter.

The choice between *jus soli* and *jus sanguinis* can also impact the sense of belongingness to the nation-state. For instance, Brubaker argued that the differences in acquiring citizenship in France, through birthplace (*jus soli*), and Germany, through parentage (*jus sanguinis*), illustrated how the French model of citizenship was assimilationist, while the German model was differentialist.[88] Regardless of the merits of that particular distinction, there is no doubt that the many legislative choices regarding *jus soli* and *jus sanguinis* – adoption of *double jus soli*, gender restrictions on *jus sanguinis*, among others – can manifest how citizenship is an instrument of social closure.

Finally, the renunciation or relinquishment of citizenship includes rules regarding the voluntary abandonment of citizenship and the revocation of citizenship. Citizenship deprivation – often justified in terms of national security and public safety – is one of the clearest examples of citizenship as an instrument of power.[89] The medieval idea of banishment has been revitalised in recent years through executive sanctions with limited judicial review.[90] The main debate concerns the stripping of citizenship in the case of terrorism. In Canada, for instance, constitutional courts have validated citizenship stripping for convicted terrorists.[91] Meanwhile, in the United States, because the Supreme Court has narrowed the acts that amount to the renunciation of citizenship,[92] the controversy has turned, instead, on whether the individuals obtained their citizenship unlawfully.[93]

This element of citizenship also includes the measures governing dual citizenship: whether one can be a citizen of two or more states. Until the 1960s, the international consensus was against the recognition of dual citizenship. Soon after, however, there was great liberalization of the

87 Thomas Faist, 'Transnationalization in International Migration: Implication for the Study of citizenship and culture' in Rainer Baubök (ed), *Trasnational Citizenship and Migration* (Routledge 2017) 177, 199.

88 Brubaker (n 20) 3.

89 Lucia Zedner, 'Citizenship Deprivation, Security and Human Rights' (2016) 18 Eur J of Mig 222.

90 Ivó Coca-Vila, 'Our "Barbarians" at the Gate: On the Undercriminalized Citizenship Deprivation as a Counterterrorism Tool' (2020) 14 Criminal L and Philosophy 149.

91 Galati v Canada (Governor General), [2015] FC 91.

92 Afroyim v Rusk, 387 US 253 (1967); Vance v Terrazas, 444 US 252 (1980).

93 See US v Iyman Faris, 2020 WL 532890 (SD Illinois).

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rules limiting dual citizenship. While defended as a human right,[94] dual citizenship policies are a clear example of the 'power politics' and the 're-ethnicization' of citizenship, especially in the context of diaspora communities.[95] Diaspora encompasses the nationals that left the state or left the territory before it was recognized as a state. Diaspora policies may include the recognition of external citizenship and external voting rights.[96] Through these policies, states create transborder populations, while preserving the power to disconnect them from the political community.[97]

These diaspora policies illustrate the dialectical relationship between the two sides of citizenship. For example, the Hungarian citizenship law of 2011 recognized the dual citizenship and voting rights of ethnic-Hungarians residing outside of Hungary.[98] But this inclusion towards the diaspora was not incompatible with exclusion towards noncitizens residing in Hungary. In fact, these politics of inclusion and exclusion actually reinforced each other. While citizenship is a source of rights for non-resident Hungarians, it is also used as an instrument of power to promote an ethno-nationalist conception of Hungarian citizenship and to exclude noncitizens residing in Hungary. Through dual citizenship policies, states can 'include absent ethnic kin and emigrant diasporas, revive territorial claims, and even justify the denationalization of undesirable persons'.[99]

Each of these components of citizenship law – acquisition, relinquishment, and rights – contribute to both citizenship as a source of rights and citizenship as an instrument of power, since they influence the effectiveness of citizenship law in building a common sense of membership and belonging.[100]

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94 Peter J Spiro, 'Dual Citizenship as Human Right' (2010) 8 I•CON 11.

95 Heino Nyyssören and Jussi Metsälä, 'Dual Citizenship as Power Politics: The Case of the Carpathian Basin' (2019) 76 Eur Ethnica 50; Joppke, 'Citizenship between De- and Re-Ethnicization' (n 86).

96 Joppke (n 12) 869.

97 Rogers Brubaker and Jaeeun Kim, 'Transborder Membership Politics in Germany and Korea' in Rainer Bauböck (ed), *Trasnational Citizenship and Migration* (Routledge 2017).

98 Szabolcs Pogonyi, 'The Passport as Means of Identity Management: Making and Unmaking Ethnic Boundaries Through Citizenship' (2018) 45 J Ethnic & Mig Stud 975.

99 Yossi Harpaz and Pablo Mateos, 'Strategic Citizenship: Negotiating Membership in the Age of Dual Nationality' (2019), 45 J Ethnic & Mig Stud 843, 853.

100 However, recent empirical research questions whether variances in citizenship law – the rules of acquisition, relinquishment, and rights – can make a difference at building a sense of national belonging. See Kristina Bakkær Simonsen,

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4. Challenges to citizenship as an instrument of power

Citizenship can be an instrument of power in several ways: when nation-states compel citizens to fulfil their duties; when access to full citizenship is conditioned upon assimilation; when citizenship is denied or stripped; when external and dual citizenship solidify an ethno-national conception of the state, among many others. Yet, instrumentalizing citizenship can have two unintended consequences. The first one is that citizenship is performed and reclaimed. In that sense, while nation-states can grant or deny citizenship as a way to legitimate power and facilitate governability, citizens and even noncitizens can act and perform citizenship as a source of rights and full membership to make demands on the state. The second one is that exploiting citizenship as an instrument of power can, in fact, diminish its instrumental value and its salience.

a. Reclaiming citizenship

Even if citizenship is imposed to forcefully assimilate a population or to compel the fulfilment of its duties, citizenship can be reclaimed and repurposed to make demands. According to Engin F. Isin, the idea of 'performative citizenship' describes how individuals perform their citizenship through contestation and making claims.[101] Citizenship should be understood as a concept that is 'in flux' and 'dynamic'.[102] Citizenship cannot be reduced to 'empowerment' (that is, citizenship as a source of rights and full membership), nor to 'domination' (that is, citizenship as an instrument of power).[103] Instead, '[c]itizenship can be both domination and empowerment separately or simultaneously'.[104]

Whereas citizenship as an instrument of power suggests a 'top-down relationship between the state and individuals', the ideas of performative and cultural citizenship are bottom-up approaches that 'focus on practice,

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'Does Citizenship Always Further Immigrants' Feeling of Belonging to the Host Nation?' (2017) 5(3) Comp Mig Stud 1.

101 Engin Isin, 'Performative Citizenship' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 501.

102 Isin, 'Citizenship in Flux: The Figure of the Activist Citizen' (n 2) 377.

103 ibid 369.

104 ibid.

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participation and belonging'.[105] Citizenship, then, can also be conceptualized as 'membership through claims-making'.[106] Even though there are forms of second-class citizenship, and rights are being de-coupled from legal citizenship, citizenship, as a social construct, retains a 'normative power'.[107] For Irene Bloemraad, this idea of citizenship as claims-making, while overlooked, has been present all along in T.H. Marshall's work, since he conceptualized citizenship as 'a *claim* to be accepted as full members of the society'.[108] Quoting Isin, Bloemraad asserts that we should ask ourselves 'what makes the citizen' (i.e. claiming rights), rather than 'who is the citizen' (i.e. full member).[109] When citizens claim rights and challenge government power, they undermine the idea of citizenship as an instrument of domination through the imposition of duties or assimilation.[110] To sum up, citizenship can be an instrument of power, but, paradoxically, the performance of citizenship subverts the power dynamics that formal citizenship law sought to preserve.

b. Instrumental turn of citizenship

The many examples of citizenship as an instrument of power – compelling loyalty and duties, assimilation, citizenship stripping, the re-ethnicization of citizenship through external citizenship – do not all work in the same way or follow the same internal logic. While for assimilation purposes the identitarian dimension of citizenship needs to be stressed, requiring military service or paying taxes do not require it to the same extent. However, some forms of citizenship as an instrument of power – for instance, dual and external citizenship – may also diminish the identity value of citizenship that is needed for assimilation. The 'instrumental turn of citizenship', understood as the way states and citizens use citizenship for their own

105 Bloemraad (n 5) 4.
106 ibid.
107 ibid 5.
108 ibid 11 (citation omitted).
109 ibid 12 (citation omitted).
110 In a similar light, Chacón argues that noncitizens, by 'making claims to citizenship, also play an important role in shaping the meaning of citizenship'. Jennifer M Chacón, 'Citizenship Matters: Conceptualizing Belonging in an Era of Fragile Inclusions' (2018) 52 UC Davis L Rev 1.

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strategic reasons, can, therefore, undermine citizenship's resourcefulness as an instrument of power.[111]

The difference between political citizenship and legal citizenship is at the root of what Christian Joppke describes as the 'instrumental turn of citizenship'.[112] On the one hand, political citizenship, which was highly exclusive, was closely linked with the identity-dimension of citizenship. On the other hand, legal citizenship was more inclusive towards foreigners, but without requiring political participation. According to Joppke, the legal model of citizenship anticipated the 'parting of ways between status and identity' that is characteristic of instrumental citizenship.[113] If citizenship is more inclusive and less substantive, then legal citizenship and identity do not overlap as closely. Some of the examples of instrumental citizenship include investor citizenship, external citizenship and external voting rights (e.g. Hungary), and EU citizenship. These instrumental uses of citizenship are 'part of a general trend toward legal individualism in liberal societies', which 'reflects a weakening of the exclusive, loyalty commanding nexus between citizen and nation-state'.[114]

These separations between status and identity, between citizen and nation-state, could undermine the idea of citizenship as an instrument of power. Rainer Bauböck, however, argues that the instrumental value of citizenship and its non-instrumental identity value 'do not conflict, but complement each other.'[115] While Joppke sees multiple and external citizenship as an example of citizenship parting ways and disincentivizing identity, Bauböck argues that the toleration of dual citizenship since the 1960s recognizes the ways globalization has led people to 'develop genuine links to two or more states'.[116] Meanwhile, the full marketisation of citizenship would only radically change its nature and diminish its instrumental value. For coercive government to be legitimate, '[c]itizens must see governments as being *their* governments', which would not be possible under a fully marketized citizenship.[117]

Joppke and Bauböck distinguish between the instrumental value of citizenship and its identity value. But while Joppke sees them as currently parting ways, Bauböck argues that they go hand-in-hand. However, neither

111 Joppke (n 12).
112 ibid.
113 ibid 862, 873.
114 ibid 875.
115 Bauböck (n 19) 1021.
116 ibid.
117 ibid 1024.

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examines another instrumental value of citizenship – how nation-states can use legal citizenship, in the Roman model, to assimilate diverse peoples and facilitate governability. In contrast with other forms of citizenship as an instrument of power, here, the instrumental value of citizenship is not only complementary, but rests upon the identity value of citizenship. In the context of indigenous peoples and colonial subjects, the identity value of citizenship is instrumentalized to facilitate colonial rule.

IV. Indigenous Peoples and Territorians

The dualistic relationship between the two sides of citizenship can be exemplified through a closer look at the relationship between constitutional liberal democracy and colonialism in the United States of America. The interaction between American citizenship and colonialism is often neglected in accounts of American constitutional development.[118] However, examining the effects of American citizenship for Indigenous peoples and territorians,[119] those residing in U.S. territories such as Puerto Rico, can illustrate broader patterns that might translate across sites and times. In both places, American citizenship was used as a tool to facilitate central government, and the elimination of the collective identity of Indigenous peoples and territorians through their 'Americanization'. However, as Native Americans and territorians came to see themselves as 'Americans', they reclaimed citizenship as a source of rights and equality. But by performing American citizenship and using it to make claims against the United States, they also contributed to the 'Americanization' of their identity. The focus was on individual rights as recognized by American constitutional discourse, rather than collective self-determination and liberation from empire.

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118 See Aziz Rana, 'How We Study the Constitution: Rethinking the Insular Cases and Modern American Empire' (2020) 130 Yale LJ Forum 312, 314.

119 The terms *Indigenous peoples*, *Indian nations* and *Indians* will be used throughout to describe the native people of the United States of America and their descendants. See Robert B Porter, 'The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples' (1999) 15 Harv Black Letter LJ 107, 108 n 4. Finally, *territorians* is the name of the inhabitants, mostly Aboriginals, who still live in the Northern Territory of Australia. The Northern Territory, like Puerto Rico, is not a state and has limited self-government. Here, however, I will borrow the term to collectively describe the residents of the territories of the Unites States.

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Neither of the two categories here examined – Indigenous peoples and territorians – are a unified monolith, since each is composed of different stateless nations with different relationships and demands on the federal government. However, the controversies of citizenship in these places share the use of citizenship as an instrument of power, and the reclaiming of citizenship as a source of rights and equal membership. Citizenship facilitated territorial rule and veiled the relationship of political subordination, while unintentionally creating a discourse that strived to undermine that unequal membership. But paradoxically, through performing U.S. citizenship, Native Americans and territorians also reinforce the instrumental power of citizenship in erasing their collective identity.

1. Indigenous peoples

Throughout history, the legal status of Indigenous peoples has changed according to the interests of the federal government and the different uses of citizenship as an instrument of power. After independence, the U.S. followed the British precedent of considering the tribes separate nations and formalizing the relationship through international treaties. The Supreme Court, in three cases penned by Chief Justice Marshall, continued the rhetoric of domestic nations, while also infantilizing the tribes and constituting them as dependent peoples.[120] By the 1840s, Native nations were removed and circumscribed to the territory known as 'Indian Country'. To govern this territory and facilitate taking their land for White settlers, state officials in the 1840s and 1850s extended U.S. citizenship to Native Americans; 'a legal and jurisdictional incorporation that would sooner or later sweep away tribal governments, collective land claims, and Native cultures'.[121] Instead of being a source of rights, citizenship was a means to dispossess Native people of their lands by dissolving their collective claims and making them 'indistinguishable' from the settler society.[122] In the words of Senator Orville Platt, citizenship served to 'wipe out the line of political distinction between the Indian citizens and other citizens of the Republic'.[123] Alongside forced education and the elimination of land

120 Porter (n 119) 129–130.
121 Kantrowitz (n 6) 38.
122 ibid 31–32.
123 Porter (n 119).

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in common, citizenship was a tool of civilization to 'kill the Indian and save the man'.[124]

The extension of citizenship of Indigenous peoples responded to the 'logic of elimination' of settler colonialism, a pattern repeated in other White settler societies like Australia, Canada and New Zealand.[125] Citizenship 'quickly led to land loss and social devastation', and even Indigenous groups who had at first embraced citizenship quickly rejected it, to no avail.[126] For the Creeks and Seminoles, for example, U.S. citizenship meant that their nations would cease to exist. Moreover, the extension of citizenship was also tied to its duties, such as paying taxes and, later, forced military service. In all these ways, citizenship was used as an instrument of power.

In 1924, the Indian Citizenship Act imposed American citizenship to the remaining indigenous peoples who were not already citizens. This consolidated their status as American citizens, even though the separate nations and wards statuses still survive. Meanwhile, the classification of Indians as racial or political minorities is also contradictory. In *Morton v. Mancari*, the Supreme Court held that federal laws can treat Indians as political minorities.[127] Thus, the Bureau of Indian Affairs could provide employment preference to Indians without facing the strict scrutiny standard if they were solely considered a racial minority. However, when federal actors are not involved, Indians are deemed a racial minority for equal protection purposes.

While citizenship was imposed as a tool to eliminate Indigenous identity, throughout the twentieth century, individuals of Indian ancestry also reclaimed their American citizenship 'as a tool for native survival' and 'equal rights'.[128] Since the civil rights movement, Indians have formed the Red Power Movement and the American Indian Movement, started voting and participating in the legislative process through lobbying. Through these acts of citizenship, Indians sought to assert their right to full citizenship and shape the meaning of American citizenship.

However, their desire for equal and full membership also clashed with their claim to self-determination and sovereignty. This debate has been

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124 ibid 108.

125 Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology* (Bloomsbury Publishing 1999) 27.

126 Kantrowitz (n 6) 38.

127 417 US 535 (1974).

128 Kantrowitz (n 6) 46; see Kevin Bruyneel, *The Third Space of Sovereignty: The Postcolonial Politics of U.S.–Indigenous Relations* 97–112 (Minnesota UP 2007).

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framed as a conflict between uniqueness versus uniformity. *Uniqueness* refers to the recognition of tribal governments, *uniformity* to the assimilation of indigenous individuals.[129] While uniqueness confronts citizenship as an instrument of power, uniformity claims citizenship as a source of rights and equal membership. For those who reject reclaiming citizenship, '[t]he degree to which Indigenous people avail themselves of the American citizenship (…) is directly related to the degree to which the Indigenous population has assimilated into American society and the degree to which Indigenous sovereignty has been jeopardized'.[130] Through performing and claiming full citizenship, Native Americans seek to confront their unequal membership, yet, they also reinforce a citizenship discourse designed to eliminate their collective identity. They are performing American citizenship by, in the words of Engin Isin, 'adopting modes and forms of being an insider (assimilation, integration, incorporation)'.[131] Indian nations, then, illustrate the danger of adopting the discourse of full citizenship without recognizing how it legitimates exclusion and homogeneity.

2. *Territorians*

The U.S. territories share many of the anomalies and mistreatments of Indigenous peoples. Since its founding, the United States has consisted of states and territories. The Northwest Ordinance – which established the rules governing the Northwest Territory – even preceded the Constitution. However, at the turn of the twentieth century, the United States took control of a different type of territory. Territories like Puerto Rico and the Philippines could not be settled by White Anglo-Saxon Protestants and were deemed to lack the capacity for self-rule. Constitutional scholars of the time debated different solutions to the question of the status of the territories and the rights of their inhabitants. Following their lead, in the infamous Insular Cases, the Supreme Court held that annexed territories did not have to become states or its inhabitants' citizens.[132] Instead, it created the legal distinction between incorporated and unincorporated territories. Unincorporated territories were not promised statehood and its inhabitants were not citizens, but subjects. The Court's reasoning had clear

129 Bruyneel (n 128) 10.
130 Porter (n 119).
131 Isin, 'Citizenship in Flux: The Figure of the Activist Citizen' (n 2) 372.
132 Downes v Bidwell, 182 US 244 (1901).

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racial overtones, as when it contrasted incorporating a distant possession with peoples of a different race and a 'contiguous territory inhabited only by people of the same race'.[133]

Some years later, American citizenship was finally imposed on Puerto Rico.[134] However, the Supreme Court rejected that the grant of American citizenship incorporated Puerto Rico for the purposes of eventual statehood.[135] Today, Puerto Rico continues as an unincorporated territory with no guaranteed path to statehood, and its limited self-government is overseen by a financial board enacted by Congress without local consent.[136] Its residents possess only second-class citizenship with no national political rights and unequal access to social rights. Congress continues to deny access to social rights, for example, Supplemental Security Income, based on residence in Puerto Rico, a controversy currently being evaluated by the Supreme Court.[137]

However, citizenship still has significant cultural and sociological consequences for Puerto Ricans and other territorians. In Puerto Rico, American citizenship did not aim to eradicate colonialism. Instead, it was meant to 'make those subject to it more easily governable'.[138] In the words of the Secretary of War, citizenship was considered a step towards 'assuring a continuing bond'.[139] Thus, American citizenship in Puerto Rico, rather than fulfilling its suggested notions of equality and membership, 'obscur[ed] the colonial relationship between a great metropolitan state and a poor overseas dependency'.[140] Citizenship, therefore, masked colonialism itself.

But while citizenship was a tool used to facilitate territorial government and to erase the collective identity of territorians, it also had unintended consequences. In Puerto Rico, citizenship created a new political subject: Puerto Ricans as American citizens.[141] Thus, U.S. citizenship facilitated, in

133 ibid 282.
134 While Cabranes (n 140) believes that Congress did not impose citizenship on the Puerto Rican population, Rivera Ramos (n 6) 152 argues that since 1912, five years before the Jones Act, Puerto Ricans became disillusioned with the American regime and official representatives of Puerto Rico from 1914 to 1916 opposed the citizenship provision of the Jones Act.
135 Balzac v Puerto Rico, 258 US 298 (1922).
136 Financial Oversight and Management Board for Puerto Rico v Aurelius Investment, LLC, 140 SCt 1649 (2020).
137 US v Vaello-Madero, 956 F3d 12 (1st Cir 2020) (petition for cert granted).
138 Rivera Ramos (n 6) 156.
139 ibid 148.
140 José A Cabranes, *Citizenship and the American Empire* 397-398 (Yale UP 1979).
141 Rivera Ramos (n 6) 163.

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the words of Efrén Rivera Ramos, 'a discursive instrument for the formulation of reciprocal demands between the United States and Puerto Rican society'.[142] Claims about full membership aim to turn colonialism upside down by relying on the constitutional discourse of the metropole against it. Ironically, *American* citizenship is conceptualized as a path towards eliminating the political subordination. Alternatives to colonial rule are conceived in ways that emphasize the 'free determination of citizens' and the right to vote for the president.[143] In November 2020, Puerto Ricans celebrated a plebiscite on whether it should become a state of the United States of America. The pro-statehood party emphasized that, as American citizens, Puerto Ricans deserved to become equal members and that statehood was the only alternative that guaranteed American citizenship. Statehood narrowly won. While it remains to be seen whether Puerto Rico becomes a state, during the electoral process citizenship was performed and used as a tool for claims-making against the federal government.

Like Native Americans, who also had citizenship imposed upon them, Puerto Ricans reclaimed citizenship as a tool to demand equality and rights. But the performance of American citizenship also diminishes their collective identity and the long-standing legacy of U.S. imperialism in Puerto Rico. By anchoring their claims on their citizenship status, they reproduce the exclusion and homogeneity inherent in the universal ideal of citizenship. In conclusion, citizenship facilitates territorial governability and conceals the relationship of political subordination, while creating a discourse of full citizenship that seeks equal membership at the expense of assimilating themselves to the universal ideal of citizenship.

This dialectical relationship between these two sides of citizenship also pervades debates over self-determination and assimilation in other unincorporated territories. In contrast to Puerto Ricans, American Samoans are U.S. nationals, rather than American citizens. Because they are not citizens, even when they move to the continental United States, they still cannot vote in federal or state elections.

Certain Samoans have filed lawsuits claiming birthright citizenship, pursuant with the Fourteenth Amendment. In *Tuaua v. U.S.*, the U.S. Court of Appeals rejected their claim to birthright citizenship.[144] What is noteworthy, however, is that the Court was conscious of the identity dimension of citizenship, and its use as an instrument of power. According

142 ibid 164.
143 ibid 169.
144 788 F3d 300, 308 (DC Circuit 2015).

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to the Court, American Samoans 'have not formed a collective consensus in favour of United States citizenship'.[145] Integral to Samoan culture are some unique kinship practices, such as extended family, and social structures, including a system of communal land ownership. The Court of Appeals highlighted that '[r]epresentatives of the American Samoan people have long expressed concern that the extension of United States citizenship to the territory could potentially undermine these aspects of the Samoan way of life'.[146] Considering this opposition, it would be 'anomalous to impose citizenship over the objections of the American Samoan people themselves, as expressed through their democratically elected representatives'.[147] The Court concluded that citizenship meant adoption of an identity; a tie to a political community with reciprocal obligations. Imposing citizenship would be akin to cultural imperialism and 'offensive to the shared democratic traditions of the United States and modern American Samoa'.[148]

The respect for the cultural identity of American Samoans is consistent with the ideas of recognition and differentiated citizenship. A universal ideal of citizenship may lead to the alteration or annihilation of their group identity, rather than equal and full membership. However, federal courts have not been consistent in their approach to the relationship of citizenship and colonialism. Guam, another unincorporated territory, wanted to narrow the participation on a plebiscite concerning its political status with the United States to the Native Inhabitants of Guam, known as Chamorros. Relying on *Morton v. Mancari*, Guam argued that the Native Inhabitants of Guam were a political category referring to 'a colonized people with a unique political relationship to the United States', rather than a racial category.[149] However, in *Davis v. Guam*, the Court of Appeals deemed that this eligibility restriction was a proxy for race and violated the Fifteenth Amendment which forbids denying the right to vote on account of race.[150] While *Tuaua* opted for a differentiated citizenship approach, *Davis* illustrates how, in the words of Young, a 'strict adherence to a principle of equal treatment tends to perpetuate oppression or disadvantage'.[151]

145 ibid 309.
146 ibid 310.
147 ibid.
148 ibid 312.
149 Davis v Guam, 932 F3d 822, 841 (9th Cir 2019).
150 See Rice v Cayetano, 528 US 495 (2000) (for a similar decision regarding Native Hawaiians).
151 Young (n 43) 251.

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Instead of recognizing Guam's colonial history, the Court of Appeals uses the constitutional prohibition against race discrimination to protect the right to vote of White settlers and their descendants on the question of Guam's political future.

In 2021, a different U.S. Court of Appeals reached the same conclusion as *Tuau*, denying birthright citizenship to American Samoans and stressing 'grave misgivings about forcing the American Samoan people to become American citizens against their wishes.'[152] If the Supreme Court reviews the decision, it will have to wrestle between two opposing and self-reinforcing conceptions of citizenship. On the one hand, the claim that citizenship is a source of rights and equal membership. On the other, the contention that the extension of citizenship will make Samoans invisible and indistinguishable. In other words, that citizenship will be just another tool of the conqueror, an instrument of power to facilitate central rule over the territories.

V. Conclusion

Since the days of the Roman Republic, citizenship has been both a source of rights and an instrument of power. Yet, until recently, social and legal scholarship have paid little interest to the interaction between these dimensions of citizenship. This is unfortunate, since one of the pressing issues of our times is constructing political communities that are inclusive and multicultural, while also preserving territorial stability and a sense of peoplehood and belongingness.

The problem with 'modern citizenship' is that 'it masquerades as universal, thereby concealing from view other plausible ways of being and relating to each other'.[153] Debates and claims against the state place citizenship at its centre, which can have unintended harmful consequences, as illustrated by the Indigenous peoples and territorians. Instead, we must articulate new ways of making claims against the state,[154] and the ideas of citizenship and membership must be negotiated among all political actors according to their distinct histories as people.[155] This will require, however, a deeper understanding of the dialectical and self-reinforcing relationship between citizenship as a source of rights and full membership and citizenship as an instrument of power.

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152 Fitisemanu v United States, 1 F4th 862, 874 (10th Cir 2021).

153 Shaw (n 33).

154 See Tendayi Bloom, *Noncitizenism: Recognising Noncitizen Capabilities in a World of Citizens* (Routledge 2017).

155 Kymlicka (n 82) 289.

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