Ways of Case-Making

WAYS OF CASE-MAKING

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Preamble: Troubling Encounters

This book is a testament to a journey through social-scientific and judicial case-making practices. It concentrates, first, on the truths and facts sociologists have produced about legal practices. That is, it is interested in the question of how sociologists have sought to *make their case* about these judicial practices. It is concerned with the questions of *what* these social-scientific observers have seen when they cast their eyes on these practices; *how* they have seen what they have seen, and which *realities* they have enacted in their approaches. Second, this book concentrates on the ways judges, clerks, administrative personnel and case files in a Dutch criminal court become instrumental in judicial ways of finding out 'what really happened' and ways of qualifying these events legally. As such this book is also an attempt to describe these *judicial ways of case-making*. Third, it also aims to account for and reflect on the ways *this* case - the book you are holding in your hands - is made, and an attempt to work through the necessary methodological and conceptual challenges that accompany the making of such a case. Taken together, these questions produce an account of a close encounter with the ingredients of judicial case-making practices - case files, clerks, judges, courtrooms, routines, and procedures - as well as a story about sociology and the Law, knowledge and judgment, more generally.

1 Is/Ought Conundrums

Knowledge and judgment, after all, tend to be treated as radically distinct species. On the one hand, there is knowledge, which emerges when we let the world speak for itself and adjust our

expectations - our theories, our stories - accordingly. Judgment, in contrast, consists of retaining our normative expectations even when these are breached, when the world disappoints them (Cf. Luhmann 1992). The distinction between knowledge and judgment is between that which passes as valid under the governing logic of facts - *de facto* - and that which passes as valid under the governing logic of norms - *de jure*. In this capacity, knowledge and judgment, de facto and de jure, are mapped quite closely onto the difference between Science and Law. Even though both Science and Law can be understood as 'two institutions for making order' (Jasanoff 2007: 761), both are fundamentally at odds on their relationship with the world. If Science seeks to know, Law seeks to intervene. Science represents, Law decides.

This demarcation between kinds of statements (is versus ought) and kinds of practices (Science versus Law) has some practical use, not least because it safeguards and protects these practices against each other. After all, is it not frightening to imagine a science that is blind to reality, concerned only with passing judgment? How tyrannical would such a science be! And, is it not ridiculous to require verdicts to be subjected to scientific tests of factual accuracy? We all know how scientists can never seem to agree on anything, how no scientific judgment is ever the last word … We wouldn't be able to make decisions! The distinction between *de jure* and *de facto* helpfully ensures the identity and distinctness of these practices - especially necessary, perhaps, given the fact that both practices draw so uneasily on a similar vocabulary of proof, validity, facts and truth, similar rituals of verification in juries of peers, and similar-sounding appeals to the necessities of capitalized abstractions of (scientific or legal) Law and Order. The binary pairs of fact/norm, is/ought, Science/Law help to manage both this potential for miscommunication and, importantly, judgment in the name of science, and truth in the name of the norm.

Yet like all binary pairs, however, these distinctions do not only contain, but also *create* trouble - most crucially, of course, for those people, things or practices that do not fit wholly and neatly into either of its classificatory slots. In this capacity, such troubles are *good to think with*,[1] as they put the self-evidence of such distinctions in doubt. Let me introduce you to one such occasion for thinking. Its principal ingredients? Three social-scientific researchers; one peer-reviewed study of sentencing disparities in Dutch criminal courts; some newspapers; a political actor here and there; public shock; and most importantly: a weary, even disgruntled judiciary.

2 Speaking Truth to Law

It is March 2012, and my fieldwork among the files, administrative staff, clerks and judges of a lower criminal court in the Netherlands upon which this book is based is yet to commence. Aside from some exploratory interviews with both practising and retired judges, I have yet to gain entry to the criminal court where I hope to study judicial decision-making practices. It is in this month, too, that a brief controversy about precisely these judicial decision-making practices evolves in the pages of Dutch newspapers (see e.g. NRC 2012, March 14; NRC 2012, March 15; Algemeen Dagblad 2012, March 14). The immediate cause for the media attention is the publication of a social-scientific study of sentencing disparities in the Dutch Jurists' Magazine [*Nederlands Juristenblad* or *NJB*]. This study, which was developed and published by three researchers associated with Leiden University Wermink, de Keijser and Schuyt (2012a), had found that lower-court magistrate judges [Dutch: *politierechters*] tend to punish certain defendant populations more harshly than others. These lower-court magistrate judges, the authors demonstrated, are more likely to opt for an unconditional prison sentence in cases involving

foreign-looking and non-Dutch speaking defendants than in cases involving Dutch-looking and Dutch-speaking defendants.

The study was received with puzzled shock. How could this be? Does the Law not promise equality before the Law? Do judges not aim to treat like cases alike? In an editorial, the politically centrist *NRC Handelsblad* for instance concluded that the 'intuitive judge has been caught out' (NRC 2012, March 15) and that 'lady Justice's blindfold' seems an 'illusion, not a self-evident professional characteristic'. Emphasizing that 'judges are not immune to stereotypes', it suggested that further large-scale studies should be conducted, and raised the following questions:

> Are criminal law judges sufficiently aware of the influence of negative stereotypes? Is there attention paid to such issues throughout their education and collegial feedback [*intervisie*]? Do people correct each other there or is this study a bolt from the blue? Are there, moreover, enough criminal law judges with a non-Dutch cultural background? (NRC 2012, March 15).

In the wake of this media attention, not only did the National Minority Counsel (LOM) express their shock with the study's conclusions, members of Parliament, Recourt (PvdA, centrist Labour Party), Dibi (the Green Left) and van der Steur (VVD, the largest Liberal party) each submitted sets of formal questions to the then Minister of Security and Justice [*Minister van Veiligheid en Justitie*] Opstelten. These questions concentrated on whether the Minister shares the researchers' conclusions 'that negative stereotyping with regards to defendants with a foreign appearance play a role in their greater likelihood of receiving a harsher sentence', and the document queried what actions the Minister would undertake to make sure that 'judges do not weigh the defendant's appearance in their sentencing decisions anymore'[2] (Kamerstukken II 2011/12). In response, the Minister mobilized the help of the Scientific Research and Documentation Centre (WODC), whose critical appraisal of the study informed his

formal reply to the Parliament. In that document, Minister Opstelten doubted the study's validity, stating that

> relevant variables that are often weighed up in the punishment stage, like having a permanent home address and a steady income, possible drug addiction, and flight risk, have not been included in the research. […] Furthermore, variables like the severity of the case, [the defendant's] criminal record, and custody have not sufficiently been controlled for. A large measure of uncertainty surrounds the strength of the reported correlations (Ministerie van Veiligheid en Justitie [*Ministry of Security and Justice*] 2012: 2).

It is for these reasons, the Minister concluded, that 'the model used diverges from the practice of judgment', and that, for now, the robust conclusions drawn about the choice of punishment by police judges with regard to persons with a foreign appearance are, on the basis of these research materials, insufficiently justified. (id.: 2).

3 Judges Speaking Back

While the controversy died a somewhat silent death in the media, its conclusions would linger on among members of the judiciary. The Council for the Judiciary [*Raad voor de Rechtspraak*], for instance, asked the Leiden researchers to design and execute a more methodologically sophisticated study into the judicial decision-making processes (see de Rechtspraak 2015: 6). Two practising judges, furthermore, replied briefly to the study's findings in the same Dutch Jurists' Magazine later in 2012 (Bade and van der Nat 2012: 973). There, the two judges pointed out that it may be defendants' lack of income and lack of permanent home-address, not their foreign looks, that could plausibly account for judges' choice for a prison term. Provocatively, the judges suggest that 'the research seems *partial*', even raising the

question whether the 'researchers have any idea how a judge arrives at a sentencing decision?' (id.: 973).

In many of my later conversations with judges I would encounter similar frustrations. Many of them felt that the authors of the study did not appear to know much about judicial decision-making practices. And as a result of that lack of familiarity, it was suggested, the researchers had failed to do justice to their work. In fact, the study had rendered their own work practices alien and unrecognizable. All in all, its portrayal of their practices seemed partial at best, and distorted at worst. Judge Beech, frustrated but lucid, for instance commented that:

> At no point do I sideline the law just because I see that a defendant is from an ethnic minority. That is just ridiculous, and I resent the implication. *I don't recognize what we do in what they are saying*. Listen, we have our ways of dealing with cases: we have the information, we have the files. That and the law is what is important to us.

Placing knowledge of individual cases and the Law in the hands of judges themselves, Judge Beech contests the researchers' credentials - what do they know anyway? - as well as the accuracy of their portrayal of judicial practices. Appealing to local knowledge - 'we have the information, we have the files' - Judge Beech suggested that the study's portrayal of judicial practices is a highly specific kind of portrayal; a portrayal that distorts these practices beyond all recognition. It is as if the researchers were speaking about a *different reality* than that of the judges. The study and its aftermath among the members of the judiciary, then, points in the direction of a controversy over knowledge, recognition, and perhaps even respect. Perhaps the researchers merely sought to speak the truth, but their study was received as both a *distorted picture* and *indictment* of judicial decision-making practices. But - to paraphrase judicial discomfort - what do they know anyway? And by extension: who are they to judge?

4 Thinking with the Trouble

The study had clearly touched a nerve. Now, it may be tempting to make sense of judges' frustrations with reference to their professional 'blind spots' and their professional pride. Of course they are hurt, or anxious, or frustrated, the argument may go: after all, the study debunks a dearly held professional engagement with equality before the Law. Neither is it uncommon, sociologists might add, for people to exhibit some discomfort at having been turned into objects of study - especially so if the sociologist manages to lay bare some inconvenient truths, for instance that a social practice that promises equality in actual fact reproduces social inequalities. Of course, this approach to the controversy places the researchers in a privileged, epistemic position vis-à-vis the judges studied. While judges may *think* they treat like cases alike, in actual fact they reproduce social inequalities. And while the Law may want to keep up the appearance of equal treatment, its promise is just that: an appearance beyond which the social scientists find a more fundamental truth. 'Forgive them, for they know not what they do': this is one way to make sense of the controversial status of the study among the practising members of the Dutch judiciary. After all, knowledge is expressly not what the Law is seeking. It merely seeks to judge, and in so doing must remain blind to the social determinants and consequences of judgment. Meanwhile, who is to blame social scientists for telling the truth? Surely their account should not be taken to be a *judgment*? Reading the controversy this way, we manage to reinstate the imperative that judges judge, and scientists speak the truth. In a way, this first way of dealing with the controversy *denies its existence*, suggesting that judges may simply be 'sore losers' who better stick to their trade - judgment - while sociological observers stick to theirs - truth telling. No category mistakes have to be made, no crossings

between law and science, between knowledge and judgment, have to occur (Latour 2013).

But such crossings do in fact occur - otherwise there would be no controversy here to begin with. We might just need another way to deal with the controversy, then; a way that takes judges' objections quite seriously. For something we do not consider, if we are content to side-line these concerns as merely 'hurt feelings', is that these judges might quite simply *be right*. That is: it might just be the case that social-scientific accounts do much more than simply 'tell the truth' about a singular world. Indeed, it might just be the case that social-scientific accounts are rooted in active and specific interventions in the world, and that they shape the world about which they speak. What the judges are getting at, I think, is this *performative dimension* of knowledge-generating practices, that is the way knowledge-making practices shape and delineate their object in specific ways, perhaps even doing so in ways not easily commensurable with other 'ways of world-making' (Goodman 1978). As such, the judges' discomfort points to a first conceptual trouble which is central here: the trouble presented by the fact that social-scientific accounts do *more* than just 'tell the truth' about the world. Taking this controversy seriously, then, demands that we try to understand and *account for* these performative effects of our knowledge practices (Haraway 1988).

Given the controversy, here is a second thing to consider: judges may also be right to question social-scientific researchers about what they think they know about judicial practices. To reiterate Bade and van der Nat's (2012) provocative question: *do* we have any idea as to how judges arrive at a sentencing decision? That is, how do 'we' - social scientific observers - tend to understand these decision-making practices, and crucially: what are we missing out on? Staying with the troubling controversy hence calls for a critical and reflexive account of the work our own observations are doing in rendering judicial practices

intelligible. Such an account would also, to my mind, attend to perplexities and aporias - *a-poros*, that which we do not manage to *pass through* - in our understanding of these practices. Especially provoking, in this case, is the contrast drawn between sociological understandings of judicial practices and 'our own way of dealing with cases'. While sociologists may have one way to 'deal with cases', what are judges' ways to deal with cases? Judge Beech's comments point to concrete practices of 'case-making': of having 'all the information, and the files', so that judges may come to a sense of what it is they must do. In that capacity, her comment also points to 'epistemic practices' (Lynch 1993) *within* these judicial practices, that is for instance local ways of evaluating evidence, of constructing a story, of attributing plausibility to different scenarios, and of arriving at an operative sense of the truth of the matter. The controversial study missed out on precisely these local ways of finding out what happened, local ways of 'seeing the case', local ways of deciding on punishment. Can we develop tools to remain sensitive to these local practices of case-making?

On a theoretical level, then, the controversy complicates a convenient mapping of judgment and knowledge onto, respectively, the Law and Science. There is more to social-scientific accounts than just facts: they seem to be active in the making of worlds. There is, on the other hand, more to judicial practices than just judgment: there, too, an operative sense of 'what really happened' must be arrived at. Scientific practices do not yield mere representation; neither are judicial practices indifferent to the facts. In a way, both are *case-making practices*: ways to shape, delineate, and organize facts, and ways consequential to the realities these facts are ostensibly drawn from. These case-making practices represent the troubles and impurities that dwell at the borders of our demarcations: the fact of performativity in scientific, representational practices on the one hand, and on the other, that fact of epistemic practices within

judicial practices. My efforts consists of staying with these troubles (Cf. Haraway 2016) and to see how these ways of case-making proceed in action.

5 Three Questions

All in all, the three central questions raised in this book are the following:

The first problematic is both specific and general, in that it wants to attend to the specifics of the aforementioned study, but also seeks to situate it vis-à-vis conceptualizations of the relationship between sociology and the Law more generally. What are the limitations and productivities of sociological descriptions of the Law anyway? Can the effort to define, describe, and know the Law do justice to the Law at all? What do these descriptions render visible and make possible - and what do they render invisible, and impossible? *How, in other words, are sociological cases made about the Law, and what realities are hence enacted?*

The feeling, among judges, that their practices are being *misrepresented* of course raises the question whether there are different ways to represent these practices, grounded perhaps in different empirical engagements with judicial practices. Reading the exasperated question whether 'the researchers have any idea what our practices look like', as an invitation, I aim to develop conceptual and empirical means to take seriously the everyday practices of case-making in a criminal court. How are cases dealt with, taking into account both 'the Law' *and,* to speak with Judge Beech again, 'the information, the files'? In other words, *how are judicial cases made in actual practices?*

Questions multiply further as I allow these questions to affect my own knowledge-seeking practices. What does it take, methodologically and conceptually, to account for the case I myself am making? How do I position myself in relation to these legal practices and the dense packing of sociological descriptions

around these practices? Do I need to accept a scientific role as a producer of facts, and facts only - or may I try to rearticulate just what it means to do description? *How, in the midst of these case-making practices, do I make my case?*

6 Abstract Accounts and the Concreteness of Practice

Staying with these troubles and trying to answer these three questions is, in this case, also an effort to *stay with the concrete*. While the theoretical chapters that will precede my empirical inquiries will elaborate this point in more detail, for now it must suffice to say that the mapping of knowledge onto Science and judgment onto Law has the unfortunate side effect of rendering the concrete practices of both 'Law' and 'Science' difficult to apprehend.

For instance, once we adopt a conception of Law as *really* being about judgment and Science as really about truth, it is tempting to slide into the suggestion that Law is *only* about judgment and Science only about facts - and that other, more troubling practices are therefore out of bounds. As we will see throughout *Chapter 1: Contemplating the Law*, this tendency - to slide from the 'really' to an 'only' - is very much with us today and exercises a strong conceptual pull on both legal positivists and social-scientific observers of the Law. Their attempts to radically distinguish between the normativity of the Law and the factuality of science, as I will show, either slide into purification, in which - with Kelsen (1960, 1981); Marx (1887); see also Hunt 2002) and Black (1972, 1976) - the distinction between Law and Science is rigidly asserted; or this distinction evolves into a problematic perspectivism with Hart (1958, 1994 [1961]) and Bourdieu (1987), within which different conceptions of the Law are argued to be rooted in the observer's location 'inside' or 'outside' the Law. Even Latour's sociology of Law (2013, 2010) falls prey to this tendency towards purified abstraction, particularly so in his

Inquiry into Modes of Existence (2013). While he traces a trajectory through the concrete practices taking place in the highest administrative Court of France - the Conseil d'État - his sociology of Law, too, is one that reinstates, after all his ambulations, the distinction between Law and Science, hence purifying them both of troublesome noise.

Tracing the fact-norm distinction through these debates, I zoom in on a tendency William James (1909) calls 'vicious abstractionism'. This intellectual tendency proceeds by way of 'singling out some salient or important feature' of a 'concrete situation' - truth in the concrete situation that is science, judgment in the concrete situation that is the Law - after which we reduce 'the originally rich phenomenon to the naked suggestions of that name abstractly taken, treating it as a case of "nothing but" that concept' (James 1909: 110). In so doing we miss out on the opportunity to do justice to concrete troubles: truth-making in legal practices, and world-making in scientific practices. This is not to say that all abstraction is necessarily wrong - James quips, for instance, that without abstractions we merely 'hop on one foot' (id.: 109). After all, it is only in the encounter between the abstract and the concrete that we manage to make ourselves capable of inquisitive movement:

> using concepts along with the particulars, we become bipedal. We throw our concept forward, get a foothold on the consequence, hitch our line to this, and draw our precept up, travelling thus with a hop, skip, and jump over the surface of life at a vaster rapider rate (James 1909: 109).

While we need both the abstract and the concrete to move about at all, then, abstractions may also fail us in our attempts to 'hop, skip and jump'. Faced with the troubling presence of performativities in social-scientific accounts and truth-making within legal practices, the abstracted accounts highlighted in Chapter 1 do not organize and order concrete experience

satisfactorily, and as such fail to operate as 'tools to think with', and think through, the specificity and concreteness of the practices we encounter (Stengers 2005). That is, if we accept that the Law is really, and only, about judgment, we miss out on the opportunity to study and trace how, within legal practices, knowledge of the reality it seeks to judge is arrived at. To be more precise: once we purify our conceptions of Law to include only that which we call legal and exclude 'the remainder of things' (Whitehead 1953: 73) we encounter in concrete experiences, we have lost the ability to do justice to these concrete, if troubling, practices. The same goes for our understanding of scientific practices. If we accept the dictum that Science is really and only about faithful representation of the world out there, we have lost the ability to do justice to the performative dimensions of our knowledge practices. Abstracted 'hyper-explanations' of the object 'the Law' (Dupret, Lynch and Berard 2015) such as the ones highlighted in this chapter, in other words, disregard the concrete.

Chapter 2: A Guide for the Perplexed is devoted to giving conceptual flesh and bone to this turn towards the concrete. The conceptual movement I make there is in many ways indebted to pragmatist philosophy and its sociological incarnations, i.e. ethnomethodology and actor network-theory in particular. There, I show that one way out of the Law-Science conundrum - and with that, one way to stay with the troubles - is to rethink first *what, concretely, we do* when we do 'description' and 'representation', and second, *what concretely goes on* in sites, settings or practices we point to as locations of 'the Law'. Crucially, this chapter is not meant as a way to transcend the opposition between sociologists and legal positivists, but rather as a way to find concrete paths to follow when a reliance on the capitalized abstractions of Law and Science are failing us. Thinking of both 'scientific description' and 'the Law' in concrete terms, I suggest, allows us to salvage both modest description - something social scientists are sure to

welcome - and the practical robustness of legal practices - an appreciation of which is sure to matter to judicial decision-makers. Of course, this salvaging comes at a certain cost. On the one hand, it will require, on the researcher's part, an accountability (Haraway 1988) with regards to the things we do in, with, and to realities when we make knowledge. On the other hand, we will also need to include in our accounts of 'the Law' those non-human things crucial to 'the Law's' practical operation, and especially of that entity which transports and transforms facts with regards to the case: the case file.

7 Hopping, Skipping, Jumping: One Journey, Four Interventions

With an emphasis placed on concrete legal practices and the concreteness of social-scientific representation, the journeying can commence. After all, there is no arriving at truth without travelling roads. My ambulations take off with the Leiden study once more. Equipped with a vocabulary to do justice to its performative dimensions, I will raise the question how this study enacts judicial decision-making practices in *Chapter 3: Dealing with Difference*. What are the consequences of treating judicial cases as bundles of legal and social characteristics? How is the promise of 'equality before the Law' operationalized? How is 'the Law' itself reconfigured as a result of its analyses? And what kind of population - of cases, of individuals - does this analyses presuppose? Together, these questions bring us closer to zooming in on a crucial performativity of social-scientific accounts of judicial practices, especially those assisted by quantitative measurement and statistical analyses; that is, how this analysis groups together individual cases as 'the same' and 'different' in ways that are not necessarily commensurable with the enactment of 'sameness' and 'difference' in these legal practices themselves.

Sensitized to the specificity of this mode of enacting judicial practices, I will then take you with me into 'the field': a criminal court in the Netherlands. There, I traced the practices the Leiden study sought to make intelligible, that is the practices of magistrate judges [*politierechters*]. These judges preside over the court proceedings on their own (as opposed to judges in the 'multiple chamber', which is composed of three judges), and adjudicate and sentence the relatively mild offenses, punishable with up to one year in prison. Their caseloads, I would learn, are high, and their work practices paced. Dealing with the vast majority of criminal court cases nationally (in 2010 for instance, magistrate judges dealt with roughly 85 per cent of all criminal court cases, see Ministerie van Veiligheid en Justitie (2010), these police judges combine the role of fact- and Law-finder. And in that capacity, they are assisted by clerks - who prepare their cases for them and who take notes during the court session - but also by their files. Indeed, entering the court is in many ways an encounter not only with human actors, but also with the non-human ingredients of bureaucratic practices: case files. Informal conversations with many of its practising judges, clerks, and administrative personnel, observations of courtroom proceedings, careful 'shadowing' of 14 judges in their preparatory, file-based work practices and their decision-making in court, as well as a study of (or rather: struggle with) over 250 individual case files confronted me with entirely different ways of case-making. That is, while the Leiden study emphasizes inputs and outputs to the judicial decision, I now found myself in the middle of a specific ecology of practice (Cf. Stengers 2005), a world composed of humans and non-humans, of spoken and written words, of rather docile subjects - defendants placed before the Law - and of recalcitrant objects - case files that are never quite as easily navigable and readable as one would like. In this specific ecology of practice, I followed up on the Leiden study to open the 'black box' of judicial decision-making and see how the Law proceeds in

action. Yet I quickly found that there is not *one* answer to that question, not *one* way towards a solution.

Take for instance that most visible, most studied, most dramaturgically rich dimension of legal practices: the court session. There, I learned, accounts are elicited, truth and falsehood are at stake, and the 'soul' (Foucault 1977) of the deviant subject becomes a matter of empirical interest: is s/he *really* sorry? Is he or she *remorseful*? Curiously, however, while the social-scientific study of remorse in legal settings has generally testified to its crucial importance to legal decision-makers, it has neglected to delve into the way it is enacted in court. How, in other words, do defendants manage to 'perform remorse' in court? How do judges make sense of defendants' remorsefulness? How is it weighed and evaluated - and what are its consequences to judicial decision-making? In *Chapter 4: Situating Remorse*[3] I delve into these questions, drawing especially on informal conversations with judges and in-court observations. With this emphasis on the morally dense texture of judicial practices, I also encounter a way of case-making that operates on the basis of narrative: cases are, first and foremost, conceived of as *stories*. Or rather, as I learned, instances of recurring, 'typical' stories, within which defendants' remorsefulness is itself made sense of, weighed, and evaluated.

This emphasis on narrative is one way to describe legal practices in a different register: a register that recognizes that cases are made in reference to more or less typical narratives. Yet this, however, is not a final account. Concrete judicial practices are not just about stories. Moving back and forth between the court's 'frontstage' - the publically accessible court session - and its 'backstage' - the offices of administrative staff, clerks and judges - I encountered episodes of quiet 'face-to-file' interaction (Scheffer 2005). In my emphasis on verbal interaction in court and the production of narrative, I seem to have produced a hiatus once again, for my emphasis on co-presence and language was not easily transposed onto these quiet episodes of desk-work.

There, there were no defendants, no lawyers, no public prosecutor, but there were only the traces of past bureaucratic actions gathered together in the case file. This is where I found 'the Law' in its most materially robust sense as well: here, central are not fleeting words, but the written report; not intangible sound, but heavy paper files and digital interfaces. It is also the setting where judges told me they try to 'see the case clearly' prior to the court session. But how do they do so? *Chapter 5: Visualizing Cases*[4] is an account of these 'visualization practices' as they take place in relation to the file, and especially the techniques judges have developed to 'navigate' files accurately and efficiently. Crucially, it also pays attention to the extra-textual affordances of the case file. Tracing the way taken-for-granted visualizing practices were disrupted as an effect of the digitization of case files over the summer of 2013, it zooms in on the medium-specificity (Lanzara 2009) of judicial 'visualization practices'. In doing so, it also puts in doubts suggestions that judicial work is found only in the 'head of the actor' (Garfinkel 1967). Judicial thinking and seeing, I suggest, involve both 'eye' and 'hand'. 'Behind' the story-telling in court put centre stage in Chapter 3, this chapter adds the socio-material visualization practices of 'the case'.

Yet here we run into another aporia once again. Yes, the case file may be a recalcitrant entity in the material sense - especially if it is digitized. Yet this is not its only recalcitrance, it seems. For in both judges' pre-trial preparation practices and in court itself, the file also resists smooth truth- and sense-making not because it is either a paper or digital object but because it is an object with a complex history and an uncertain future. Whereas the preceding chapter has taken the case file as an object immediately present in the here-and-now of ongoing practices, *Chapter 6: Folding Times, Doing Truths*[5] highlights the case file not as a materially, but as a temporally recalcitrant object. It traces the case file's procedural and institutional history, paying attention in particular to the way

these histories are evoked and negotiated in court. Drawing on M'charek's notion of the folded object (2014), I show how the case file becomes implicated in struggles over 'what really happened', and distinguish between two modes in which it does so: on the one hand, the legal case file acts as an innocent transporter of facts and truth; on the other, it becomes visible as an object that has actively transformed and delineated the case in question. In the first situation, truth-production draws on the documents present in the file, treating these as neutral containers of evidence; in the second case, the documents themselves are interrogated, a process of interrogation that crucially includes the histories, routines, and decisions these documents render invisible. In so doing, this chapter offers yet another appreciation of the concreteness and coproduction of legal procedure and fact-making over and against accounts that treat either as subservient (in which case, only procedure qualifies as properly legal), or accounts which rigidly separate the two (in which case, procedure is only a 'legal context' for truth-making).

8 The Law Multiple

Throughout these four empirical chapters, then, I highlight how each mode of engaging with the Law defines and delineates the Law, and I further seek to situate such definition and delineations by concentrating on how these are mediated by methods, instruments, and procedure. These concerns include my own instruments, methods and positionings, for which reason the chapters offer not only substantive contributions to different bodies of research, but also analyses of the performative effects of situated observations of, and collaborations with, the Law. In other words, I aim to account for the effect my own methods of observation have on the way I enact 'the Law', and retrace the steps I have taken throughout my ambulations in through its corridors and offices.

Now, all journeying must come to an end - this we all know (Cf. Lévi-Strauss 1961). The real question is: *how* do we end our journeying? Looking back, what have we learned? Looking forward, what concepts may allow us to hop, skip and jump some more? This question is a conceptual challenge, as the aforementioned four interventions, taken together, demonstrate that 'the Law' - that abstract being - is in a very real sense *something else* depending on our concrete collaborations with it. Sometimes it is an input-output mechanism distributing justice over population groups. With a sociological, cross-sectional 'view' of the Law we lose all sense of legality at all, even though we may be happy to see many cases at once - or at least, the 'factors' of which they are composed and the outputs they yield. At other times, it is a morally charged practice of story-telling. In the emphasis on the processes taking place in the quintessentially legal courtroom, we encounter morals within which the distinction between legal culpability and moral responsibility is continually at stake. Then again, it is also a practice of paper-shuffling, in which judicial visualizations of the case prove reliant upon social and material infrastructures. Lastly and yet again, these legal practices are also practices of writing and erasing histories, or of observing procedure and the facts simultaneously. With legal procedure, often branded so uniquely legal, comes simultaneously the question of facts, truths, and the relationship between documentary as well as 'actual' realities. How do we make sense of this multiplicity?

One way to make sense of multiplicity, Mol (2002) teaches us, is to hierarchize: to say only one of these accounts captures 'the Law' best, while the others are derivative, flawed, mere approximation. In a way, this is a route that retreats into purified generalities once more: there can only be one true being to the Law. The other, more productive, route however is to *retain this multiplicity* in enactments of the legal, and to come up with a conception of 'the Law' that allows researchers to make sense of

this multiplicity. In order to do so we need not, I argue in *Chapter 7: Productive Fictions for the Study of the Law*, abstracted hyper-explanations of presumably singular objects, but humble accounts of hyper-objects. In that last chapter, I propose to use the notion of the hyper-object as a productive fiction to make sense of the Law in its multiplicity. Hyper-objects, according to Morton (2013), are objects that are tentacular, devoid of a centre, and stretched out. Hyper-objects are both inter-subjective and inter-objective: not only a product of intersubjective understanding, but materially dense knottings and practices. Of course, they are slightly mysterious, but not because they have a hidden centre, but because of their sheer scale: they are simply too large, too stretched out across time and space, to apprehend in full. The Law, to speak with Deleuze and Guattari (1986: 45) is always partially in 'the office next door, or behind the door, on to infinity'. This conception of the Law as hyper-object demands situated, humble accounts. In other words, the notion of the hyper-object forces us to situate and account for our collaborations: we will never be able to claim we have apprehended the Law in its totality, yet we need not sacrifice description entirely. With this conception of the Law as an hyper-object we may not ignore what we do not know, we can't quite aim to purify too hastily and recklessly, we can't continue to mistake parts ('*this* legal practice', '*this* scientific practice') for wholes ('*all* legal practices', 'scientific practices in *general*'). Such a conception is situated and for that reason sensitive to the fact that every inside is another outside; that it is not moving into phenomena that matters but moving *through* them. With hyper-objects, the point is not in arriving but in the journey itself.

Waarvan akte.

NOTES

1 My thinking here is informed by Donna Haraway (1988), in particular by her use of the figure of the cyborg to simultaneously think through nature and culture, and the body and technology, and is indebted, in its mode of response, to efforts that try to think and take seriously the in-between, the marginal, or the hybrid. In Chapters 1 and 2, I will give conceptual flesh and bone to this kind of thinking, particularly in relation to pragmatist (re)conceptions of the subject-object binary.

2 Both quotes are from Minister Opstelten's answers to Recourt's set of questions; Opstelten referred to the other members of Parliament in his answers to Recourt's questions, see Ministerie van Veiligheid en Justitie 2012: 1-6.

3 Parts of Chapter 4, as well as parts of its arguments, are published as Oorschot, I. van, Mascini, P. and Weenink, D. (2017), "Remorse in Context(s): A Qualitative Exploration of the Negotiation of Remorse and its Consequences" in *Social & Legal Studies* 26(3): 359-377.

4 Parts of Chapter 5, as well as parts of its arguments, have been published as Oorschot, I. van (2014a) "Seeing the Case Clearly: File-Work, Material Mediation and Visualizing Practices in a Dutch Criminal Court" in *Symbolic Interaction* 37(4): 439-457.

5 Parts of Chapter 6, as well as parts of its arguments, have been published as two venues: the first, Oorschot, I. van (2014b) "Het Dossier in Actie: Vouw- en Ontvouwpraktijken in Juridische Waarheidsvinding" in *Sociologie* 10(3): 301-318, the second, Oorschot, I. van and Schinkel, W. (2015) "The Case File as Border Object: On Self-reference and Other-reference in Criminal Law". in *Journal of Law & Society* 42(4): 499-527.

1 Contemplating the Law

1 'Before the Law': An Allegory (But not of the Law Itself)

In the ninth chapter of Kafka's *The Trial* (1924), Joseph K. encounters a priest. The priest, who happens to double as prison chaplain, is one of the many characters Joseph K. will meet in his search for justice. The priest relates to Joseph K. the 'opening paragraphs of the Law'. It is a story about waiting, wandering, and hesitating before the Law:

> Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. "It is possible," says the gatekeeper, "but not now." At the moment the gate to the law stands open, as always, and the gatekeeper walks to the side, so the man bends over in order to see through the gate into the inside. When the gatekeeper notices that, he laughs and says: "If it tempts you so much, try it in spite of my prohibition. But take note: I am powerful. And I am only the most lowly gatekeeper. But from room to room stand gatekeepers, each more powerful than the other. I can't endure even one glimpse of the third." The man from the country has not expected such difficulties: the law should always be accessible for everyone, he thinks, but as he now looks more closely at the gatekeeper in his fur coat, at his large pointed nose and his long, thin, black Tartar's beard, he decides that it would be better to wait until he gets permission to go inside. The gatekeeper gives him a stool and allows him to sit down at the side in front of the gate. There he sits for days and years. He makes many attempts to be let in, and he wears the gatekeeper out with his requests. The gatekeeper often interrogates him briefly, questioning

> him about his homeland and many other things, but they are indifferent questions, the kind great men put, and at the end he always tells him once more that he cannot let him inside yet. The man, who has equipped himself with many things for his journey, spends everything, no matter how valuable, to win over the gatekeeper. The latter takes it all but, as he does so, says, "I am taking this only so that you do not think you have failed to do anything." During the many years the man observes the gatekeeper almost continuously. He forgets the other gatekeepers, and this one seems to him the only obstacle for entry into the law. He curses the unlucky circumstance, in the first years thoughtlessly and out loud, later, as he grows old, he still mumbles to himself. He becomes childish and, since in the long years studying the gatekeeper he has come to know the fleas in his fur collar, he even asks the fleas to help him persuade the gatekeeper. Finally his eyesight grows weak, and he does not know whether things are really darker around him or whether his eyes are merely deceiving him. But he recognizes now in the darkness an illumination which breaks inextinguishably out of the gateway to the law. Now he no longer has much time to live. Before his death he gathers in his head all his experiences of the entire time up into one question which he has not yet put to the gatekeeper. He waves to him, since he can no longer lift up his stiffening body. The gatekeeper has to bend way down to him, for the great difference has changed things to the disadvantage of the man. "What do you still want to know, then?" asks the gatekeeper. "You are insatiable." "Everyone strives after the law," says the man, "so how is it that in these many years no one except me has requested entry?" The gatekeeper sees that the man is already dying and, in order to reach his diminishing sense of hearing, he shouts at him, "Here no one else can gain entry, since this entrance was assigned only to you. I'm going now to close it."

Much has been said about this story, which - as one commentator suggested - is precisely as impenetrable and opaque as the gated, guarded, and walled Law of which it speaks (van Houtem 2010: 286; see also Derrida 1992). Aside from precisely that mystery - what lies behind those walls? - what is perhaps the most striking

is absence of action on the part of the man from the countryside. His primary act seems to consist of the decision 'to put off deciding: he decides not to decide, he delays and adjourns while he waits' (Derrida 1992: 195-196). It is also a man who decides to wait before the gates of the Law, even when its gates were always already *open* … The man from the country never needed a key to the Law's gates, then, but only: to make a decision.

This book is a testament to my decisions as I found myself in the presence of the Law. Kafka's story helps to situate these decisions conceptually and assists in demonstrating the points this book will make. I will not use this story as an object to be interpreted, nor, strictly speaking, as a story that tells us something about the Law. *If* we wish to read it as a metaphor,[1] I suggest, it is not a metaphor for the Law itself, but rather for those who seek to know it, enter it and see it. Read this way, *Before the Law* is evocative of a descriptive desire to know and expose the Law, while it at the same time demonstrates the sheer perplexities, confusion, and contradictions in which this descriptive desire has tended to result.

In this chapter, I concentrate on these perplexities, and show how these are rooted in the demarcation between *norm* and *fact;* it is this distinction, after all, that presents the Law as an object of description to begin with. Tracing both sociological as well as legal-positivist answers to the question, *what is the Law?,* I show how commentators' abstract, purified modes of answering this question leads to the sacrificing of either the Law or scientific description. That is, while some suggest that Law is indeed amenable to scientific description, something uniquely legal seems to escape their accounts. Meanwhile, those that seeks to rescue some crucial and unique legality tend to insulate that specific quality against description itself. And while these two positions are extreme indeed, more moderate 'perspectivist' solutions, in which the two conceptions of the Law are understood as rooted in the observer's 'perspective' or viewpoint,

similarly face the choice between saving the Law or rescuing description. Like the man from the countryside, commentators of the Law seem to have become stuck in a state of agitated contemplation where the wish to describe and 'enter the Law' is met, again and again, with deferral ('not yet') that slides into negation ('not ever'). Hence, this response is largely one of awestruck contemplation animated by the will to know or to see - but a will that also runs into the limitations of description itself.

Now, definitional exercises in general tend to lead to conundrums of a foundationalist or tautological character, and this foundationalism and tautology is certainly going on in the debates I am about to discuss here. Yet something else is going on here too. Or rather, two additional things are going on here: the first, an emphasis on purity - 'pure' Law, 'pure' description or theory - and the second, an unmediated understanding of 'vision' and knowledge. Taken together, these two dimensions yield accounts abstracted from both concrete legal practices and concrete practices of description and of 'seeing'. It is precisely therefore that these conceptual tools do not enable me to do justice to the *concrete* noise and troubles present in legal practices of case-making and sociological practices of case-making. For one, an emphasis on description or 'vision' within scientific self-understanding hardly accounts for the performative work that social-scientific accounts of the world, and of judicial practices in particular, are doing. Second, an insistence on Law's normativity or legality does not help me understand legal modes of finding out the facts about 'what really happened' in different cases. These troublesome presences make the foundational distinction between norms and facts, *de jure* and *de facto*, highlighted in this chapter highly problematic. The 'habits of thought' I highlight, then, do little to 'give to the situation the power to make us think' (Stengers 2005: 185). And as the demand to that we *think* and not merely *recognize* (id.: 185) captures quite precisely the ethnographic task, I must therefore develop and elaborate different tools for

thinking. That is, if description fails in the face of the Law we must scrutinize both what we mean when we speak of and study 'the Law' and what we do when we do 'Science'.

I do so in Chapter 2, where I look for inspiration in the story that envelops *Before the Law* - that is *The Trial*. In that chapter, I will set the theoretical stage to begin asking not what the Law *is*, but instead highlight the question, how, where, and when the Law is *done*. Instead of relying on 'looking inside', I will suggest that 'inside' and 'outside' are not to be taken for granted as unproblematic epistemic positions, but are mediated accomplishments in their own right; accomplishments, furthermore, that actively shape, delineate, and produce legal as well as social realities. Lastly and importantly, instead of accepting the regulatory distinction between norms and facts or Law and Science, I aim to stay with two realities that trouble such demarcations: on the one hand, the performativities of social-scientific inquiry and on the other, legal modes of truth production.

However, let us first return to Kafka's mysterious *Before the Law* and to the habits of thought of which it is evocative. A word of warning: the following discussion is deliberately unfaithful to disciplinary boundaries that separate the sociology of Law from jurisprudential and legal thought, and it does not aim for exhaustiveness or exegesis. What concerns me is first, the habit of thought that postulates that an understanding of Law should be both descriptive and move beyond appearances; second, the habit of thought that understands different conceptions of Law to be due to perspective. The authors selected to exemplify these strands of thought are noteworthy *not* because they are representative of a consensus shared between legal scholars and sociologists of Law, but precisely because they embody more extreme conceptualizations and problematizations of the Law. Tracing these more extreme positions assists in highlighting the outer reaches of these debates, while at the same time they help

to show how even these ostensibly opposed contributions to the debate nevertheless share some crucial presuppositions.

2 A Shared Commitment: What is the Law?

The man from the countryside in Kafka's story never quite finds out *what* it is that is kept inside these walls, and neither do the readers of the story. What lies at its centre is a mystery, and together with Kafka's man from the countryside we are stuck contemplating on the question, *what is the Law?* This question, Hunt (2002: 16) argues, arises at the historical moment that capitalist expansion, political strife, and the colonial encounter with different 'customs' and 'habit' - that is, different forms of making and sustaining social order - cast doubt on the natural or divine necessity of the Law. It is in this context, too, that appeals to a *positive* and *general* understandings of the Law find resonance among its commentators.

Of course, this reflex has its source and mandate in the demarcation I have briefly touched upon in the Preamble: the distinction between *de jure* and *de facto*, between the two different 'institutions of making order' (Jasanoff 2007: 761), that postulates that Law decides, and Science represents. Yet the search to describe the Law has quite a pedigree and, it must be emphasized, is not to be found in social-scientific efforts to understand the Law alone. Indeed, it is only a presentist tendency that allows for sharp distinctions to be retroactively drawn between legal and sociological description of the Law. The Law and the social, after all, posed similar ontological and epistemological puzzles to their 18th and 19th century observers. Once severed from a necessary grounding in natural or divine order, or, for that matter, from the will of the sovereign (Hunt 2002), both the social and the Law confronted observers with an entity that is neither natural nor a product of individual acts of will or consciousness alone: a thing that behaves and acts seemingly 'on its own' even though it does

not 'belong to the world of atoms and molecules, of gravity, electricity, or magnetism' (Rudzinski 1976: 111). The puzzle presented by this thing that behaves on its own and seems to have a sui generis existence irreducible to God, individual volition, or the laws of nature should alert sociologists to the heritage they share with legal scholars. In a way, both 'the social' and 'the Law' are answers to a similar problem, that is: how to understand, account for, and explain the presumed fact of order. How is 'order in the plenum' (Cf. Garfinkel 2002) achieved? Where and how is it sustained? These are crucial questions for the social sciences, and different disciplines may emphasize different dimensions of the question and privilege different kinds of explananda, e.g. society, the state, culture, markets. Within legal thought, too, there has long been a strong current that aims to avoid the trappings of normative or metaphysical contemplation and instead aims to similarly ground its appeal in the realm of positive facts: *legal positivism*. Despite the large differences between self-designated legal positivists, legal positivism can be understood as the attempt to arrive at an evaluatively neutral, general description of those things which are necessarily true of the Law (Priel 2013): a search, if you will, for the laws of the Law.

Foundational in this regard is Bentham's (1988 [1776]) introduction within legal thought of two differentiated roles: that of the *censor* and that of the *expositor*. Drawing on Hume's distinction between the realm of the *is* and that of the *ought*, Bentham insisted upon the necessity for legal scholars to divorce themselves from the normative impulse of natural law theories. Natural law theories, it was argued, have both descriptive and prescriptive intent: they must simultaneously function as descriptions of the laws of nature and in so doing be capable of guiding decision-makers. In that capacity they combine the role of the censor, who makes normative judgments, with that of the expositor, who seeks to expose the Law as it is. In combining the

two roles they confuse the realm of the (legal) *ought* with that of the (empirical) *is*. It is precisely this confusion, the utilitarian Bentham argued, that is corrosive to the very legal order such natural law theories seek to understand and protect (indeed, there is some sense in calling this a normative argument in favour of non-normative legal positivism, Cf. Waldron 1996). Hart summarizes Bentham's concerns as follows:

> Bentham had in mind the anarchist who argues thus: "This ought not to be the law, therefore it is not and I am free not merely to censure but to disregard it." On the other hand he thought of the reactionary who argues: "This is the law, therefore it is what it ought to be," and thus stifles criticism at its birth (Hart 1958: 598).

The disconnect between is and (moral) ought 'haunts' (Hart 1958) legal thought: it appears in Austin's dictum that 'the existence of the Law is one thing; its merit or demerit another' (Austin 1995 [1832]: 157); we see it reflected in Kelsen's emphasis on non-normative, 'pure' theory of the Law (1960, 1981); and legal philosopher H. L. A. Hart's concern with the 'separation of Law and morals' (see 1958, 1961), emphasizing the both 'general' and 'descriptive' nature of his own interventions (Hart 1994 [1961]: 239). Legal positivism is far from uncontroversial and displays significant internal differences (e.g. what may be called 'hard' and 'soft' positivism). Yet in contrast to scholars who suggest that legal scholarship should not try to describe the Law at all, legal positivists continue to insist on this Benthiam, descriptive mandate - even though, as we will see, it is a highly limited mandate considering the normative character of the Law itself. It is that descriptive desire they share with sociologists, and it is on that descriptive promise I am taking them up now.

3 The Appearance of Law: Genetic and Documentary Understandings of the Law

A non-normative, descriptive impetus coupled with wonder about this strange object - the Law - may be understood as a shared commitment among sociologists and legal positivists, but upon a closer look these similarities give way to crucial differences. That is, while both legal scholars and sociologists seek the Law, what they have tended to *find* bears little resemblance. While both treat Law essentially not as linked to divine will or natural order, but as a 'construction' (Cf. Hunt 2002: 16), *who or what* is doing the constructing is disputed. At its most extreme, the first line of response answers that what Law *is* can only be properly defined and understood by Law itself, as Law is crucially a legal construction. The second line of reasoning suggests, in contrasts, that Law is a manifestation of something else, particularly of political economy, power, or the social; here, Law is conceived of as a social, not purely legal, construction. The following discussion in which I unfold these approaches is not exhaustive, but rather concentrates on a few particularly extreme exemplifications of these strands of thought in order to fully trace the conceptual terrain upon which we find ourselves.

Law all the Way Down: Kelsen's Pure Theory of the Law

An obligatory passage point in this discussion is, first and foremost, Kelsen's highly influential 'pure theory' of Law. It is first of all, like legal positivist theories more generally, a response to natural law theories which postulate that Law is and ultimately should be grounded in the law of nature or in divine law. Kelsen (1960, 1981) roundly rejects such normative, natural law, and insists that his own 'pure theory' merely aims to *describe* the Law. He further makes a distinction between the world of facts and the world of norms, within which the first is the site of 'nature' (and hence the object of science), while only the latter is the true

province of the Law. Coupling these two moves leads Kelsen to insist that, descriptively, Law is a *system of norms* that express 'objective oughts': normative statements that postulate acts to be, or not to be, performed (Kelsen 1960; see also Spaak 2005). In so doing Kelsen diverges from accounts that highlight commands (e.g. Austin 1995 [1832], see Vinx 2012), and we will see later on in this chapter that this conception of the Law contrasts with Hart's emphasis on rules (1994 [1961]). These objective oughts, crucially, form a consistent whole - a *Stufenbau*, a structure - as each of these norms is, in the end, supported and grounded in a basic norm: the *Grundnorm*. This is the norm that ensures the legal validity of all other legal norms:

> The basic norm represents, as it were, a blank check, while the task of prescribing the content of the legal norms is the province of the act giving rise to the constitution and of the law-positing acts that ensue in conformity to the constitution (Kelsen 1981: 185).

Kelsen's pure theory of the Law postulates, then, that the *only arbiter on what 'is' Law (and what is not) is Law itself*; and that it does so with reference to a legal 'basic norm' or Grundnorm. Of course, this conceptualization of Law is highly tautological. But far from a handicap, this is precisely its point. Kelsen hence places the tautology as the heart of the Law. Founding his 'pure' conception of Law upon Law itself, Kelsen suggests that it is for that reason that his theory is 'nonmetaphysical' (id.: 185), and excludes grounds upon which the basic norm itself can be evaluated, questioned, or understood:

> A norm of a positive legal order cannot be denied validity on the ground that it prescribes behaviour incompatible with a norm not belonging to this legal order, and in particular not on the ground that its content can for one reason or another be judged unjust. A legal norm is valid, it belongs to a valid legal order, not because it is just but because it was created in accordance with the procedures specified in the constitution (Kelsen 1981: 185).

This *Grundnorm* is not grounded in anything other than itself: it only and merely 'presupposes the existence of an authority that could not possibly exist' (Spaak 2005: 204). The basic norm hence 'contains a contradiction with itself' (id.: 405): it evokes the presence of a sovereign that is, after all, only a legal fiction.[2] This 'pure' understanding of Law then, insists that all explanation must come to an end with Law's basic norm. As such this conception is weary of further reduction of the Law to moral, political, or 'natural' realities.

In this lies the purity this conception of the Law promises: description of the Law must be 'pure' in that it deliberately disregards the things that are not properly legal. That is, in order to truly know the Law we must seek to describe it in the purest of terms; it is only in pure terms that we capture the purity of Law itself. In this sense, Kelsen's purification is also an exercise in abstraction: it distinguishes between that which is necessarily true of the Law, and that which merely contingent, superfluous, and 'impure'. Priel (2013) likens the legal positivist in this regard with the botanical taxonomist, who 'seeks to identify the central features of Law and this way distinguish it from other phenomena' (Priel 2013: 2). In so doing, this botanist must assume that *despite differences in appearance*, members of a genus or species share with each other a crucial and determinative morsel of genetic *code* that makes them what they are. It is only through the 'removal of all features found on comparison to vary from species to species' that it becomes possible to speak of the '*natural character* of the genus' (Stearn 1959: 37 cited in Priel 2013). Kelsen's understanding of the Law is, in precisely this sense, genetic:[3] Kelsen's legal positivism promises us that beyond all individual manifestation lies a constitutive, if necessarily fictional, legal norm that ensures Law's identity (and therefore distinction).

Storming the Bastille: Marx and Black

If, for the (extreme) legal positivist, Law holds itself suspended above the mire of political, moral, and cultural concerns it is precisely these concerns that dominate a second response to the question raised, and never answered, in Kafka's story-within-a-story. The man from the countryside came to seek the Law where it promised it would present itself to him: behind its gates. There are no guarantees, however, that Law is what it promises to be. A second line of response, then, seeks behind the Law something else: a something else the Law either *manifests* or *conceals* (or indeed both). These kinds of arguments, it must be said, predate Kelsen's positivism developed in the early 20th century: Kelsen was writing precisely against efforts that sought to 'illustrate the primacy of the social over the legal' (Banakar 2002: 34). Again, I will sketch the outlines of these argument only impressionistically; what concerns me is the basic mechanisms of their explanation. What they share is an unease with the way legal positivist descriptions of the Law 'assume its [Law's] own completeness and its unassailable integrity', and their tendency to 'close off inquiry because within its sphere answers are already known' (Cotterrell 1996: 11).

It is quite impossible to tell this story, first, without reference to Marx. While not explicitly trying to account for Law, his vocabulary of structural base and ideological superstructure has had important repercussions for contemporary understandings of how Law operates in society. Even though Marxist understandings of power have been modified and critiqued, Marxists' understanding of the Law have arguably informed important strands of thought both within the sociology of Law, as well as critical legal scholarship.[4]

Very broadly, Marx's (dispersed and fragmentary) comments on Law suggest that 'beneath sanctified juridical categories' such as right, freedom, and liberty, lie concealed 'real social antagonisms' (Fine 2002: 102), so that his contribution lies in

uncovering how 'social relations [are] expressed, mediated and obscured' (id.:. 102) in and by these same legal categories. The Law's deceptive trick, to Marx, consists of introducing the formal equality and freedom that form the legal preconditions, under capitalist relations of production, for labour power to be freely bought and sold. In doing so, however, it merely masks the substantive inequalities between those who are 'doubly free' to sell their labour and those who buy it:

> At first the rights of property seemed to us to be based on a man's own labour. At least, some such assumption was necessary since only commodity-owners with equal rights confronted each other, and the sole means by which a man could become possessed of the commodities of others, was by alienating his own commodities; and these could be replaced by labour alone. Now, however, property turns out to be the right, on the part of the capitalist, to appropriate the unpaid labour of others or its product, and to be the impossibility, on the part of the labourer, of appropriating his own product (Marx 1887: 412).

Of course, this line of critique pivots on the central promise of (liberal, modern) Law: that of individual liberty, which - according to Marx - quickly falls apart once it is established how formal liberties are leveraged in the production and reproduction of substantive, social inequalities.[5] These arise as a result 'not from a violation, but, on the contrary, from the application of these laws' (id.: 413). Hence:

> The relation of exchange subsisting between capitalist and labourer becomes a *mere semblance* appertaining to the process of circulation, a *mere form*, foreign to the *real* nature of the transaction, and only *mystifying* it. The ever repeated purchase and sale of labour-power is now the mere form; what really takes place is this - the capitalist again and again appropriates, without equivalent, a portion of the previously materialised labour of others, and exchanges it for a greater quantity of living labour (Marx 1887: 412, emphases added).

The italicized words in this fragment from the first volume of *Capital* are particularly suggestive of the kind of response I am highlighting here: that of approaching Law as both an expression and concealment of the real and structural violence that comes with a notion of 'right' and 'liberty' to buy and sell labour power: 'the illusion of a free and equal relationship is dissolved once we explore the *content* of the exchange' (Fine 2002: 104). Law's form is opposed to the substance, the content, of actual reality. Its norms are empty form, mere mystifying gloss on the substance of actual fact of exploitation.

Although it may not place absolute primacy on relations of production as the *realest real,* another mode of response that structurally resembles this mode of thinking is Black's sociology of Law. If Kelsen promised us to purify Law and extract it from the contingent, normative 'remainder of things' (Whitehead 1953: 73), then Black is offering us, in symmetrical fashion, a 'pure sociology' that is 'more Durkheimian than Durkheim'[6] (Abramowitz and Black 2010: 39). Like Kelsen, Black insists that Law is a normative practice, and that 'the core problems of legal policy-making are problems of values' - which, he agrees with Kelsen, set Law apart from science: 'such value considerations are as irrelevant to a sociology of Law as they are to any other scientific theory of the empirical world' (Black 1972: 1087). While this reads, at least on the surface, as a mode to *respect* the Law's integrity we will see that Black's strict behaviourism does indeed effectuate a similar reduction as that of Marx. For upon what is the Law in all its normativity based?

In *The Behavior of Law*, Black (1976) sets out to understand Law in strictly behavioural terms. Target of his criticism is in particular a sociology that engages itself with individual motivations and subjectivities; all this 'psychology' must be purged from sociology if it is to become an actual science. Enter his strict behaviourism: only behaviour, and in particular, *amounts and intensities of behaviour* can be the object of sociology. Behaviour, according to Black,

takes place within a 'social space', the shape of which is defined along several structural axes, for instance (vertical) stratification, (horizontal) differentiation and organization, and a realm of 'morphology' or culture. One of these axes is social control. Law, within this framework, is defined as 'governmental social control' (Black 1976). Governmental social control displays variation in two ways: quantitatively and qualitatively, that is in the kind of sanctioning it results in. Black spends most of his time concentrating on this quantitative dimension of Law, showing how the *amount* of Law mobilized in specific situations depends on the respective social locations the two parties involved inhabit in the geometry of social space (e.g. a lower-class defendant charged with petty theft faces harsh punishment, while those accused of white-collar fraud can settle their way out of a criminal prosecution).

Black's promise to leave the Law in all its normativity untouched proves, however, an illusion. Precisely because he evacuates from his 'pure sociological' account considerations of meaning, of evaluation, and of subjectivity, his sociology of Law is unable to account for the normativity of Law it claimed to protect. Hunt suggests, then, that Black 'must disallow any conception of "legality" or "illegality"; he can say nothing beyond that which governments act against or rewards is Law' (Hunt 1983: 26). In his interest in purifying sociology, Black seems stuck with a sociology without Law and its normativity at all. Again, Law is reduced; not, this time, to capitalist relations of production, but that other beast: to 'social behavior'. In a way, Black takes Marx's reduction a step further, even: Marx at least attributes to Law a capacity for action in that it is capable of concealment and mystification, while no such agency exists for Black at all; all is determined by the shape of social space. The Bastille stormed is, in actual fact, empty.

Like Kelsen, these two contributions value *purity*. It is explicit in Black's appeal to a 'pure sociology' and implicitly present in

Marx' appeal to the distinction between Law's illusory promise and Law's actual reality. One question, of course, is whether it is possible and desirable to achieve descriptive purity at all (see in particular Mascini 2016) - a question I will attend to in the following chapter. For now, it must be emphasized that descriptive purity is arrived at by different means. If the legal positivist can be likened to the taxonomist who carefully distinguishes noise from a shared 'genetic' *signal* across legal practices, the kind of explanation offered here is rather that of the commentator who treats appearances as a *sign* of an underlying reality. Garfinkel understands such a reading as a 'documentary' mode of interpretation:

> the method consists of treating actual appearance as "the document of", as "pointing to", as "standing on behalf of" a presupposed underlying pattern (Garfinkel 1967: 78).

In more scathing terms, Nietzsche compares, rather, this scientific practice to that of the astrologer, who is similarly motivated by an almost libidinal 'thirst, a hunger, and a taste for hidden and forbidden powers' (Nietzsche 1974 [1882]: 170) of which actual reality is merely a surface manifestation. Latour, in similarly dismissive terms, locates this thirst at the heart of sociology more generally when he suggests that reliance on 'the social' as a final explanans constitutes a 'magical invocation' (Latour 2005: 65), that testifies, more than anything, to a 'mythical belief in another world behind the real world' (id.: 67). In any case, the differences with a Kelsenian understanding of Law are now becoming clear: while one seeks for a shared, original signal, the other treats the Law as a sign of something else.

4 Jurisdictional Troubles and the Two Provinces

My discussion so far has concentrated on the more extreme positions advanced in these disputes about the Law. These

descriptions of the Law are both concerned with teasing out a general truth about the Law, yet proceed along different paths: the first a genetic mode of interpretation looking for a shared constitutive signal across legal practices (exemplified by Kelsen), the second a documentary mode of interpretation seeking that of which the Law is merely a sign (exemplified by Marx and Black). In so doing these contributions also imbue the Law with varying levels of autonomy or dependence. The suggestion that Law is what it says it is makes Law impenetrable to moral, political, or cultural concerns and portrays it as independent of the social: a walled fortress. The suggestion that Law is merely politics or the social by other means leaves it wide-open to sociological inquiry, even though by these accounts the Law, like the Bastille, is in actual fact empty … In Kafka's story, this tension between accounts that posit Law's closure and autonomy on the one hand, and those that treat it as 'open' to social determination on the other is captured quite precisely in Law's status as both *walled* and *open*.

Empirically and historically speaking, there can be little doubt that both positions are indeed reconcilable. Weber suggests as much when he locates the unicity and autonomy of legal practices in the historical rise of formal rationality (1978 [1922]). This formal, as opposed to substantial, rationality is the Law's kernel, but this kernel itself emerges from social and historical contingencies. Luhmann (1972) similarly treats the legal subsystem's autonomy as a product of historical processes of differentiation. The binary code governing legal communications - legal/illegal - structures the legal-subsystem's operations in a way that is not unrelated to Kelsen's *Grundnorm* (although Luhmann's conception is not hierarchical in the way Kelsen's is, within which norms derive legal validity from a Grundnorm).[7] Hunt argues, then, that:

> these [two] views of the law are not antithetical; the rise of Law as autonomous system increasingly separated from the political sphere is consistent with a view of Law as dependent on society, in the sense of being a historical achievement (Hunt 2002: 17).

And of course, the two different positions *share* a few things as well. Logically speaking, neither of the positions fully escapes tautology, for reducing Law to the social and *then* proceeding to explain the social with reference to the social leads the sociologist into yet another tautological puzzle. Bourdieu grasps the irony when he suggests that:

> stare decisis, the rule which decrees the authority of prior legal decisions for any current actions, stands in relation to juridical thought as Durkheim's precept, "explain the social by the social" does to sociological thought (Bourdieu 1987: 823).

Crucially, *stare decisis* is 'but another way of asserting the autonomy and specificity of legal reasoning and legal judgments', Bourdieu argues (id.: 823). Tautology burgeons at yet higher levels of abstraction as well. Ask a jurist what ensures social order and the answer is likely to be, 'the Law'; ask a sociologist what shapes the Law and one is directed to 'the social'. The social explains the Law and the Law, the social. At the same time, both approaches may have to end up drawing the similar conclusion in that they both, to speak with Gertrude Stein (1937), suggest that 'there is no *there* there': for Kelsen's genetic reading must presuppose a fictional signal that shapes actually existing Law, while Marx's and Black's documentary readings instead treat the empty formalism of 'the Law' as a sign of the realer social real.

As something that requires explanation itself, the distinction between Law's tautology or Law's social determinants, between 'Law as autonomous' and 'Law as dependent on society', continues to haunt commentators. The dispute is, in this sense, *jurisdictional*: it operates on the basis of an almost territorial understanding of the object of study: is the Law a separate

jurisdiction? Or is it merely an administrative province in and of that much larger territory of which it must obey the laws, that is, the territory of the social? Both positions have large consequences for the distribution of authority over both legal and non-legal commentators: who gets to authoritatively speak about the Law? And who gets the decisive last word?

In a sense, we are dealing here with a territorial dispute, and territorial disputes tend to concentrate on the question of borders: borders to distinguish those inside from those outside: those with claims to a right to speak, and those without. Considering what is at stake - Law's dignity or the possibility of critique and sociological explanation - commentators of the Law have settled precisely upon such a border. It is here that a vocabulary of 'perspective' and of 'seeing' makes its entrance, and is coupled with an almost jurisdictional and territorial understanding of the place and border of the Law. That is, the distinction between Law-as-autonomous and Law-as-social-being is rearticulated as a distinction between internal and external points of view (Hunt 2002: 17; Cf. Hart 1994 [1961]), or distinctions between the legal, professional 'vision' and that of laypeople. These borders help to distinguish those on the inside from those who shall remain stuck - like Kafka's man from the countryside - before the gates of the Law. There they may contemplate or steal a glance, but not enter. This approach *accepts* the difference between the accounts and their portrayal of the Law, and seeks to understand such differences with recourse to a vocabulary of *perspective*. Law is whatever it is, and what one understands it to be is a function of one's perspective.

5 Inside/Outside Visions

As exemplifications of this perspectivism I will use, first, Bourdieu's most specific account of the Law - *The Force of Law: A Sociology of the Juridical Field* (1987), and second, the aforementioned

Hart's *The Concept of Law* (1994 [1961]). Both authors have a central and authoritative position within their respective disciplines; both take issue with the more extreme accounts of the Law their disciplines have offered (exemplified here by Kelsen, Black, and Marx); and both try to come to a settlement somewhere in the middle ground between tautology and reduction, between conceiving of Law as an hermetically sealed off space and Law as mere chimera. Both do so crucially by nodding, in passing, to their non-disciplinary interlocutors. Bourdieu notes that it is important to free 'the science of the Law' from:

> the dominant jurisprudential debate considering Law, between formalism, which asserts the absolute autonomy of the juridical form in relation to the social world, and instrumentalism, which conceives of the law as a reflection, or a tool in the service of dominant groups' (Bourdieu 1987: 814).

Hart, meanwhile, suggests not only that his book may be read as 'descriptive sociology' (1994 [1961]: v), but as we shall see, will open up his account of the Law to rather sociological understandings of rule-following behaviour. Both authors, furthermore, mobilize visual metaphors and draw borders in order to settle the dispute: Bourdieu speaks of vulgar versus professional vision, while Hart zooms in on the distinction between internal and external points of view. Their work, then, is an exercise in disciplinary boundary work (Gieryn 1983). But it is also an exercise in the *drawing of borders* between Law and non-Law itself, between Law's inside and its outside, so that accounts of it may be situated either internally or externally.

As we will see, however, the distinction between inside and outside quickly gives way to difficulties we have encountered before. In trying to strike a balance between 'formalism' and 'instrumentalism', Bourdieu himself ends up reproducing a similar reduction of Law to something that goes on behind it: in this

case, to (social) field dynamics. Hart's conception of the 'internal point of view', meanwhile, remains hermetically sealed off for non-intuitive, non-legal modes of knowledge seeking (i.e. that of the sociologist, for instance): here, description runs into its own limitations.

A Bourdieusian Settlement: Vulgar versus Professional Vision

As is suggested by the title of Bourdieu's piece, *The Force of Law: A Sociology of the Juridical Field,* is first and foremost an attempt to elaborate on Law as a social field. Noting the necessity of moving beyond tautological 'formalism' and reductive 'instrumentalism', he suggests that the juridical field is primarily a site of competition. In this case, competition takes place over the 'monopoly of the right to determine Law' (Bourdieu 1987: 817). These struggles are engaged in by professionals in this field, who vie with each other for the right to 'determine Law'. It is through such struggles that professionals dictate Law's 'practical content' (id.: 827). The Law's content is 'product of a symbolic struggle between professionals possessing unequal technical skills and social influence' (id.: 827). This implies that 'the juridical effect of the rule - its real meaning - can be discovered in the specific power relationship between the professionals' (id.: 827). Note, here, how Bourdieu locates the meaning of legal rules in their effect; that is, in their enactment or use as it is shaped by struggles over power between legal professionals. 'Control of the legal text', Bourdieu states, 'is the prize to be won in interpretative struggles' (id.: 818). Participants in these struggles, however, possess unequal levels of expertise and technical skills (id.: 827), and despite habitual acculturation to the field's dynamics some may fare better than others. Competition over the right to determine Law, then, is predicated furthermore upon 'the tacit acceptance of the field's fundamental Law, an essential tautology which requires that conflicts can only be resolved juridically - that is according to the rules and conventions of the

field itself' (id.: 831). Only then can professionals vie for mastery of the text, the prized right to determine Law.

It is here that Bourdieu explicitly distinguishes the 'vision' that is produced within the juridical field from those outside of it. Those competing with each other for the right to determine Law have, he states, a 'professional vision' that contrasts with those outside, whose vision upon the Law Bourdieu calls 'vulgar'. These two visions can be mapped onto two wholly different mental spaces: that of the person engaged in the struggle over the right to determine the Law and those without the juridical, technical skill to do so (id.: 828). The difference between these two modalities of vision, Bourdieu argues,

> is far from accidental. Rather, it is essential to a power relation upon which two systems of presuppositions, two systems of expressive intention - two world-views - are grounded. The difference, which is the basis for excluding the nonspecialist, results from the establishment of a system of injunctions through the structure of the field and of the system of principles of vision and of division which are written into its fundamental Law, into its *constitution* (Bourdieu 1987: 828-829).

Bourdieu hence maps different kinds of vision upon the distinction between member and non-member, specialist and non-specialist, those trained, education, and habitually cultivated within the juridical field and those who are not. Of course, such a conception helps to understand (arguably frequent) misunderstandings between legal professionals and lay participants in legal proceedings. But such an understanding also allows Bourdieu to characterize this professional vision as a kind of *miscognition*:

> within this field occurs a confrontation among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognized capacity to interpret a corpus of texts sanctifying a correct or legitimized vision of the social world. It

> is essential to recognize this in order to take account both of the relative autonomy of the law and of the properly symbolic effect of "miscognition" that results from the illusion of the law's absolute autonomy in relation to external pressures (Bourdieu 1987: 817).

On the one hand, the juridical field is characterized by a certain internally produced 'vision', a vision furthermore that understands both the Law itself and the social world in highly specific terms. This vision contrasts with that of the lay person, whose vernacular vision of terms and events regularly clashes with that of those with professional vision. But it is also, crucially, a mode of 'miscognition', an illusion, produced by competitive and most importantly, *social* dynamics between and within fields. For all Bourdieu's emphasis on dynamics internal to the juridical field, then, it is this internally and socially produced vision that does not, more generally, have epistemic value except perhaps as a manifestation of miscognition. Of course, this conceptualization of the juridical field itself and possible perspectives upon it leads us right back to where we started: with the sociologist who seeks behind the surface of the Law a deeper reality of social processes: a reality, moreover, concealed by the Law, something to which the Law or its participants are blind …

This point assumes importance if we pay some attention to Bourdieu's *own* vision upon the juridical field. If not 'professional', nor 'vulgar', how is Bourdieu's own vision upon the juridical field - and by extension, that of the sociological commentator - to be understood? It seems neither inside nor outside: on the one hand, it distances itself perpetually from the 'illusion' and 'miscognition' that constitutes juridical vision. On the other, it desires to offer a more incisive, an altogether more knowledgeable vision of the Law than laypeople's vulgar vision can provide. Bourdieu's vision is not itself, then, subject to this regulatory distinction between outside or inside perspectives. In fact it is *elevated* beyond the distinction: a perspective upon

perspectives, a meta-perspective (Schinkel 2015). It is only that outside vision, or that vision form above, that has descriptive value; those on Law's inside may have something to say, but it is mere miscognition.

It is almost needless to say, then, that Bourdieu *reproduces* in many ways Marx's understanding of the Law. But it is crucial to see how a Bourdieusian conception of the Law incorporates, and tries to account, for the tautology of Law. It does so by suggesting that this tautological insistence upon Law's autonomy is in actual fact a perspective produced within the Law. At the same time, this internal perspective is fatally flawed, at least by Bourdieu's standards of sociological description: it cannot truly transcend its own limitations and come to inhabit sociology's meta-perspective (Cf. Schinkel 2015).

Hart's Internal Point of View: The Nadir of Description

Much like earlier efforts in analytical jurisprudence, Hart considers his work to be an exercise in description, suggesting that his work 'may be of use to those whose chief interests are in […] sociology, rather than Law' (Hart 1994 [1961]: v). In doing so he does not run counter to the positivist aspirations of earlier analytic jurisprudence; in fact, Hart seeks for a more empirically accurate portrayal of the Law, and in particular Law as it is experienced, used, and oriented to by those who accept the Law as guides for conduct.

A first step to come to a more accurate understanding of the Law, Hart argues, is to rid ourselves of sanction-based accounts of the Law and in so doing, come to an understanding of 'Law's social being' (Hart 1994 [1961], see also Fitzpatrick 1992: 6). The deficit of such sanction-based accounts, according to Hart, is that they narrowly associate Law's binding force with the threat of sanction (Hart 1994 [1961], Shapiro 2006). Empirically, Hart argues, such an account does little to help us understand those cases in which actors do in fact exhibit rule-following behaviour

but are not, or not primarily, guided by the threat of force (Hart 1994 [1961]: 40) but rather by a sense of obligation. What is necessary to understand Law, he argues, is a conception of the Law that is sensitive to its broader appeal to those acting according to its dictates. That is, it is necessary to think about what it is that makes people follow rules. Importantly, this is where Hart seeks guidance in the realm of social, and not strictly legal, rules.

Human societies, Hart suggests, hang together by virtue of social rules. These may not be unambiguously accepted or at all times followed, but they nevertheless constitute the texture of social life. People follow them and accept them not simply because they fear sanction if they do not (although such a motivation may, of course, be present); they also follow them out of a sense of obligation. But what if there is a contradiction between these primary rules? How to decide, then, which rule should take precedence?

Imagine a community without such second-order rules: doubts are surely to arise about their application, and it is at that moment that:

> there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declaration on this point are authoritative (Hart 1994 [1961]: 90).

Second-order, legal rules, then, are rules 'concerned with the primary rules themselves' in that they specify how, when, and by whom these primary rules should be taken into account. Of course, this argument merely raises the question what further (third-order) rules regulate the use of these second-order rules. It is there, however, that Hart refuses to postulate the existence of further rules - diverging, of course, from Kelsen's insistence on one basic norm[8] - and suggests that secondary rules derive their validity from the *rule of recognition*. The rule of recognition is the rule that specifies how and what we should recognize as properly

legal, second order rules. Crucially, this rule of recognition is a *social* rule: a *convention* among judges to treat as authoritative the second order rules which they use to guide their conduct. This rule of recognition, then, is constitutive of all legal rules; it confers upon these rules their legal validity. It is with this rule of recognition that explanation comes to an end; it is no use searching for ever higher orders of rules.

Now, there are various ways to interpret Hart's insistence upon this rule of recognition. One way is to argue that it is this social nature of the rule of recognition that leaves the Law 'open', as it were, to a non-tautological grounding of Law, a grounding if not in morality, but in consensus, intersubjectively shared ideas, in short what (especially meaning-oriented) sociologists would recognize as the *social*. It is with this rule of recognition that we find ourselves miles away from a Kelsian, tautological insistence upon the basic norm. At the same time - and this is where I think Hart's legal thought closes off Law again - he introduces the 'internal point of view' that resists any description or understanding. To understand this it is necessary to further specify Hart's answer to the question: how do people come to follow rules at all? What is the affective texture of these relations of obligation?

To Hart, sheer *habit* - people follow social rules because they are used to doing so - is not an adequate answer to this question, because it mistakes regularities in behaviour for the mechanism through which such patterns in behaviour are established. What is needed instead is an account of various *orientations* towards rules. This is where Hart introduces the distinction between internal and external aspects of rules. In a crucial passage, Hart speaks of the distinction as follows:

> The following contrast […] in terms of the "internal" and "external" aspect of rules may serve to mark what gives this distinction its great importance for the understanding not only of Law but of the

> structure of any society. […] [I]t is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the "external" and the "internal points of view" (Hart 1994 [1961]: 88-89).

Taking an external point of view, then, is to be a non-member, 'merely an observer who does not himself accept them', while the internal point of view is reserved to 'a member of the group which accepts and uses them as guides to conduct'. Tamanaha (2006) points out that hence effectuated is a mapping between being a non-member, being an observer, and not accepting a rule, and between being a member and accepting a rule.[9] But this mapping proves untenable, Hart realizes very well. On the one hand, external observers may be content to describe regularities and patternings in the members' actions without reference at all to the rule (Hart 1994 [1961]: 89). On the other hand, there are surely instances in which participants in rule-following do not accept the rule but merely follow it 'because they judge that unpleasant consequences are likely to follow violation' (id.: 90). Describing rule-following can be done without recourse to the rule at all; while being a member does not guarantee any acceptance of the legitimacy or morality of the rule (see also Tamanaha 2006).

In order for a point of view to be truly internal, then, rules must both be *oriented to* and *accepted*. There are ways to orient oneself to rules, Hart suggests, that are not 'internal', either because they neglect the rule at all and contend themselves merely to record regularities and patterns of behaviour (an 'extreme' external point of view), or because they take a hermeneutic, but still 'theoretical', approach to the rules. In both of these cases, the rule is *not* an ingredient of actual practices; it is not, as an ethnomethodologist may argue, 'oriented to' over the course of ongoing, practical action. But over the course of practical action, rules may not be accepted; non-acceptance of the

rule, then, constitutes another instance of an 'external point of view'. This does not mean one cannot 'go against' the rule: the rule must to some extent be internalized as obliging to allow people to go against it; it is only *theoretical* (as opposed to practical) non-acceptance that marks the external perspective. Shapiro points out that Hart's 'internal point of view' is more adequately grasped, then, as an '*internalized* point of view', that is the view of 'a specific kind of normative attitude held by certain insiders, namely, those who *accept* the legitimacy of the rules' (Shapiro 2006: 1159); it is furthermore a view that refers to 'the *practical attitude* of rule acceptance' (id.: 1159), emphases added. This practical acceptance of the rule may manifest itself empirically in cases where one acts in accordance with the rule, or when participants chastise others for not following the rule, or using 'internal statements' that point out people's obligations (Hart 1994 [1961]: 102-103; Shapiro 2006). The attitude of practical acceptance is the difference, then, between theoretical and practical orientations to the rule (Shapiro 2006) and hence, between (various kinds of) external and internal views of the rule.

Several features of Hart's theory are by now clear: first, its divergence from sanction-based accounts of the Law as well as Kelsen's insistence on the basic norm; second, its incorporation of 'the social' through Hart's concern with the social convention that underlies acceptance of the rule of recognition; third, its emphasis on practical attitudes of rule-acceptance as constitutive of the 'internal point of view'. This emphasis on the practical attitude of rule-acceptance as constitutive of the internal point of view represents an acute challenge to descriptive efforts (Shapiro 2006). This is so because *each description of the internal point of view will necessarily be external*: the internal point of view can only be inhabited, not described in 'internal' terms. Now this impossibility is not necessarily a problem: just like sociologists seek to take seriously, as objects of empirical attention, all kinds of moral, religious, and aesthetic evaluations, judgments and

justifications without facing the need to 'adopt the point of view' of the actor (see for such exercises in particular Becker 1982; Bourdieu 1979; Boltanksi and Thevenot 2006), they may similarly continue to describe what legal rule-following looks like. Hart suggests as much when he states that one may still seek to describe this kind of internal perspective: after all description 'may still be description, even when what is described is an evaluation' (Hart 1994 [1961]: 244). Crucially, however, what is in fact *not* permitted, according to this schema, is to mistake that external point of view with that of the internal rule-follower.

And this is why Hart's work is so eminently useful to show how, precisely by nodding to social rules and in advancing a rather sociological thesis that relies on consensus, Hart's legal thought at first reads as a diplomatic exercise: it grants sociologists their due. Yes, legal rules depend on the social rule of recognition; only *that* confers legal validity. At the same time it illustrates how, in making this gesture, Hart erects an epistemic border that may be crossed - it is possible for instance to follow a legal rule oneself and in so doing assume an internal point of view - but behind the border is something that actively resists efforts at representation. Perhaps Law's province is shown to be based upon 'the social', but it nevertheless retreats with every inquisitive step into the centre of its practices. Again, what is truly internal resists description. Again, our descriptive impulses have been thwarted; precisely as we attempt to move inside Law's gates, we find ourselves outside, barred by yet another formidable obstacle: the limitations of description itself.

6 What About the Concrete?

Working through recurring answers to the ever-present question, w*hat is the Law*?, and working through several *perspectival solutions* to the contradictions and tensions between various answers to this question has led us to return once again to the crucial

ordering principle within these discussions. Taken to their logical extremes, neither Kelsen nor Marx nor Black allow us much leeway to understand *concrete instances* of doing, using, mobilizing, challenging, thwarting, resisting, or even ignoring Law. Either we are left with the ephemeral, fictional Grundnorm, or else conceive of the Law as mere form. Even sustained efforts to move away from either reductive or tautological understandings of the Law - here exemplified by Hart's conception of legal behaviour as consisting in the practical attitude of rule-acceptance - erect a border around a kernel of 'lawness' that must, by logical necessity, resist all description. Our choice between tautology and reduction is now rearticulated to become a choice between trying to inhabit the impossible, Archimedean, all-seeing location of the Bourdieusian sociologist or assume the position of the practical rule-follower whose 'perspective' on the rule is itself something that cannot be described. Either we see much, but not much legally; or else we act legally, but do not 'see'. Either we're out, or we're in.

The priest's story, then, evokes and simultaneously disavows certain habits of thought that seem to govern our thinking in the presence of the Law. These habits of thought find their source and mandate in the demarcation between fact and norm, Science and Law, but simultaneously find their nadir in description itself. It couples description with the demand for purity, which coupling leads to diametrically opposed conclusions with regards to the Law. Tellingly, both of these positions remain haunted by the sense that there is no substance to Law, only fiction, mere form.

It is against this background that I wish to introduce a last answer to the question, w*hat is the Law?* This thinker is Bruno Latour.[10] Concentrating on his sociology of Law (2010) and positioning it within his broader engagement with different 'modes of existence' (2013), I show how Latour offers us a glimpse of a different way of approaching and answering this question, but ultimately falls prey, again, to the 'purificationist'

habit I highlighted in the preceding pages. That is, while he restores at first to both science and the Law a concrete existence lacking in the more abstract understandings put forward by the preceding authors, his sociology of law, distinguishing mode of existence [LAW] from that of Science, [REF] (the notations are Latour's), similarly falls prey to the temptations of purification. Latour's argument is rather complex, but working through it will provide us with a sense of the tenacity of the distinction in descriptions of the Law, and - importantly - the academic work of purification that sustains it.

Latour: Diplomatic Purifications

Latour casts his sociology of Law within two different problematics. The first is by now familiar: he seeks to account for Law in a way that does not fall back on sociology's 'magical invocation' of 'the social' (see Latour 2005, 2010) - a position we have encountered in Marx and Bourdieu - while it at the same time does not want to uncritically adopt Law's tautological self-understanding - a position we can roughly attribute to Kelsen. The problem with the first, according to Latour, is that it treats the Law as 'a sort of wrapping for power relations' (Latour 2010: 140) and cannot understand the specifically *legal* qualities of legal judgments; the problem with the second, for the more empirically-minded Latour, is that it disregards all the hesitancies, the practicalities, the little emergencies and legal controversies that make up the activity of 'making Law' and replaces this instead with 'the true reality of the rule and its immanent logic' (id.: 142). For Latour, neither reduction nor tautology, neither documentary nor genetic readings of the Law do the trick: 'if we are led to question the notion of "power" or "society", we will also call into question the notion of a "legal rule"' (id.: 142-143). The crucial step he makes is to focus, in a more empirical manner, on the *actual practices* that go into the 'winding of reasoning itself' (id.: 143) that takes place within the Conseil

d'État. The Conseil d'État is the highest appellate and advisory administrative court in France, and through an ethnographic study of the practices of its members as well as its various clerical assistants and its files Latour sets out to construct an account of these practices that does not fall prey to either tautology or reduction. To Latour, these practices have the capacity to dissolve the hold of such abstractions upon our thought. On the one hand, these practices show how there is no simple translation of violence, power, or interests into legal decisions - for that, the members of the Conseil d'État are far too legalistic, far too detached, far too recalcitrant, even, in the face of government (which after all they are supposed to keep in check). On the other hand, these practices show the existence of hesitations, of interruptions, of little experiments in reasoning, of doubts and of debate, which 'winding of legal reasoning' is glossed over in legal self-descriptions that put centre stage the self-evidence of rules and their intuitive grasping.

The focus on actual practices here operates in much the same way as it has in Latour's previous work. There, scientific practices are similarly understood to be irreducible to academic power-play or bourgeois knowledge production, and as invariably more complex and rich than suggested by the impoverished epistemologies that have to serve double duty as both their description and legitimation (see e.g. Latour and Woolgar 1979; Latour 1999). Ever the realist, Latour treats these descriptions as the purified abstractions they are and have always been. Over and against either conceptions of truth, Latour suggests that facts are neither the simple product of 'nature' nor an imposition of the human mind upon nature; instead, they are far better conceived as both factual - they are real - and fictitious - they are made. In many ways, Latour pursues this agenda, too, in the Conseil d'État. Bracketing both sociological and legal description of legal practices, Latour starts instead with the legal practices *themselves*. This emphasis on practices is highly laudable, and indeed a

powerful corrective to excessively abstracted and purified accounts of the Law. I will say more about the affordances of a concentration on practices in the following chapter, but for now it must suffice to say that large swaths of Latour's sociology of Law constitute direly needed 'therapy' (Cf. Wittgenstein 2001 [1958]) against the confusion that ensues once we start to understand the *teloi* of practices as their guiding, omnipresent logic. Indeed, this emphasis on practices is part and parcel of what I will introduce as a *pragmatic respecification* in Chapter 2. But here Latour and I will start to diverge quite radically. The reasons for this divergence are found in the second problematic Latour addresses in his sociology of Law, in particular in relation to his recently elaborated *Inquiry into Modes of Existence* (2013). It is in this second problematic that the categorical distinction between legal and scientific practices rears its head once again.

Emancipating Modes of Existence

The second problematic within which Latour situates his sociology of Law is both more general and more specific than the first. It is more general, as it aims to account for not only the legal mode of existence but a variety of other modes of existence as well. In doing so Latour aims to formulate a vocabulary to talk not only about the Law, but also about science, art, or politics. At the same time the problem is highly specific to what Latour considers the weakness of actor network-theoretical approaches as they have been developed over the last few decades. Helped along to no insignificant degree by his own previous work on scientific practices, actor network-theoretical approaches have done important work by showing how there is no straightforward 'social'. Rather, the 'social world' (or perhaps: worlds) hangs together by virtue of highly specific but heterogeneous entanglements, practices, or networks, composed of very different parts (technical, scientific, economic, political, etc.) all of which are irreducible to 'the social'. To Latour, this is both its

greatest strength and its Achilles heel. This actor network-theoretical focus on 'the network' (or networks) has remained largely oblivious, he states, to *that which passes along these networks*. In so doing it runs the risk of becoming unable to differentiate between specific 'modes of existence' and in so doing opens up room for reduction: not to 'the social', but rather to 'the network'. This possibility of reduction is dangerous both theoretically and politically: on the one hand, we run the theoretical risk of becoming unable to distinguish between very different kinds of 'being', confusing for instance a religious invocation with a scientific fact. Politically, we run the risk of glossing over the unicity of these beings and in doing so treat them disrespectfully and violently, for instance when we ask of religion to justify itself upon epistemic grounds (or to ask science to justify itself upon religious grounds, for that matter). These kinds of question constitute category mistakes: we ask questions within a register of 'felicity conditions' - for instance, true or false, or legally sound or unsound - which the mode of existence in question does not share. It is in this sense that Latour casts his *Inquiry into Modes of Existence* as an exercise in *diplomacy*: the diplomat aims to respect the highly different beings it has brought to one table, and to not ask them to meet demands they are unable to meet.

The beings Latour speaks of are not simply different substances or essences (here, again, his *Inquiry into Modes of Existence* is anti-essentialist, just as Kelsen's fictional Grundnorm, or Marx's emphasis on empty form denies 'the Law' an essence).[11] Modes of existence differ not because they are made of different substances, but differ because of the different ways they deal with the inevitable fact of discontinuity. Between states of being lie hiatuses, and it is the modality according to which these hiatuses are bridged that defines the specific mode of existence. For instance, [REF] is a mode of existence associated with scientific practices: there, information has to travel along

chains of reference tying together, say, a patch of soil in an Amazonian forest, through samples, through tables and calculations upon paper, to its publication in a peer-reviewed journal. The hiatuses are bridged referentially: each of the links in the chain of reference retain information by referring back to the link preceding it. [LAW], crucially, is different.

Latour argues that the legal 'mode of existence' [LAW] is characterized by a different kind of movement or circulation than those characterizing scientific practices. The *passage* at stake in his portrayal of these legal practices is the movement between the text of the file and the text of the Law. Latour traces this passage as the work of the members of the Conseil d'État unfolds around the hefty case files accompanying the cases the Conseil d'État seeks to judge. This work consists of series of sequentially distributed note-taking operations through which the members will try to 'extract, like diamonds from the ore' (Latour 2013: 201), the precise legal issue at stake. They have to 'extract the means from the confused pile which constitutes the file', the means here being his translation of the French *moyen*, in legal practice meaning both legal ground and argument or the precise legal issue at stake in this or that case. This *moyen* is the

> connection, the coming-and-going between *two types of writing*: on the one hand, the ad hoc documents of both parties which are produced for and through the occasion, such as statements and various productions, and, on the other hand, the printed, authorized, voted upon and connected texts which are carefully arranged on the shelves of the library [written law] (Latour 2010: 86).

The *moyen* is a particular bridge that has to span a hiatus, a gap, between two kinds of texts; and this movement is what Latour calls the 'passage of Law' (2010) which characterizes mode of existence [LAW]. In so distinguishing between [REF] and [LAW], the mode of existence that organizes reference to the world and the mode of existence that emerges in the bridging of the text of

the file with the text of the Law, Latour bifurcates between legal and scientific practices. Of course, Latour recognizes that judges, like scientists, are sometimes concerned with the question of reference, that is 'superimposing layer upon layer of documents and tracings, which are very different in terms of their materiality (photographs, graphs, documents and plans)' (Latour 2010: 226). Yet this activity, according to Latour, is *nothing legal*:

> to be sure, it is possible to retrieve numerous traces of this very particular kind of activity that one finds in laboratories in judicial files, but far from defining the nature of judicial activity, *it merely organizes a few of its segments, the remainder being characterized by activities that are more properly legal* (Latour 2010: 226).

This is the movement - circulation - of *reference,* i.e. [REF], and is as such radically distinct from the legal passage. While recognizing, then, that the Law does need 'facts' to do its work, Latour nevertheless delegates these to the mode of existence [REF] and expulses them from [LAW]. 'The making of Law' is fundamentally unlike - and independent of - the production of facts and (referential) truths.

In its interest in the legal *moyen* and in its delegation of factual questions to mode of existence [REF], Latour's sociology of Law reproduces, then, the same Leitunterscheidung that structures Law's self-understandings. While he warns against hasty purification, his account nevertheless again purifies the Law in a way that is by now familiar. On the one hand, faced with the 'hesitations, the winding paths, the meanders of reflexivity', in the deliberative practices of the members of the Conseil d'État, he suggests that 'we should not be too hasty to *purify* this movement' (Latour 2010: 151, emphasis added). Proceeding, Latour argues that:

> [l]et us not profit *until the end* from the opportunity of *not being a legalist* ourselves and hence of not understanding too hastily what in those movements is purely legal and what is not (Latour 2010: 151).

At the same time his demarcation between [LAW] and [REF] is an exercise in purification itself. *Hesitation before purification*: this is a movement that characterizes, for Latour, both legal practices itself, but it is precisely this movement towards purification that characterizes his own argument.

Only in recognizing the difference between [LAW] and [REF] can we, according to Latour, remain diplomatic in our dealing with these different modes of existence. But what, I wonder, is diplomatic about an effacing of large swaths of judicial work, i.e. the neglect of fact- and truth-making in legal settings? And, on a more empirical level: while it may be helpful to keep the differences between [LAW] and [REF] in clear sight, I do wonder - again - what we are to do, conceptually and empirically, with concrete practices of truth-telling in legal settings and with the performativities of social-scientific accounts of the world.

7 Simple Stories Losing their Shape: Returning to Kafka

What started quite innocently as a search for the Law has now become a self-perpetuating circle of thought: with our expository mandate we run into the limitations of description itself. Kelsen, Marx, Black, Bourdieu, Hart, and finally, Latour: we have traced the work that the distinction between norm and fact, Law and Science, judgment and knowledge is doing in the fraught debates about the character of the Law, and, for that matter, the character of description itself. While Latour is the 'odd duck' in that we find ourselves, with him, in the middle of concrete practices, we run into a similar tendency towards purification. There, too, the distinction between Law and Science is reinstated: each are governed by a wholly different felicity conditions, wholly different 'tonalities' (Latour 2013). It is at that point that Law's expositors have to admit that whatever they say will not quite approach the tonality of the Law itself. Running the risk of striking such a disharmonious chord, it is better, perhaps, to

remain silent. But how, then, to proceed? Perhaps more unforgivably, we have purified and abstracted both Law and Science in such a way as to divorce their presupposed purity - a purity that is not even an essence, for its substance is mere fiction or form - from their practical, particular, and concrete existence. Tracing this conceptual looping has led us not, then, to the capacity to inquisitively 'hop, skip and jump' (James 1909: 109) through the many concrete practices we encounter, but to confusion, contradiction, and in the end: silence, the tools for our thinking lying quite uselessly at our feet.

A similar weariness with interpretation, with description, and even understanding itself descends on Joseph K., who becomes 'too tired to think about all the ramifications of the story'. The story, related to him by the priest, has led him into all sorts of thoughts, thoughts 'not familiar to him, unrealistic things' (Kafka 1924: 263). 'The simple story', Kafka (id.: 263) writes, 'had lost its shape, he wanted to shake it off, […]'.

So do I. The next chapter represents an attempt at doing so. It starts not with a man who waits before the gates of the Law, but with a character already enveloped by it, a character who has no choice but to keep on moving and searching, but a character, too, who has little time to contemplate and must act in the here-and-now. I think there is much to learn from this character. For instance, in contrast with abstracted and purified accounts of the Law, we may begin to ask not what the Law, in general, everywhere and always, is, but rather how the Law is done and enacted as a matter of practical work. Instead of relying on inside and outside visions, we can inquire into how 'vision' takes place at all - how it is mediated, where it is done - and how the distinction between inside and outside the Law empirically *takes place* in many different ways and instances. Instead of keeping our accounts harmoniously in tune with legal and scientific felicity conditions, we can attempt to stay with the troubles in concrete practices: the categorical troubles represented by sociological

modes of enacting worlds, and the troubles represented by legal modes of organizing knowledge and 'vision' upon the world it seeks to judge. That, to me, sounds like an alternative. But it is an alternative that must start not with stasis but with movement, not with detached observation but with envelopment. We find this story of envelopment in the story that envelops the 'opening paragraphs of the Law', that is Kafka's *The Trial* itself.

Enter Joseph K.

NOTES

1 Deleuze and Guattari (1986) are dismissive of allegorical readings of Kafka's work, and for good reason. Yet here is a crucial difference between dominant allegorical readings of Kafka's work and my own: if these allegorical readings of 'Before the Law' have focused on unearthing just what the story says about the *Law*, I am far more interested in what this story tells us about *those who come and seek what they think* is 'the Law'. As an allegory of 'the Law' the story fails, precisely for the reason that it attributed to Law an almost transcendent existence that itself must be explained, not assumed. As an allegory for the kinds of assumptions made, among commentators, *about* the Law, and about the kind of 'access' to it, *Before the Law* succeeds remarkably well - particularly when it is placed, as I will do in Chapter 2, in a conversation with the story that envelops it: Kafka's *The Trial* itself.

2 Kelsen's treatment of the state (or the sovereign) as an effect, not source, of the Grundnorm diverges sharply from utilitarian, 'command theories' within legal positivism. Associated in particular with legal scholar Austin, command theories of the Law generally suggest that the sovereign acts as a guarantee and enforcer of the Law. While both Kelsen and Austin seek to from legal thought both moral concerns and social concerns - Austin famously insists that 'the existence of the law is one thing; its merit or demerit another' (Austin 1995 [1832]: 157) - a crucial difference between the two consists in their treatment of the nature of Law's force, and by association, the role of the sovereign. For Austin, Law is to be understood as a collection of commands, i.e. 'threats backed by sanctions and statements of legal obligation as predictions that the threatened sanctions will be carried out' (Shapiro 2006: 1157). Kelsen however diverges from this account as his treats norms as primary. After all, it is norms that specify how and what

behaviour is to be sanctioned and who is legitimized to sanction: 'legal norms are to be recast as imperatives directing legal officials to impose sanctions on citizens under certain conditions' (Shapiro 2000: 204). In Kelsen's words: 'if the state is a community, it is a legal community' (Kelsen 1948: 381).

3 A note to those familiar with genes and theories with regards to their operation: I am referring here to an understanding of phenomena as determined by a constitutive code (DNA), which is arguably a rather vulgar theory of evolution (exemplified best, perhaps, by (popular readings of) Dawkins' theory of the selfish gene (1976). This is not, I must say, necessarily a position shared by actually existing geneticists. Indeed, advances in the study of processes of epigenetics - within which genes do not determine outcomes, but are rather selectively activated or even reconstituted in response to processes taking place in the gene's 'environment' - underscore the limits of genetic reductionism in explaining the behaviour of individuals and makes problematic the nature-culture binary upon which such genetic reductionism tends to rest more generally.

4 Obligatory references include, here, Chambliss' work on vagrancy laws (1964); Althusser's understanding of Law and its relation to the ideological state apparatus (1970) one could also think of Wacquant's account of the 'deadly symbiosis' between the ghetto and the prison, and Law's instrumentality in projects of 'punishing the poor' (2009).

5 Of course, this tension between substance and form is crucial to Weber's sociology of Law as well; however, if Weber suggests that there is a *tension* between the prioritization of means through formal rationality and the question of substantive ends and points to the crucial role of legitimacy, Marx's account is much more cynical about the very possibility that Law may do anything else than cover up substantive inequalities by legal rational means. In other words: for Weber, Law may indeed fall short of its promised substantive justice, but to Marx, this is precisely the point of Law, as these claims are built upon a conception of freedom and right that is in and of itself a mere form (Hunt 2002).

6 In an interview conducted for the International Journal for Law, Crime and Justice, Black describes his stance vis-à-vis Durkheim as follows:

> as a graduate student I was […] somewhat disappointed to discover that Durkheim never really delivered what he claimed or promised. And because my own work contains no psychology at all, I sometimes saw that I am more Durkheimian than Durkheim, and that even Durkheim was not really Durkheimian (Ambramowitz and Black 2010: 39).

7 In doing so, these accounts enact a small but crucial distinction between the *character* and the *origin* of Law. This distinction, while crucial, plays a minor

role in this book and will return to the fore only in my last chapter, where I will briefly discuss Benjamin's (1978 [1921]) account of Law-positing violence in relation to social-scientific efforts at description. For now, it suffices to say that historicizing accounts notwithstanding, the distinction between tautology and reduction, between Law's factual as well as legal 'source', has not been surpassed in contemporary theorizing.

8 The difference between a Kelsenian, more hierarchical understanding of the relationship between legal norms and their derivative relationship with the basic norm and a Hartian conception of the Law that refuses to seek ever higher norms of legal validity that culminate in one central basic norm roughly maps onto differences between continental jurisdictions characterized by a Constitution, and (Anglo-Saxon) common law traditions within which the precedent plays a larger role.

9 As I show, this is in fact a rather superficial reading of Hart's account of the internal and external point of view. However, it is worth noticing that this kind of misreading of Hart's point - the unproblematic mapping of the internal view onto members and the external view onto observers, sociologists included - surfaces again and again in legal and sociological scholarship. See e.g. Tuori's characterization: 'the legal scholar is supposed to adopt an internal, participant's point of view, whereas the sociologist is said to approach Law from an external observer's perspective' (Tuori 2006: 28), or Cotterrel's admonition: 'in order to understand Law, the legal sociologist has to understand it as a participant, or as a participant does, or rather as many different kinds of participants do - lawyers and citizens, for example, living in the world of Law', so that the sociological study of the Law 'samples, inhabits, imagines, explores, compares, questions and confronts different participant perspectives' (Cotterrel 1996: 369-370).

10 Latour does not fit neatly the category of sociologist nor that of legal-positivist. However, as he regularly converses with (or polemicizes against) certain strands in sociology (2005) and engages himself specifically with both sociology of Law and legal positivism in his recent work on Law, he certainly has a place in this discussion. More importantly, however, his empirical attention to the particularities of legal work practices is a helpful pointer into the right direction and in that capacity a bridge to the next chapter, which develops tools to understand both 'Law' and 'Scientific description' as concrete practices.

11 Indeed, the problem with Kelsen or Marx (or Latour) is crucially *not* that they are essentialists - attributing to the Law a fixed essence - but rather that they, in teasing out Law at its purest, fall prey to abstractionism that irrevocably ends up with a dematerialized understanding of 'Law' as form or fiction. The difference is one between an essentialist position that posits that

Law is an immutable, fixed 'there' (a position not shared by any of the authors discussed here, and arguably quite rare) and a position that, as a result of its own tendency towards purification, must conclude that there is effectively no *there* there. In other words: the axis around which this dissertation turns is *not* the one of essentialism versus constructivism - a bad opposition, as both run the risks of abstractionism - but purified abstractionism versus an emphasis on the concrete and bringing that concrete into relation with practices of abstraction (e.g. concrete instances of 'seeing' and description, concrete instances of enacting 'the Law').

2 A Guide for the Perplexed

1 Shaking it off: Lessons from Joseph K.

If *Before the Law* is suggestive of several habits of thought surrounding the description of the enigma of the Law, the book from which it is taken - *The Trial* - offers a bewildering sense of what it is not to contemplate the Law or to try to steal a glance inside, *but to find oneself already enveloped by it.*

At first glance, this interpretation is not immediately obvious. Think of the tragedy of Joseph K. frantic searching: does he not, in the end, fail to find the elusive magistrate judge capable of finding him innocent? While Joseph K. may find himself 'inside' various rooms and offices where the Law is done, he never finds what he presumes to be Law itself. In this, he is at least superficially quite like the man from the countryside, who fails to find what he was searching all along. The suspicion running through both stories is at first sight quite similar: it is the suspicion that there is no magistrate, that there is no centre to this power … Indeed, both stories raise the suspicion that there is no *there* there. 'Seeking a being, an essence offered to [their] mediations, something meaningful to command [their] respect' (Hegel cited in Derrida 1992: 208), both the man from the countryside and Joseph K. seem to find nothing at all: Law itself remains 'ungesehen und ungefühlt' (id.).

However, this interpretation relies on the assumption that *Before the Law* is supposed to function as a metaphor for the Law itself. Only then do the parallels between the two stories become so obvious. However, there is also the possibility that *Before the Law* captures not the Law, but one of our 'delusions' in the face

of the Law. That is the delusion, or the mistaken expectation, that there is something *there* that hides itself, and that we may move inside of it and see for ourselves. Indeed, prior to the priest's recounting of the story, the priest warns Joseph K. that he is 'deluding himself about the court', and that 'that delusion is described thus' - after which the priest relates to him the infamous *Before the Law*. Now, in the last chapter we have seen what kind of theoretical cognitive dissonance is required of us if we follow this route: yes, we can describe the Law - but we really cannot. Yes, we can 'see inside it' - but there is nothing to see …

Envelopment and Journeying

Let's zoom in, then, on the *differences* between *Before the Law* and *The Trial*. Take this striking passage in *The Trial*. Before Joseph K. is to meet the priest-cum-prison chaplain, Joseph K. finds himself at one of the entrances to a large, officious building. There, he had been informed, a first hearing with regards to his case would be held: a chance for him to plead his innocence. The building is large, but, like many of Kafka's buildings, not spacious. Searching various hallways for the room in which he is expected to make his appearance, Joseph K. makes some inquiries. Ashamed for his legal troubles, he invents for himself an alibi. Going around knocking on doors and asking for Lanz, the joiner, he is surprised to be pointed in the direction of one room in particular. Entering it,

> K. thought he had stepped into a meeting. A medium sized, two-windowed room was filled with the most diverse crowd of people - nobody paid any attention to the person who had just entered. Close under its ceiling it was surrounded by a gallery which was also fully occupied and where the people could only stand bent down with their heads and their backs touching the ceiling. K., who found the air too stuffy, stepped out again and said to the young woman, who had probably misunderstood what he had said, "I asked for a joiner, someone by the name of Lanz." "Yes," said the woman, "please go

> on in." K. would probably not have followed her if the woman had not gone up to him, taken hold of the door handle and said, "I'll have to close the door after you, no-one else will be allowed in." "Very sensible," said K., "but it's too full already" (Kafka 1924: 46).

The resemblance between the woman's words - 'I'll have to close the door after you, no-one else will be allowed in' - and that of the Tartar-bearded guard in *Before the Law* - 'here no one else can gain entry, since this entry was assigned only to you. I'm going now to close it' - is uncanny. Both guard and woman are mysterious representatives of the Law; but where the guard locks the man from the countryside out of the Law, the Law now envelops Joseph K. Even if he does not find that final Judge, that final office, he is nevertheless caught in its machinations, forced to move about. 'The Law' *behaves differently* in the two stories: in *Before the Law*, it rests and only asks for waiting; in *The Trial*, its tentacles force Joseph K. from room to room.

Indeed, that *movement* is a second salient difference between the man from the countryside and *The Trial*'s Joseph K. While both man from the countryside and Joseph K. may share the same delusion - the delusion that there is a *there* there - the first remains stuck in static contemplation, the second is continually wandering from room to room, from office to office, negotiating and pleading. Deleuze and Guattari highlight the contrast when they suggest that Joseph K., more than anything, is a *figure in movement*:

> he [Josepk K.] will find justice only by moving, by going from room to room, […] He will take control of the machine of expression: he will take over the investigation, he will write without stop, he will demand a leave of absence so that he can totally devote himself to this 'virtually interminable' work' (Deleuze and Guattari 1986: 50-51).

Envelopment and journeying: these are the two dimensions upon which the crucial difference rests. In *The Trial*, the Law is not some mysteriously gated, bounded entity but rather a concrete, even networked, many-faced thing. It makes itself known, to

Joseph K., not in the guise of a solitary guard but is made present in many different place-holders ('lieu-tenants'): from mysterious men who show up in Joseph K.'s apartment, to voices on the telephone, and from lowliest chambermaid, to artist, to investigating judge and his notebook. All, to Joseph K., appear to have something to do with the Law, but neither are its pure embodiment. Of course Joseph K. keeps searching, but the final and decisive magistrate judge is never seen or felt. Meanwhile his journey is shaped by concrete conversations and collaborations that always lead him into yet another room, yet another office.

This, then, is *The Trial's* comedy: it consists in Joseph K.'s delusions coupled with his unwillingness to trust his own eyes. Deluded by abstracted metaphors for the Law, escaping him is the possibility that his own searching, pleading, and wandering, his own journeying from room to room, representative to representative, might just provide for a more productive understanding of the Law than the priest's story. That he might be helped in his journeying not by revealing parable nor 'intellectualist philosophies', but that he is helped along by the 'surprises and cruelties', the 'wildness' (James 1995 [1907]: 9) of these experiences. *The Trial* suggests that the facts of encountering, of cajoling, of collaborating, of finding yet another passage or room that are themselves the space of 'Law'.

This is why Joseph K.'s fraught attempts to find the Law are far more interesting than that of the man from the countryside: while the latter assumes knowledge of the Law to come to him through waiting, Joseph K.'s seeks concrete ways to deal, to collaborate, to convince, to mobilize. That he does not find what he expected to find - capitalized Law - is an indictment of his presumptions, not of his methods of inquiry. After all, it is precisely through these concrete, if fraught, practices of collaboration that the reader comes to appreciate the viscose and the opaque, as well as the smooth and the seamless, of the world in which Joseph K. is thrown. Indeed, *what is the Law?* might have

been the wrong question to ask. With Joseph K., we wonder instead where it takes place, whom and what it envelops, how it is done, and how we might move about it.

In the following chapter, I will make a turn similar to the one effectuated by my juxtaposition of the man from the countryside and Joseph K. This is a turn that emphasizes concrete legal practices and concrete practices of description and 'vision'; it is also a movement towards an appreciation of the concrete beings - methods of inquiry, instruments of measurement, case files - that populate these practices. Last, it is also a movement that puts centre stage *movement itself*, especially where it pertains to my own inquiries and investigations. The following is an elaboration.

2 Abstraction and the Remainder of Things

Description fails in the face of the Law - it must, at some point, throw up its hands and accept the fact it has merely circumvented, rather than penetrated, the Law. Far from a theoretical problem only, this defeatism is a challenge, too, for the practices I seek to understand. Relying on a purified conception of both Law and scientific description, these tools do not enable me to do justice to sociological modes of enacting worlds and legal modes of finding out 'what really happened'. In so doing, both the abstraction 'Law' and the abstractions of 'description' or 'seeing' fail to operate as good abstractions should: as tools to think with, and think through, the specificity and concreteness of practices (Stengers 2005). Hence the necessity to scrutinize both what we mean to refer to when we speak of 'the Law', and what we do when we seek to describe it and to see it at all.

The answer to these questions lies in the relationship between the abstract and the concrete. That is, it lies in understanding the descriptions proffered by commentators in the preceding chapter as the outcome of exercises in abstraction. Abstraction proceeds

by way of flight away from the concrete. Only some things survive the process of abstraction while other things become 'the remainder of things' (Whitehead 1953: 73). In working through several answers to the question of the Law, we have seen descriptions of a particular kind. Not just *any* description will do, it has been suggested; description must be separated from normative evaluation, the 'ought', so that description and description alone must do the trick. Descriptions, secondly, must not only themselves be purely descriptive, but must also index and isolate an essential or necessary feature of the phenomenon described. This is the function of appeals to descriptive 'purity': proper descriptions of the phenomenon Law do not include the inessential, the accidental, or the contingent. Description of the kind offered in the preceding chapter, then, relies upon abstraction: on the teasing out of something general, something determinative, about the phenomenon in question. By distinguishing figure from ground, signal or sign from noise, abstraction itself produces the remainder of things.

Of course, that things are excluded from description after the process of abstraction is not in and of itself a problem but something that simply accompanies any such effort. Indeed, abstractions are eminently useful in the same way good theories are: conceived as 'tools for thinking' (Stengers 2005), they help focus attention, draw distinctions between figure and ground, are the precondition for agreement and shape the possibilities for dissensus. They are operationally valuable, too, when they mediate between different observations, ideas, prior knowledges and programs of action in fruitful ways: when, as ideas, they 'help us get into satisfactory relation with other parts of our experience' (James 1995 [1907]: 21).[1] But abstractions may also be mobilized to *sever* the link between themselves and 'the remainder of things'. It is at that point a return towards the concrete may come to present acute problems. In the conceptions of 'the Law' presented in the preceding chapter this is evident in their drive

towards purification. In asking what is 'necessarily true of the Law' concrete legal practices are either understood as constituted by a determinative signal or sign of the underlying, substantive 'social'. In doing so these accounts risk prioritize abstraction itself over the concrete practices to which they aim to refer.

Dupretet al. (2015) speak of this process when they coin the kinds of accounts I have highlighted in the preceding chapter 'hyper-explanation'. Wanting to account for the operation of Law, commentators put forth accounts that 'deploy abstract concepts that have (arguable) relevance to any and all social situations and social actions' (Dupret et al. 2015: 4). Their own examples of such hyper-explanations include the notion of bureaucracy, modernization theory, and general theories of power and domination. While not in and of themselves words that necessarily lead to practices of hyper-explanation, these concepts tend however to be used in ways that gloss over concrete, ongoing practices, for instance when we argue that this or that institution responds to 'modernization' or this or that practice is determined by underlying power relations. It is instructive, here, to add to this brief and non-exhaustive list of examples of hyper-explanations the kind of descriptions proffered by Kelsen or by Marx. In their own ways, these descriptions reduce the many varieties of legal practices to zoom in on the code they share or on the societal interests, purposes, or structures they serve. Aside from obvious differences in opinion and foreseeable breakdowns in communication between (the admittedly rare) pure Kelsian jurists and Marxist sociologists of Law, such hyper-explanations suggests that legal practices can adequately be explained with reference to their preferred abstraction.

However, the irony here is that we may look for concrete occurrences of capitalized 'Law' only to find nothing at all. Precisely this chasm between abstract and the concrete is written into Kafka's *The Trial*. 'This is where the Law is done', proclaims the Court. Yet instead of that elusive Law, embodied in the

absent magistrate judge, Judge Joseph K. finds offices, rooms, lawyers, examining judges, notebooks, pleadings and proceedings. Compare this with my own experiences: instead of hidden interests or the logic of the Grundnorm, I was, upon entry to the court under study, confronted with documentary practices, with emails, faxes and telephone calls, with episodes of quiet work punctualized by the occasional court session or shared lunch. I saw offices, computers, files and filing cabinets; hurried judges whose ritualistic dress failed to conceal the fact they are only humans. I found, in other words, what Whitehead calls 'the remainder of things' (1953: 73): the things we have not included in our abstractions but that nevertheless stubbornly persist in experience. Here, our attempts at abstraction runs into troubles accompanying their own 'craving for generality' (Lynch 1997; Cf. Wittgenstein 1958 [2001]: 18) when we are faced with the concreteness and specificity of legal practices.

Of course, we can choose to stay at the level of abstraction and disregard practices altogether, yet we have seen this does not necessarily lead to clarity, nor does it help us to say something about *these specific cases,* these being: social scientific performativities as well as concrete legal practices of truth-making. Another option is to retain abstraction and to approach legal practices as a manifestations of their preferred, hyper-*explanans*. Of course, one might say, I don't 'see' the Grundnorm: it is after all a fiction! And of course I don't 'see' powerful interests at work; Law precisely conceals their operation, so that the fact that I do not notice them is a sign of their efficacy (Cf. Valverde 2008). Notice, however, how this objection proceeds: it saves these specific abstractions, yes, but it can only do so by downgrading the concrete facts of experience. Both

> focus on another reality, one that is invisible to the actors themselves but which is supposed to explain their behaviour: either the true

> reality of society and social violence or the true reality of the rule [or norm] and its immanent logic (Latour 2010: 142).

This gesture is one of saving abstract concepts by treating them as more real than the stubborn facts of experience. Whitehead calls this the fallacy of misplaced concreteness: of attributing to abstractions a realer, more concrete existence than experience itself (1953: 73). In doing so, it looks suspiciously like 'throwing out the baby and leaving the bathwater for analysis' (Wilkens cited in Dupret et al. 2015: 4). Of course, there is nothing wrong with a study of bathwater per se - except, of course, when you were interested in the baby.

How are Abstractions Done?

One way out of these both conceptual and practical conundrums is by asking where and how our abstractions are concretely done. Within sociology, this gesture can be traced most directly to Garfinkel's ethnomethodological studies (1967, 2002). Think, by way of an example, of the problem of social order - a quintessentially sociological conundrum. How can we explain social order? How does it arise? What are its consequences?

Garfinkel suggests that precisely this question has suffered from sociological tendencies towards abstracted hyper-explanation. Not disputing the 'objective reality' of social order, Garfinkel draws a contrast between two orientations to the question of social order. The first, he suggests, implicitly assumes that sociologists derive their mandate from the way they distill and isolate 'order in the plenum'. Often, they are assisted by what Garfinkel calls a 'technology of formal analysis' (2002), within which the concreteness of life is reconfigured. Faced with the 'concreteness of social facts of ordinary activities', they have sought to respecify these activities so that they may be 'displayed in details of orderliness in formal analytic and generic representational theories' (Garfinkel 2002: 65). The implicit

assumption made, Garfinkel argues, is that there is 'no order in the plenum' and that sociologists are privileged in their access to the objective reality of social facts in a way the actors themselves are not. Yet theoretical problems begin to burgeon as soon as these sociological abstractions are imbued with a concrete existence out there: how precisely do these objective social orders steer social action 'on the ground'? Lost in this process of abstraction, Garfinkel suggests, are two important things: first, an appreciation of the ways *social order is concretely done and enacted* as a matter of ongoing, practical action; second, an understanding of sociological hyper-explanation as just that: a *practice of abstraction* assisted by a specific *technology*.

While we may not agree with this portrayal of contemporary sociology (of course it is partial!), it is nevertheless worthwhile to stay with Garfinkel's programmatic remarks here. Note how Garfinkel does not deny the objective reality of social facts and of social order, but that he suggests these must be *respecified*: that is, brought into touch with concrete practices of doing social order and, where necessary, modified. The focus is not on the social fact as a *principle of inquiry* but on its status as a *phenomenon* - in other words, something that is concretely achieved. Garfinkel's novelty lies in translating this more general problematic of abstractions and their relationship with the concrete into a program for investigative action. With Garfinkel, we find ways to stay with the concrete for a while and to inquire into how 'our' abstractions are locally enacted. Latour's sociology of Law is precisely in this sense important: it refuses to treat legal practices in the Conseil d'État as exemplars or manifestations of an invisible governing norm or social logic; instead, he is interested in 'the winding path of practice' (Latour 2010: 142).

It is with this respecification in mind that I will turn to the two abstractions that, in the preceding chapter, were continually played out against each other. On the one hand, I want to replace overtly abstract speech of 'the Law' with an appreciation of, even

care for, concrete legal practices. On the other hand, I want to move away from conceiving of representation in the abstract towards an understanding of how 'representation' is done. Together, these gestures constitute a *pragmatic respecification* of the Law-Science conundrum. Emphasizing concrete practices of description and 'vision' as well as concrete legal practices, this pragmatic respecification opens up room to stay with the conceptual troubles within the practices that we call 'the Law' or 'Science'. In the following, I concentrate on a series of salient dimensions - the courtroom, the legal rule, the file, methods of scientific inquiry - of concrete legal and scientific practices to give flesh and bone to this pragmatic respecification.

3 Legal Practices: The Courtroom and the Archive

A pragmatic respecification of the enigma of Law returns to the concrete practices in and through which 'the Law' is done and enacted. It does not seek for pure Law embodied but locates it in its concrete operations, most notably those taking place in self-designated legal practices. Of course, legal practices are never tied only to a specific site nor tied to a specific professional group; lay-people may orient their actions towards legal standards (Garfinkel 1967), and the Law is done at borders, in policy-making, in trade and commerce, in the fabrication and legal qualification of 'people and things' (Mundy and Pottage 2004). Yet courts, precisely by promising the unity of place, time, and act - 'this is where the Law is done' - offer themselves up as the legal setting par excellence. What better way to situate our abstractions than to start with the concrete practices that make us this promise?

The Courtroom

Joseph K. is partially right to go on searching for 'the Law' in courtrooms: they are the site of interrogation, of narrative strife,

and of interaction between co-present participants (Atkinson and Drew 1979; Conley and O'Barr 1990, 1997; Matoesian 1993; Dingwall 2000). In the specifically Dutch context studied here - the practices of magistrate judges, or *politierechters* - they are also sites of judicial inquiry and decision. In a sense, courtrooms dramatize precisely the (abstract) encounter of Subject and Law deferred in both *The Trial* and *Before the Law*: that of the subject thrown before the punishing gaze of the judge. Yet treating judgment as a practical, ongoing achievement, the pragmatic task is to inquire into how judgment is achieved over the course of the interaction between defendant and judge. Pointed to as sites of 'degradation ceremonies' (Goffman 1956), courtrooms are pregnant with both legal and moral possibility. Not only the defendants' legal culpability, but also her morality is in question: courtrooms are among the sites where the 'soul' of the defendant (Cf. Foucault 1977) and particularly his/her remorsefulness (Weisman 2004, 2014) is an *empirical question* for decision-makers. While studies of the role of remorse in these decision-making practices have generally demonstrated its importance, precisely how, on a local level, remorse is communicated, negotiated, and challenged remains a question ill-attended to (Bandes 2015). This lacuna in studies of the role of remorse in legal settings raises questions about the 'practical grammar' (Dupret 2011) of remorse; in other words, how 'remorse' is interactively and narratively established. How, then, do judges make sense of the defendants' remorsefulness in court? How is such sense-making mediated by the stories told by the defendant him/herself? How do judges weigh, prioritize, and evaluate these narratives?

Courtrooms are 'rich' settings: they dramatize, in their infrastructural layout and procedural demands, the encounter between the subject and 'the Law' that is often elevated to the level of general truth. Yet settings like these are far from the only venue where the Law is enacted in the broader sense. That is: although they may be the site of face-to-face interaction, as well

as the performative utterance par excellence - the 'you are guilty' (Austin 1955: 59) - these Courtroom dramas depend on protracted episodes of quiet 'face-to-file interaction' (Scheffer 2005: 75) taking place in the court's 'backstage' (Goffman 1959), as well as professional familiarity with legal rules and statutes. It is to these dimensions of legal practices I now turn.

The Archive

If the aforementioned face-to-face interactions are fruitfully studied as practices of 'doing Law' and 'doing remorse', a crucial difference between social and legal orders starts to emerge when we take into account two further specificities of legal practices. The first difference pivots on the distinction between 'social rules' and *legal* rules; the second emphasizes the specificities of *bureaucratic* action in its concern with the legal case file. Both concerns - the rule and the file - have to do with the materiality and the temporality of the legal archive. That is the way legal practices mobilize, produce, and process materials explicitly aimed to *outlast* their moments of mobilization, production, or processing. More concretely, first I am referring to the body of legal rules stored and transmitted in black-letter Law; second, I am pointing to the information storage, transmission, and retrieval technique of the case file.[2] Both are two sides of the archival coin: the first pertains to commandment - to rules, to obligations, to 'the place from which order is given' - while the second pertains to commencement, the site 'where things commence' (Derrida 1995: 9) with the original filing of a document. Both are salient dimensions of legal practices. Indeed, with Latour (2010) we might understand these legal practices as engaged in the making of a connection between these two dimensions of legal practices: from file to law-book. Of course, the empirical, pragmatic question is how, precisely, this connection is made.

A Body of Laws

Think, first, of legal rules: the written constitution and the stored and transmitted decisions that make up legal precedent. In legal practices, we are not solely dealing with a purely sociological abstraction - 'social order' - which then must be treated as an ongoing and practical accomplishment, but rather with a kind of practice ingredients of which clearly exist *prior* to the work of enactment. That is, legal practices can emphatically *not* invent standards of legality each time anew in a way similar to the ongoing, practical accomplishment of social order with each and every interaction. Specific to legal practices is precisely their *stability* over time: with the exception of a constitution, typical legal practices do not invent Law anew each time but are oriented to a body of rules and statutes. In short: legal practices are enacted with reference to an *archive of rules and precedent* that envelops the locality and temporality of specific work practices. But that does not mean that legal rules can be understood to unproblematically guide and steer legal activities. Hawkins (1992) suggests that there is significant fact-finding and fact-defining discretion involved in the choice for a certain legal rule over another. In this sense legal rules are not a fixed 'legal context' to legal practice, but *part and parcel* of these practices. Within a pragmatic understanding of practices, legal and procedural 'context becomes a moving horizon' (Scheffer 2010: 45) made relevant to the here-and-now by *implication*: that is, when these rules are oriented to, included and enfolded in the here-and-now of practical activity. The normative 'theory' or 'model' of decision-making, written down in black-letter Law, does not stand apart from the practice to guide it; the 'theory' is part and parcel of the practice itself. In asking the question how actors come to orient their actions and decisions to a body of legal rules at all I zoom in on precisely the 'missing what' (Garfinkel 2002: 99; Dupret et al. 2015: 4-6; Dupret 2011; Travers 1997) in much socio-legal scholarship. A pragmatic respecification of the 'Law',

asking where and how Law is done, must remain sensitive to this difference between legal rules and the 'social rules' sociologists speak of.

'Fallen Writing': The Case File

This understanding of the interrelationship of legal rules and legal action - that is, the point that they constitute legal practices together - also offers a way into the specificity of *these* concrete practices, that is those taking place within a Dutch, inquisitorial, lower criminal court. The specificities of this setting lead me to a second permutation of the legal archive: that is, the legal case file. This object has received rather little attention in sociological accounts of the Law's workings (Scheffer 2005, 2007; a problem these share moreover with historical studies, see Vismann 2008). Perhaps this has to do with our tendency to treat documents as mirrors onto the world instead of objects of interest in and of themselves (see Prior 2008), or with a more Anglo-Saxon focus in the study of legal practices, which jurisdictions tend to rely to a far smaller extent on the 'administrative technology' of the legal case file (Vismann 2008). While Anglo-Saxon courtrooms are in general more 'phonocentric' (Derrida 1967) in that they privilege oral testimony and may dismiss written evidence as hearsay, Dutch criminal law in contrast makes far more procedural allowances for (formal) written materials: not 'voice' but the 'fallen writing' (Cf. Messick 1989) of administrative forms, process-verbals [*processen-verbaal*], expert reports and witness statements found in the legal case file play an important role in Dutch criminal law. In contrast with black-letter Law, these legal case files are more humble, 'pragmatic writings' (Luhmann 2004: 237) may not be made to last forever but must nevertheless allow for decisions in the here-and-now about the there-and-then. Legal practices are also archival practices, then, in the *informational* sense of the word: they draw on case files to collect, store, and transport materials that allow a decision in the here-and-now of

the courtroom about the there-and-then of the offense in question. After all, judges say, 'we were not there when [the offense] actually happened'. Legal practices may hence fruitfully be studied as practical, archival work concerned with the bringing into a mutual relation 'deposits, traces, signs or clues' (Osborne 1999: 58). Again, the empirical question is hence how, over the course of practical work, case files come to be implicated in the unfolding of everyday judicial activities, and how they allow the production of a *spatio-temporal bridge* between the here-and-now of the decision, and the there-and-then of the (alleged) offense in question.

Time-Space Matterings

In this sense this pragmatic respecification builds upon Latour's sociology of Law (2010, 2013) in that it takes seriously the practices that go into *making a connection* between the text of the file and the text of the Law. Both rule and information, or more concretely: *law book and case file,* are implicated in legal practices. Both legal rule and case file are things we need to contend with if we seek a pragmatic respecification of the thin and ephemeral abstractions that have proven unproductive as tools for thinking. Yet the conception I am seeking diverges from Latour's conceptualization in that it directs more attention to both the materiality and the temporality of the archive. One, Latour has a tendency to treat case files solely as containers of texts of which the decision-makers try to make sense (see also van Oorschot 2014a, van Oorschot and Schinkel 2015). In portraying juridical practices in this light it is tempting to forget that the case file has a *material existence*: that it is made of heavy carton folders collecting written and photographic evidence, or of digital files that can be accessed using personal computers. A second difference pertains to its temporalities: the fact that the 'bridge' between case file and law book in question requires a *temporal folding* as well: the making of a relation between the here-and-now

of the decision and the there-and-then of the offense in question. Just *how* the legal case files mediates this temporal folding is another question that assumes importance in my efforts to restore to legal practices their practical robustness (see Chapters 5 and 6 respectively for my empirical discussion of these issues).

4 Knowing the Law: How Vision Happens

Part of our task is now respecified: it consists not of seeking abstract Law above or behind the concrete, but starts with the concrete itself and devises abstractions that may do productive work in organizing experience satisfactorily. However, with a pragmatic understanding of abstractions comes not only the question of the concrete practices they wish to help navigate, but also the question about the *making of abstractions* itself. In other words, how are these activities situated? In the preceding chapter, we see that such exercises in abstraction have either adopted a language of representational description - speaking in the realm of the 'is', within which a word comes to stand for a world - or, when meeting the challenge of incommensurable understandings of the Law, have shifted in focus to adopt a language of perspective. Yet this perspectivism similarly runs into the limitations of description of the Law: either we are returned, via Bourdieu, to the unmasking expositor already embodied in Marx; or, via Hart, to the viewpoint-that-is-no-viewpoint of the internal rule-follower. The problem with these understandings of description and of perspective, I argue here, lies in its disregard for the concrete, situated activities of knowing that precede and inform both vision and description. In this sense, both representational description and vision may be convenient catch-all ways of speaking about (knowing) practices, yet both miss out on the concrete 'in-between' (James 1995 [1907]): that which lies between the knowing subject and the known object.

The Mediated In-Between

The implicit model of knowing that informs both mandate to representational description and the emphasis on vision and perspective can be understood as the 'spectator theory of knowledge' (Dewey 1929). It postulates a crucial distinction between, on the one hand, the perceiving mind (the metaphorical 'eye') and on the other, the world which extends before it. Within this model, knowledge can be arrived in either of two ways: it passes from the world into the perceiving mind; or else the eye surveys the world. The postulated direction of the arrow - from world to mind, from mind to world - is suggestive of 'empiricist' or 'rationalist' understandings of knowledge respectively; yet what they share is the distinction between eye and world.

For Dewey such a conception of knowledge must, from the start, exclude an appreciation of knowing as a matter of *practical activity* (Dewey 1929: 22). We do not simply 'know' the world because we survey it or because it impresses itself mercilessly upon our passive senses. Instead knowledge is the outcome of various ways to experiment, collaborate, and grapple with the world's recalcitrances and affordances (Gibson 1979). Think, for instance, of trying to find out where the light switch is in a strange and darkened hotel room. Our eyes may not help us, but our sense of touch, coupled with our guesses as to typical locations for light switches, do. Our body and our expectations mediate the encounter. It is only in retrospect that these activities become the 'in-between', or rather, the 'before' of metaphorical (and in this case, literal) illumination. In contrast with approaches that treat knowledge or vision as unproblematic and radically separate the observer from the observed, a more pragmatist understanding emphasizes, instead, this neglected in-between. The empirical question facing us, then, is how this 'in-between' takes place concretely. Or, formulated differently, it raises questions about the situatedness of knowledge: how, in other words, our capacities for 'sight' and 'vision' are mediated and

distributed. In order to tease out these concerns I turn to Donna Haraway (1988).

Situated Visions

Like Dewey, Haraway (1988) draws out the metaphorical connection between knowledge and 'vision' when she suggests that visual metaphors - vision, E/enlightenment, insight - have proven productive in glossing over the active work that constitutes knowing. Yet she seeks to retain the metaphor of vision by mutating our conception of the 'eye'. She does so by translating it from either an all-seeing force or a passive recipient of data into an *active and situated perceptual system*. The metaphorical eye is assisted by 'prosthetic devices': instruments that amplify and mutate our 'seeing' capacities:

> the "eyes" made available in modern technological sciences shatter any idea of passive vision; these prosthetic devices show us that all eyes, including our own organic ones, are active perceptual systems, building on translations and specific *ways* of seeing, that is, ways of life (Haraway 1988: 583).

With its emphasis on prosthesis - literally, that which is 'put before' but better conceived of as that which is 'plugged in' - this conception of vision understands knowledge to be mediated. That is, the 'in-between' that constitutes subject and object is made out of many parts that help us 'see': e.g. experimental set-ups that help us stabilize and isolate a phenomenon of interest; measurement techniques such as the survey, eliciting responses on pre-coded categories; data analysis techniques that help us order and reorder into patterns suggestive of correlations. Our 'ways of seeing' depend on this mediated in-between and are shaped by it; after all, there is only so much one can 'see' with a particle accelerator, an experiment, a survey, or for that matter an interview. This mediated in-between is a material-semiotic assemblage populated by things of many kinds: cultural codes and

categories play their part, sure, but the in-between is also populated by things - *pragmata*. This conception of knowing calls for attention to the material-semiotic mediations and distributions of knowing practices:

> there is no unmediated photograph or passive camera obscura in scientific accounts of bodies and machines; there are only highly specific visual possibilities, each with a wonderfully detailed, active, partial ways of organizing worlds (Haraway 1988: 583).

Now, such an understanding of knowing clearly disallows any appeal to absolute, capital-t Truth. There is no 'view from nowhere': no all-seeing eye that, unmediated and detached, observes the world as it is.[3] Claiming this Archimedean position constitutes, for Haraway, a 'God trick' (1988): it glosses over or positively ignores the many mediations that allowed vision to occur at all. In a way, Bourdieu's sociology of Law falls prey to this specific 'God trick'. Note how Bourdieu (1987) situated both laypeople's and legal professionals' specific 'visions'. But what about his own 'perspective' on these issues? Where is that perspective located, and how is it mediated? We have seen that his 'perspective' leads us back to the role of the unmasking expositor who sees things as they really are behind the legal façade. Here, Bourdieu aims to 'represent while escaping representation' (Haraway 1988: 581). Of course, such a move is impossible - there is no Archimedean point of view. Nor does this emphasis on situated knowledges amount to relativism[4] in which every perspective is as valid as any other: truth does not 'vary with the subject' but rather speaks to the 'condition in which an eventual subject apprehends a variation' (Deleuze 1993: 21). Condition, situation: both speak to the constitutive implication of the observer in 'detailed, active, partial ways of organizing worlds' (Haraway 1988: 583).

Visions and Worlds: On Enactment

Haraway's insistence on the 'organization of worlds' is crucial here. If the subject only emerges as a result of observation, then the object to which the perspective refers is similarly an effect of observation. The relation is one between *ways of seeing* and *ways of world-making* (the formulations here are, respectively, Berger's (1972) and Goodman's (1978: 7)). Within the study of knowledge practices, this dimension of knowing activity is often referred to as performativity (Butler 1990), or enactment (Mol 2002).[5] Mol's (2002) study of the concrete ways through which the disease atheroslerosis is done and enacted is especially helpful in this regard. Much like Butler (1990), she is not content to understand (in this case biological) matter as a passive substratum of knowing activities. The distinctions between biological sex and social gender, between physical disease and socially constructed illness, is one that continues to uphold a sense of a world from which we are quite radically cut off. This world is conceived to be unitary and prior to, and independent of our actions. Yet precisely because knowing is always an activity not just 'about' the world, but in and with specific worlds, the distinction necessarily collapses. Within the hospital practices she studies, Mol (2002) notes that the disease atherosclerosis is not 'constructed' or 'thought of' in different ways, but rather that its reality is enacted in different ways. We do not simply 'know' objects; we 'enact reality in practice' (Mol 2002: 50). In that sense, there is a real and non-trivial sense in which there is not one world at all; only multiple worlds that may, or may not, be unified under the banner of the one.[6] Precisely this recognition - that we *make* different worlds as soon as we start any kind of collaboration with specific worlds, and that these worlds are not necessarily compatible with each other - opens up room for us to become able to assume responsibilities for the worlds we make. For Haraway, this kind of responsibility is the *ability to give an account*:

an account-ability that consists in the willingness to 'become answerable for what we learn how to see' (Haraway 1988: 583).

5 Making Room: Three Ways of Case-Making

Slowly but surely we are arriving at the possibility to make room for the troubles I highlighted in the introductory chapter of this book. The Law has been de-purified and restored to its practical and concrete robustness; description and vision have similarly been shown to be situated in concrete and highly variable, highly specific ways of knowing and enacting the world. It is with this vocabulary that we can start to do justice to both sociological and judicial 'ways of case-making'.

Enacting Worlds: Social-Scientific Case-Making

First, if abstraction always generates a 'remainder of things', and making knowledge is rooted in specific engagements and collaborations with reality, room is opened up to start inquiry into the *reality effects* of sociological accounts of legal practices.

Raising this question allows me to inquire into the specific reality effects produced by sociologists who, much like me, have sought to study legal practices. For instance, it allows me to ask just what it was about the Leiden study that rendered legal practices so alien to judges. With a conception of knowing as a situated and mediated practice comes the possibility to unpack the mediations crucial to the production of the Leiden study's account. On the one hand, it is worth inquiring how the Leiden study has enacted its object - judicial decision-making - but we may also ask what other realities, perhaps 'collateral' (Cf. Law 2009) to that central object, are being made. In so doing this approach also moves away from understanding legal professional's self-understandings as 'miscognition' (Cf. Bourdieu 1978) and instead aims to treat their perceptions as at least partially correct in that the 'view' granted by the Leiden study is

but one, and far from the only, mode of enacting legal practices. Inquiring just how this reality is made allows us to take seriously the rather significant levels of discomfort judges expressed in relation to the Leiden study, and inquire into how 'their practice' was made and remade in the researchers' attempts to know it.

But this recognition of the relationship between knowledge-making and world-making also raises questions with regards to the situatedness of *other* kinds of accounts of legal practices. For instance, we find more interpretatively oriented sociologists criticizing statistical accounts of legal (sentencing) practices because these would tend to neglect actual, unfolding instances of legal decision-making. Often, a concentration on narrative and spoken language is perceived as capable of counterbalancing this emphasis on offender and offense 'factors' (Mears 1998). E.g. we find Tata suggesting that these 'factors' only emerge over the course of narrative typification practices on the part of decision-makers:

> Far from being discrete, immutable and irreducible elements, in the routine decision process "factors" are inextricable and inseparable from the meaning of the constructed and reconstructed typified whole-case narrative (Tata 2007: 435).

Often, the courtroom is pointed to as a particularly salient site of story-telling and of narrative strife (Jackson 1988, 1996). This emphasis on narrative typification and its situatedness in courtrooms is important to follow up on, yet the question - again - is how and where such a mode of enacting legal realities is situated, and whether accounts like these do not *themselves* neglect other important facets of legal practices. As we will see, these narrative-centred accounts have the tendency to enact legal practices as a kind of dematerialized struggle over the meaning of words and the sense of stories, hence neglecting a crucial, if recalcitrant object in and of legal practices. I am referring here of course to that transporter of evidence, clerks' and judges' access

to 'what really happened', object of struggle in and of itself: the legal case file.

Truth as a Legal Epistopic: Judicial Case-Making

The legal case file assumes particular importance in relation to local ways of finding out 'what really happened'. As I have bracketed the constitutive distinction between norm and fact, Law and Science, the presence of truth-making practices within legal practices represents not a conceptual problem but an object of study in and of itself. Opened up is the question how various 'epistopics' (Lynch 1993) - topics of epistemological concern like truth, method, and observation - are done as a matter of unfolding activity in the sites we study. How, in other words, does observation take place? How are facts[7] made? How is truth established? This is not to suggest that the truths made in legal settings will pass scientific tests of accuracy, but merely to insist on local ways of 'seeing' and enacting specific realities. In other words, there where legal practices promise some kind of access to 'what really happened', these instances are helpfully addressed using a distributed, mediated, and practical conception of observation. Particularly the case file, allowing the transportation of evidentiary materials and the translation of an event into a punishable offense, is a salient ingredient of these epistemic practices: without it, there is no 'case' to be made.

This interest in local, epistemic practices is to be distinguished from exercises that treat 'the Law' as a more or less homogenous 'epistemic subject' (Teubner 1989) that orders and constructs reality in its own terms. While this Luhmannian vocabulary allows us to decentre the seeing subject - just like Haraway's insistence on perceptual systems does (1988) - it is important to stay with the practical robustness, as well as the specificity of concrete practices. Here, the contrast I make is between, on the one hand, a vocabulary that ties the capacity for systemic observation onto societal subsystems, and on the other a more pragmatic

understanding of truth-making allows for multiplicity within and between 'subsystems'. By tying observation so tightly to the various societal subsystems, this Luhmannian approach after all leaves little room to appreciate the aforementioned instances of multiplicity, both within and between various subsystems: the fact, for instance, that atherosclerosis *is* something multiple, even *within* what we might call the medical-scientific subsystem (Mol 2002); or the fact that there is, empirically speaking, no one 'legal perspective' or no one 'sociological perspective' to begin with. A second difference to be kept in mind, here, is the one between a Luhmannian concentration on communication - in other words, on semiosis - and Haraway's (1988) material-semiotics, which includes both meaning and *things* (see, for Luhmann's treatment of materiality (or lack thereof), Philoppopoulos-Mihalopulos 2014; van Oorschot and Schinkel 2015). In so doing we may come to appreciate the case file not only as the surface of semiotic signs, but as a material entity shaping judicial case-making practices.

An insistence on the specificity and materiality of mediation (Haraway 1988), coupled with a concern with enactment (Mol 2002), all in all allows for a more fine-grained understanding of knowing practices - wherever they practically occur. It proceeds on the basis of the suggestions that 'observation' of the world is never a disembodied, dematerialized practice of detached surveying but a situated and mediated practice (Haraway 1988). Indeed, treating the question as to 'what really happened' as a mediated practice also means opening up room to study its *distribution* over a variety of actors. Among these actors are human actors, particularly court clerks, or defendants, but also non-human ones, specifically of course the transporters and transformers of written evidence: the legal case files. But this activity is also distributed over various sites: on the one hand, the veridictional site of the courtroom; on the other, the relatively more quiet backstage offices and file-rooms. This approach, then,

brackets juristic understandings of the judge as the all-determining actor within such local 'epistemic practices' (Lynch 1993) and instead distributes knowing activity over both human and non-human actors. If we wish to cast this discussion in perspectivist terms at all, the question is not who 'has' the internal point of view, but rather one that wonders *how, where, and when perspectives upon the case happen.*

Situated Ambulations: This Case

The emphasis on activities of seeing, description, and abstraction raise question as to the 'case' I will be making throughout this book. In other words, what does the 'in-between' of my own collaborations with realities look like? How is this case situated?

Of course, the first thing to emphasize here is how this case is the product of speaking with and working alongside a total of 14 'police judges' in a Dutch court, of acquainting myself with the many other actors populating 'their' ecology of practice - especially clerks and case files! - and of following cases from file room, to judicial desk, to the courtroom. Taking place over a period between March 2013 and November 2015, this fieldwork consisted of both trying to understand the goings-on within the court's administrative offices, its dealings with files, and judges' pre- and post-trial appraisals of the individual cases. Drawing on a technique of 'shadowing', my observations of judges' work practices mostly took place right at their desk and right in the courtroom, where after some months I was allowed to take place, properly attired in robe and bib, at the judicial desk. I 'shadowed' 14 judges this way. I studied 'their' files prior to their preparatory work practices as well, so that I became familiar with about 250 individual cases (this number excludes the case files studied during my own preparatory study of files), the vast majority of which were decided on by the judges I shadowed (some cases were suspended). Informal talk and conversations with judges and clerks over lunch and throughout the ethnographically

infamous hallways further helped me along, as well as the opportunity I was granted to participate, in the Fall of 2013, in a three-day educational course for beginning police judges. Throughout this book, or rather case, I will refer to the 14 crucial judges using a pseudonym, while other judges I spoke with on a more informal basis will be referred to simply as 'a judge' (a distinction that will help you situate their words). Similarly, defendants whose individual case I have observed (and about which I have spoken with judges) are referred to by a (fictional) name, while more generalizing statements - either mine or those made by judges - will simply refer to 'defendants'.

Now, the preceding notes are only a bare outline of the activities of which my collaborations with this practice consisted. However, it is only a beginning of an answer to the question of how this case is situated. Indeed, this question is difficult to answer in such broad strokes, as each of the following chapters are rooted in different *kinds* of collaborations. One is based on a close reading of the Leiden study and aims to reconstruct, from the text as well as from correspondence with one of its authors, a sense of the specific choices made and methods used. Another chapter focuses on verbal interactions in court and is rooted in informal conversations with judges and observations of court proceedings. Yet another takes as its object clerks' and judges' file-based preparation practices, and is largely rooted in observations of their face-to-file interaction (Scheffer 2005). The last empirical chapter, in turn, combines various sources of data - conversation as well as observation of court proceedings. Taken together, these modes of collaboration combine a critical[8] approach to social-scientific approaches surrounding 'my' object of study - judicial decision-making practices - with a *praxiographic* concern (Mol 2002) with the practical work that constitutes 'judging'.

This praxiographic concern is itself less a well-defined method than a sensitivity to the vagaries of actual practices. Indeed, what

exactly constitutes praxiography is in and of itself difficult to say; it all depends on the way it is exercised in relation to specific problems, specific settings, and specific objects. In lieu of a neatly packaged definition of the 'tool' of praxiography, then, I prefer to think of it as an active mode of paying attention to actual practices, and, with James (1995 [1907]: 9) especially to their 'surprises and wildness'. Given my emphasis, too, on the case file as a salient ingredient of these practices, this praxiographic sensibility contrasts productively, for my purposes, with ethnography as it is commonly understood: that is, with ethnography as a mode of researching and writing that takes as its object *human* actors and their culture. Praxiography's objects of concern are not any predetermined human collectives (the 'ethnoi') or their culture, but *practices*. Last, and much like ethnography, it places emphasis on writing and rewriting (*graphein*) over the extraction, from practices, their guiding logos (as in: praxe-ology, see also Schatzki, Cetina and Savigny 2001).

To me, praxiography's definitional openness is immensely productive, precisely *because* there are no pre-existing habits that can dictate how one should go about 'doing' or 'using' praxiography. Indeed, the very notion forces us to *think* about how we conceive of practices and how we might *write* about them. Praxiography is precisely therefore a 'tool for thinking' (Stengers 2005), that is an attempt give 'to the situation [itself] the power to make us think' (Stengers 2005: 185). It also raises direct questions with regards to its own 'toolness', that is, its own non-innocence in mediating our own inquiries. It is not immediately ready-to-hand to us, but mere contemplation upon its capacities and limitations will not do either. It must be taken up in so that we can *work through* its affordances, and there is no guarantee such efforts will yield the desired results. In other words: it produces itself the *risk* the researcher will have to be willing to take (Cf. Stengers 2005). Taking it up is each and every time a new and particular gesture (id.: 185). Its 'application', or rather its *exercise*, is

intimately connected with the specificities of the 'object' of study, whether this is a peer-reviewed article, narratives in court, or various 'doings with documents' (Harper 1998) in legal practices. It is for that reason that I will not isolate these concerns in a separate methodological chapter, but comment on the way this praxiographic sensibility takes shape in relation to specific sites and objects of study throughout the separate chapters in more detail than I can provide here.

'Knowing as One Goes'

Together the following chapters demonstrate not only an attentiveness to the situatedness of knowledge, but also to the value of *movement* between various perspectives. Each of the following chapters takes up a hiatus produced, a reality unmade, in the preceding chapter by moving from one standpoint to the next. From a study of the 'factorial approach' to legal practices evident in the Leiden study, I move to the unfolding of decision-making in relation to narrative typification practices taking place in court (Tata 2007), specifically as they pertain to the mutual elaboration of questions of guilt and remorse. From the court, I move 'backstage' (Goffman 1959), where clerks, judges and files are all implicated in extracting from the paper or digital file a condensed 'image of the case' (van Oorschot 2014a). From an understanding of the file as a materially recalcitrant object, I move to an appreciation of its temporalities, so that I find myself always *in relation to* the file, but also - depending on the 'quality' of the file - both 'here', in court, and 'there', at the time and place of the offense in question.

This ambulatory and praxiographic mode of paying attention, then, is not necessarily rooted in one place in particular, although it is always situated. It takes seriously the pragmatic dictum that in order to *arrive* at truth, we'll have to set ourselves in *motion*: after all, methodology - meta-hodoi - is always a matter of travelling roads. The roads travelled between these epistemic situations are

written into this book as part and parcel of the 'case' I am making. In a sense, I practice a metaphorical praxiography 'on foot' (Ingold and Vergunst 2008), as my position is not tied down to one static perspective but instead seeks to travel between situations. This kind of travelling cannot forget or gloss over the fact that the sailing is not always smooth, that the roads travelled may be bumpy and the terrain treacherous. In contrast to a conception of knowing that forgets this rocky in-between - a floating eye that 'barely skims the surface of the world, leaving no trace […] or even any recollection of the journey' (Ingold 2006: 25) - I will attempt to retrace my steps and reconstruct the building of a perspective as well as my lines of escape towards differently situated perspectives. These trajectories are shaped in relation to the physical, digital, even legal environment; they are also shaped in relation to disciplinary problematizations, theoretical blind alleys and conceptual lines of flight. Both the 'mechanics of movement' and 'formation of knowledge' (Ingold 2007: 50) are always implicated in each other; my task is to show you how, where, and with what effects. With Joseph K., I will stay on the move - without hope of finding that elusive magistrate judge, perhaps, but in anticipation of encounters with the unexpected.

NOTES

1 I highlight in this chapter the epistemic uses of abstractions, hence narrowing the question of 'experience' down to experiences we would call 'empirical'. Of course, this is a rather limited understanding of 'experience', not including, for instance, metaphysical experience (the question is whether one can separate the metaphysical and the physical, of course). I will touch upon these issues in the last chapter of this book, when I introduce a more fruitful abstraction - the notion of the hyper-object - with which the think and study 'the Law'. There, I will pay attention to possibilities for action and intervention afforded by a more pragmatic, as opposed to contemplative,

orientation to beings that always tend to escape both our capacity to know and our scales of (political, ethical) action.

2 I use the term *archive*, and not 'written Law' or 'Law-on-the-books', here because I seek to divorce this issue from accounts of the Law that place its historical emergence within an oral/literacy framework (e.g. Goody 1986). This kind of account generally suggests that Law emerges once societies or cultures move from largely oral modes of communication to written modes of communication. After all, writing - according to this kind of account - is crucial in organizing not only the present but, in Levi-Strauss' words, 'the present and the future':

> Once men know how to write, they are enormously more able to keep in being a large body of knowledge. Writing might, that is to say, be regarded as a form of artificial memory, whose development should be accompanied by a deeper knowledge of the past and, therefore, by a greater ability to organize the present and the future. Of all the criteria by which people habitually distinguish civilization from barbarism, this should be the one most worth retaining: that certain peoples write and others do not (Levi-Strauss 1961: 292).

In contrast with this rather narrow concentration on writing I emphasize the archive itself, as the notion of the archive is (at least conceptually, if not empirically) not tied up with a specific medium of communication. While writing surely may introduce efficient ways to retrieve, from the past, decisions in a search for precedent, I am not convinced that this archival 'memory work' is adequately captured by mapping it narrowly on to the medium of writing. Oral modes oftransmission may ensure both the Law's memory and archive function - see e.g. the Quran, which literally translates as 'recitation' (see Messick 1993). The archive, conceived broadly as a technology of memory, storage, and order conveniently escapes the narrow confines of the orality/literacy framework. Moreover, it also carries with it the suggestion that the archive itself is always the product of archival *work*, subject to ordering and interpretation, and as an object related to the technologies of Law and/or State (see e.g. Osborne 1999).

3 This is the objection that asks: if absolute truth is dead, is everything permitted? Are all statements quite as true, or rather quite as false, as any other? Is everything a 'matter of perspective'? It is a tempting question, but rests, in my view, upon a flawed opposition, i.e. the suggestion that the opposite of the 'view from nowhere' must be a 'view from everywhere'. The answer to this question is a resounding no. Haraway's conception of seeing is precisely a cure against such relativism. Relativism conceived as an attempt to 'see from everywhere' is as neglectful of mediations as its obverse, i.e. the view from nowhere. By taking into account how, where and when

knowledge is situated is to retain a sense of its objectivity (Haraway 1988). This objectivity is limited, as it does not seek transcendence or detachment; it is also partial, as it does not seek absolutes but remains committed to the production of operative, workable truths. Such truths do not need the metaphysical scaffolding of the Absolute: what is wrong with provisional, situated, humble truths rooted in specific modes of grappling with the world in and of itself? Valverde (2008: 9) warns, too, that the opposite of capital-T truth is not 'lies'; its opposite is rather a multiplicity of truths, each valid to the extent that they are operative and accountable for their situated and mediated character. The notion of accountability is crucial here: required of us is the ability to give an account of the various mediations that went into producing this truth here or that fact there.

4 Also, consider how the location of Bourdieu's metaperspective is *also* the epistemic location of that secularized God: the State (Schinkel 2015). A God trick, indeed.

5 Mol (2002) draws distinctions between the notions of performance, performativity, and that of enactment. Notions of performance needlessly assume the existence of an actor 'backstage', or a 'doer behind the deed' (Cf. Butler 1990). The notion of performativity, however, is also problematic to Mol (2002), and for two additional reasons. First, the word remains too much burdened by its implication in debates regarding (social) identities, while she wants to be able to speak not (only) of the constitution of subjects (e.g. women, observers) but of objects (disease). Second, the notion of performativity remains too much tied to the doing and making of the social, while her proposed notion of enactment would be able to justice to both material and semiotic practices of world-making. For that reason, she prefers the term enactment (see Mol 2002: 32-41). In this book, I tend to use both notions interchangeably.

6 Mol's point on multiplicity (2002), here, is eminently pragmatic (in the philosophical sense of the term), but not obviously so. For on the one hand, one may wonder why we need such trading in ontology at all: is it not enough that there are *different constructions* of what we assume to be a singular world? What, to raise the pragmatic question, difference does this difference make? Yet the difference between the relativist 'social construction of realities' and the more radically ontological insistence on 'multiple enactments of realities' is crucial, precisely because it suggests that there is pragmatically no *need* for an underlying world to encompass or unify our accounts. Why such encompassment or totalization takes place, how it does so and where, are then viable questions in and of themselves. How is the fact of multiple objects juggled in, for instance, hospital settings? How are realities ordered, compared, hierarchized, made compatible?

7 A note on the word legal fact: I am not referring, here, to notoriously fictitious legal facts such as the 'reasonable man' but to local ways of establishing something factually happened.

8 I am using the term 'critical' not to suggest I am interested in treating these accounts as 'lies' covering up a realer truth. Precisely the opposite, I would argue: a critical stance, invested in finding out what social-scientific accounts may do (and what they might not do) is one that takes its object very seriously. The kind of critical stance taken here is one that aims to situate social-scientific accounts of judicial practices. Unless one understands criticism and care to be mutually exclusive (I do not, see also Haraway 1988, Latour 2004), this effort strikes me as one more respectful to the intricacies and 'wildness' of social-scientific research practices than either a simplistic belief in its truth-telling mandate or an equally simplistic rejection of social-scientific expertise as mere power-struggle by epistemological means. For these debates, see also Latour (2004).

3 Dealing with Difference: Doing Criminal Law and Social Order

1 Guilt and Denial?

Intellectual work takes patience, practice, and, of course sheer serendipity. Serendipity would have it that the start of this research project was marked by a controversy that went directly to the heart of the issues I am discussing here: the relation between legal practices on the one hand and their social-scientific description on the other. I am referring here to the study of sentencing disparities in Dutch criminal law titled *Differences in Sentencing in Similar Cases: A Quantitative Study into the Role of Specific Defendant Characteristics*, authored by Wermink et al. (2012a), and published in the Dutch Jurists' Magazine [*Nederlands Juristenblad*]. The study concluded that defendants with foreign looks, particularly when they did not speak Dutch, were more likely to receive a prison term than defendants who both look and speak Dutch.

As I have shown in the introduction to this book, judges were not pleased with this study. They raised questions about the 'partiality' of the research and about the qualifications of the researchers themselves - do they have 'any idea how a judge arrives at a sentencing decision?' (Bade and van der Nat 2012: 973). Judges who I was to meet later during my fieldwork had not forgotten about the study, and would assert in no uncertain terms that they were not happy with the study's implication. The implication being, of course, that they would disadvantage people with certain legally irrelevant characteristics - specifically those

with foreign looks and those unable to speak Dutch. Of course, there is a (very much disputed) word for making such illegitimate differences: racism.

Given this implication - i.e. judges wittingly or not reproduce discrimination against minorities - it is particularly tempting, perhaps, to understand judges' responses to the study as variations on the psychological mechanism of denial: 'I know very well I am guilty, but I will pretend not to be (even to myself if need be)'. Or, it is possible to understand, with Bourdieu (1987) perhaps, these reactions as rooted in a blind spot that would accompany judges' professional pride: surely discriminating people on the basis of their looks would go against the very thing in whose service they are working, that is the Law and its promise of equal treatment. Or, yet more generally, it is also possible to explain these reactions as a broadly Dutch kind of racism in and of itself: a racism that, more collectively than individually, thrives upon its own denial of guilt in a claim to either 'Dutch' or 'white' innocence (Cf. Wekker 2016). All such readings fundamentally find the root of judges' reactions to the study in pride and self-deception. Crucially, all such readings also attribute to the sociological observer epistemic privilege: the social-scientific researcher simply knows best. Now, I am the last to dispute the political import of diagnosing and addressing racism, especially when it takes on complex and opaque psychological, social, and cultural forms. Yet in this specific instance I think these interpretations of the judges' reactions to the Leiden study are both theoretically reductive and actively harmful in their appeal to the epistemic privilege of the social-scientific observer. Let's zoom in on three problematic consequences in particular.

Situating Expert Knowledges, Establishing Rapport

For one, such readings are reductive in that they gloss over the ways judges may have been on to something when they spoke of 'partiality'. In attributing judges' responses to a psychological or

cultural mechanism of denial, in other words, we miss out on the opportunity to take their concerns seriously and to inquire into the differences between this specific account of their practices and local ways of making cases and doing justice. That is, even if we agree that illegitimate forms of making differences *can* and *should* be studied using social-scientific methods and standards of inquiry (which I do), we may still want to understand just how specific combinations of subject matter, methodological apparatuses, research questions and implicit assumptions shape and enact realities that may, or may not, be commensurable with local ways of judging. After all, social-scientific interventions do 'category work' as well (Krebbeckx, Spronk and M'charek 2016; Yanow 2003). Differences, to speak with Krebbeckx et al. (2016: 3), are always 'in the making' (see also M'charek 2010). Lumping and splitting individuals or 'cases', they may just categorize and classify in ways that do not necessarily resonate with local ways of 'seeing' and making differences between cases or individuals.

This emphasis on the realities enacted in and through this study is all the more important, secondly, considering the politics of undisputed claims to social-scientific privilege and the singular reality these claims tend to presume. Indeed, if there are valid indications that the all-knowing subject of knowledge or science has historically hidden its own situatedness at the centre of Western, imperial, and male power (e.g. Chakrabarty 2000; Haraway 1988; Spivak 1988) is it not crucial to political struggle itself to question the self-evidence of the 'view from nowhere' (Haraway 1988) of the social-scientific expert? Does such a project not require us to put into doubt the possibility or the desirability of absolute, unmarked, unmediated vision and the mighty subject it presumes? Against an understanding of politics as driven by facts about a singular world, I would point out that the *precondition* of political struggle - including those of anti-racism activists - is precisely multiplicity in *perception* (of realities) and *conception* (of alternatives).

Last, I doubt that relegating judicial responses to a variation on the psychoanalytic mechanism of denial has the capacity to establish *rapport* between social-scientific observers and practising jurists, that is, the possibility of first, understanding, and second, independently valuing, the specificity of both social-scientific research practices and legal practices. For that kind of rapport seemed very much missing throughout this controversy. Like Bade and van der Nat (2012) in their written reply to the Leiden study, many of the judges I met felt that the Leiden study suffered from a similar ailment: the researchers did not seem to know 'what judging looks like'.[1] Doubtlessly making this epistemic controversy particularly tenacious is the charge of discrimination, which is in essence a discussion about what differences - between cases, between individual defendants - should, and should not, be allowed to make a difference to judicial decisions. With commentators 'talking past each other' this way, it is my aim not to adjudicate between these two positions at epistemic war, but rather to trace what realities the Leiden study enacts. In doing so, I hope to demonstrate just where and how it hurts for judges: not in order to heal, but simply to understand just enough to establish the beginnings of rapport.

2 Journeying and Points of Passage

In tracing the specific performativities of the Leiden study, this chapter is an account of the kinds of methods social scientists have employed in the study of judicial practices and the kinds of realities enacted in doing so. It is a reflection on a set of common-sensical assumptions made about the objects of sociological attention, and a commentary on the frictions that emerge when such assumptions are coupled with an unproblematic appeal to social-scientific jurisdiction. At that moment, not only is there little room to establish 'rapport' with

the practices and people hence judged, but also conceptually difficult to find ways to do justice to local, practical, and unfolding ways of 'doing justice'.

Yet this chapter is also an effort to incorporate the *fact of journeying* into this narrative, and to retain a sense of the roads travelled in my account. That is, journeying is not only a question of navigating physical boundaries (although it is that, too), but also of encountering densely packed and entangled knowledges, claims, and truths surrounding one's object of study. Often, we encounter these at the stages of exploratory literature review, and incorporate the insights these offer about the object of study into our own questions, methods, and choices for topics of inquiry. In doing so we use these accounts as a lens, sharpening (or perhaps dulling) our preliminary insight into the object of study. We look *through* these accounts, directly to the reality - presumably singular - to which they refer, trying to combine and contrast insights just to know more about the object of study. Yet the Leiden study and the brief controversy it sparked precisely seem to disallow such exercise in 'looking through' accounts of 'our' object of study: it is a moment where the people studied spoke back and (re)claimed jurisdiction. As an entanglement of professional, epistemic, and methodological claims, then, it proffers itself as an object to be looked *at* in its own right.

This is all the more so as the Leiden study places itself within an established tradition of statistical research into sentencing disparities (see e.g. Zatz 1987; Spohn 2000). This tradition proffers itself as crucial to not just (epistemic) understanding of legal practices but also aims to mobilize interest by pointing out the difference between 'Law on the books' and 'Law in action' (see Pound 1910), the promise of equal treatment on the one hand, and differential outcomes on the other. As part and parcel of the various modes of research into judicial practices, this kind of research approach is in many respects an 'obligatory passage point' (Callon 1986) for those seeking to understand judicial

practices. All the more reason, then, to look *at,* rather than look *through,* this kind of approach to sentencing practices. What happens when we journey using this obligatory passage point? How is criminal law constituted?

As such, this attention to the 'obligatory passage point' of the Leiden study contrasts, too, with more classically ethnographic modes of writing that emphasize arrival in the 'field' and departure from it. Captured most famously in Malinowski's *Brief Outline of the Ethnographer's Tribulations*, the arrival trope is mobilized when he asks the reader to imagine

> yourself suddenly set down surrounded by your own gear, alone on a tropical beach close to a native village while the launch or dinghy which has brought you sails away out of sight (Malinowski 1922: 4).

Of course, this ethnographic arrival scene is a narrative artefact (Pratt 1986) and tends to write away the fact that arrival was made possible by capitalist and colonialist expansion to begin with - something Malinowski laments and later, Levi-Strauss comments on with significant *tristesse* (1961). This narrative gesture is present not only in such more classically ethnographic writings, however; in the social study of knowledge practices, it is perhaps most interestingly drawn on by Latour and Woolgar (1979), whose *Laboratory Life's* first chapter similarly starts with a plunge into the deep end: the laboratory under study. While there are excellent reasons to start, pragmatically, 'in the middle of things' (after all, that is where we always already are), this does not always mean we must start our narratives as if we are suddenly set down 'in the field'. Writing *as if* we were 'suddenly set down' in the middle of things glosses over our explorations, our detours, our stumbling about in the face of objects of study both familiar and strange. Arrival scenes also isolate both 'the field' and 'the researcher': 'the field' from many specific (research) practices and networks within which it is taken up, even if only as an 'object of study'; the researcher from a community of scholars

and from the conceptual pull of disciplinary borders, problematizations, and obligatory passage points. Yet these all shape one's travels, and should be accounted for. Starting, then, not with arriving in the 'field' but with the beginning to journeying, this chapter is both study of the Leiden study's performativities and part account of passages I sought.

In the following, I will first briefly introduce the Leiden study in more detail, taking care to introduce its theoretical concerns, the methodology it employed, and the conclusions it draws. After this brief discussion, I turn to a discussion of its performativities, distinguishing between its enactment of decision-making, of (criminal) law, of the individual defendant and, in relation to the individual defendant, the naturally occurring population its enacts.

3 The Specifics of the Leiden Study

The three researchers of the study published in the peer-reviewed section of the Dutch Jurists' Magazine, studied, in brief, what defendant characteristics exert influence on judges' decisions to unconditionally imprison defendants or opt for another (conditional or unconditional) sentence type, e.g. a community service or fine. That is, it is interested in finding out what factors play a role in judges' decision between sentence types. Theoretically, the researchers draw on what in the Anglo-Saxon literature is called the 'focal concerns theory' (see e.g. Steffensmeier, Ulmer and Kramer 1998). Originally 'focal concerns theory' was constructed to account for the cultural dimensions of lower-class gang life (see Millers 1958), yet later generations of sociologists have come to apply it to members of the judiciary to account for the concerns they incorporate into their sentencing decision. Focal concern theory suggests that judicial decision-makers incorporate three focal concerns into their sentencing decisions:

1. the offender's culpability,
2. the offender's (perceived) dangerousness to society, and
3. the practical consequences of the decision for the offender, as well as the organization itself (see Millers 1958; Wermink et al. 2012a: 727).

Each of these three focal concerns are expected to have some explanatory power; yet as concepts, they are in dire need of operationalizations. That is, they have to be translated into a set of concrete variables. Here, socio-demographic factors make an entrance in their operationalization.

The authors identify the first focal concern - the offender's culpability - as plausibly connected with an offender's criminal past, as 'that kind of past would suggest greater culpability for the current offense' (Wermink et al. 2012a: 727). In addition, the authors state that a criminal past is also plausible to increase perceptions of offenders' 'dangerousness' - the second focal concern. But offenders' criminal past, they note, together with the legally relevant factors of offense type and severity, does not appear to explain all variation in sentence types. Previous research also suggests that 'socio-demographic characteristics, like the offender's ethnicity and gender' (id.: 727) similarly seem to play a role. Here, too, focal concerns theory - and in particular focal concern number two, the perceived dangerousness of the offender - helps the authors to justify their hypothesis with regard to these socio-demographic factors:

> allochthons or defendants with a foreign appearance could be deemed more dangerous through stereotyping by judges, for example because of [allochthons' and foreign-looking defendants'] disproportionate participation in criminal activities and overrepresentation in the prison population in comparison with the Dutch [population] (Wermink et al. 2012a: 728).

Both the offender's criminal history and various socio-demographic factors, particularly whether he or she is allochthon

or has a foreign appearance, are hence included with reference to focal concern 1 (the offender's culpability) and focal concern 2 (the offender's perceived dangerousness to society).

Positing, furthermore, a slightly different causal mechanism, as well as a causal mechanism exacerbating the influence of stereotyping, the researchers also suggest that the *language* the offender uses in court will matter: first, miscommunication between judge and offender is more likely, and second, because those who do not speak Dutch and appear foreign are likely to have an ever higher chance of being stereotyped than those who look foreign, but speak Dutch. The authors also touch upon the last of the three focal concerns - the practical consequences of a sentence for the offender or the organization itself - when they suggest that practical considerations make those who do not speak Dutch even more likely to receive a prison term, as their incapacity to speak Dutch will likely pose problems when a community service must be executed.

The researchers also incorporate a set of control variables such as the location of the court, the type of offense, the defendant's age category, and a series of binary variables detailing whether or not the defendant has spent time in pre-trial custody, whether or not the defendant has a criminal record, and whether or not the defendant perpetrated the offense alone or in association. Importantly, the dependent variable details whether or not the defendant receives an unconditional prison sentence and is hence dichotomous. A distinction is made between unconditional prison sentences on the one hand, and on the other, all other sentence types, such as a fine, an unconditional community service, or conditional prison sentence (all of varying gravity). Crucially, as this dependent variable is dichotomous, the authors cannot use measures of correlation but instead turn to a binomial logistic regression analysis. Without detailing much about this particular kind of analysis - which contrasts with more traditional forms of regression analyses of variation on (presumed to be)

continuous variables - the authors go on to present their descriptive statistics (id.: 730) and then their analysis (id.: 731).

Going on to review their findings, the authors state that their expectations with regards to the role of 'foreign appearance' and 'speaking Dutch' have been confirmed: controlling for all relevant variables, they find that defendants who look and speak Dutch have the smallest chance of being sent to prison, while those who do speak Dutch but have a foreign appearance are five times more likely to be sent to prison than not being sent to prison in comparison with that group. Those who do not speak or look Dutch are twenty times more likely to be sent to prison than being *not* sent to prison in comparison with the Dutch-looking and Dutch-speaking reference category, so that this category of defendants qualifies as the 'most severely punished' (id.: 732).[2]

Now, I have alluded to the fact that this study, upon publication, sparked a brief controversy in the media. Following the publication of the study, the NRC Handelsblad paid attention to its findings in a brief newspaper article, summarizing the researchers as having found that judges

> punish defendants with a 'foreign appearance' more severely than they do the Dutch, in particular when the defendants do not speak Dutch. […] The researchers have judged by the defendant's appearance whether he or she is possibly from abroad. Whether the defendant is in actual fact a foreigner was checked with help of the defendant's country of birth, which is always mentioned in court' (NRC 2012, March 14).

In the next day's editorial, the NRC concluded that the 'intuitive judge has been caught out' (NRC 2012, March 15) and that lady Justice's blindfold 'seems an illusion, not a self-evident professional characteristic'. Emphasizing that 'judges are not immune to stereotypes', it suggested that further large-scale studies should be conducted. Indeed, while it emphasizes that 'solid conclusions about the possible lack of sentencing parity

between allochthons and autochthons cannot be drawn from one study', it nevertheless raised the following questions:

> Are criminal law judges sufficiently aware of the influence of negative stereotypes? Is there attention paid to such issues throughout their education and in collegial 'intervision' [*intervisie*]? Do people correct each other there or is this study a bolt from the blue? Are there, moreover, enough criminal law judges with a non-Dutch cultural background? (NRC 2012, March 15).

Other actors similarly extracted, from the article, the suggestion that the Dutch judiciary is facing significant problems in *dealing with difference*. For instance, not only did the National Minority Counsel (LOM) express their shock with the study's conclusions, they also requested of Minister of Security and Justice Opstelten to formally distance himself from these discriminatory practices, to take 'appropriate measures', and to enter into dialogue with the partnerships making up the Counsel as soon as possible (LOM 2012). Members of Parliament, Recourt (PvdA, centrist Labour Party), Dibi (the Green left) and van der Steur (VVD, the largest Liberal party), for their part, each submitted sets of formal questions to the same Opstelten. These questions roughly concentrated on whether the Minister shares the researcher's conclusions 'that negative stereotyping with regards to defendants with a foreign appearance play a role in their greater likelihood of receiving a harsher sentence', and the actions the Minister would undertake to make sure that 'judges do not weigh the defendant's appearance in their sentencing decisions anymore'[3] (Kamerstukken II 2011/12). In response, the Minister asked the Scientific Research and Documentation Centre (WODC) to critically appraise the study and used this to inform his own reply to the request of the members of Parliament (Ministerie van Veiligheid en Justitie 2012). A more detailed reply, written by two WODC researchers was later published in the same Dutch Jurists' Magazine (Weijters and Leeuw 2012), together with a

reply of the three authors of the study (Wermink, de Keijser and Schuyt 2012b) and a reply by two judges (Bade and van der Nat 2012). These assorted documents, together with personal correspondence with one of the study's authors, make up the core materials upon which this analysis is based.

4 Seeing Decision-Making, Making Differences

Let's turn, now, to the central questions addressed in this piece. How is the Leiden study's 'perspective' upon judicial practices made? And what realities are enacted in the building of this perspective?

Oligopticism-in-Action and the Black-Boxing of Decision-Making

While Hartian socio-legal scholars may be quick to understand the Leiden study to embody an 'extreme point of view' (Hart 1994 [1961]), it is nevertheless instructive to be a bit more specific about how this perspective is built and how it is situated. First of all, what strikes any reader is the rather large N of the study. While a sample size of 333 cases may not seem much in comparison with other, larger databases, this number of cases nevertheless effectuates itself what Latour (2005: 181) calls a kind of oligopticism. This sociological oligopticism allows the researchers to 'see' many cases at once. However, this is a qualified kind of oligopticism: it is far from an effort to see 'everything', but rather to 'see' *cross-sectionally* in order to gauge differences between groups of individuals. In so doing its ambition is revelatory: it tries to see many cases at once and to reveal consistencies and patterns one might not see 'up close'.

It must do so, crucially, by cutting up cases into dependent and independent variables (in this case, it only works with one dependent variable, that is the binary variable detailing whether or not the defendant received an unconditional prison sentence). The making of these variables is inevitably a practice of lumping

and splitting: of making differences, as well as grouping together, phenomena of a certain kind. This is, incidentally, where the study attracted most criticism. For instance, the objection to this study that the researchers, in their measure of the defendant's criminal history, had opted for a binary variable detailing only whether the defendant did or did not have a criminal record, is one such an objection. The question is not whether a defendant does or does not have a criminal record, it was argued, but also precisely how 'long' it is, and whether it details 'relevant' recidivism (that is, whether the current offense is of a similar type as the one the defendant was previously convicted with). Neither did the study adequately control for the severity of cases lumped together: dealing in large quantities of heroine is arguably a wholly different offense than the possession of a small amount of party drugs, for instance (see also Ministerie van Veiligheid en Justitie 2012; Weijters and Leeuw 2012). In the social study of legal practices, much has been said about the particular reduction such a 'perspective' effectuates. Case-specific characteristics of relevance to decision-makers may not be measured at all (if only to function as control variables in the final analysis), or, distinctions of local relevance may be glossed over and grouped together as constituting a single variable. Lumping and splitting, then, are never neutral operations. And as we will see later on, the 'category work' the study did in lumping and splitting defendants' in their social characteristics will prove somewhat controversial as well.

However, let's first look at its object of study: the outcomes of judicial decision-making. The charge that statistical research inevitably runs into difficulties accounting for the causal mechanisms at the heart of its analyses applies here to some extent as well. Analysing the effect of 'input' on the decision's 'output', judicial decision-making itself is 'black-boxed'[4] (Latour 1999). That is, enacting judicial decision-making as an input and output system - values on the independent variables go in, values

on the dependent variable come out - the statistical analysis has the tendency to seal off the complexities of such decision-making itself. This, of course, is not necessarily a problem: black-boxing decision-making in favour of a more cross-sectional perspective is instructive. Yet the theoretical addition that the observed differences in output are plausibly explained with reference to focal concern theory adds, in turn, another black-box at the heart of the postulated causal mechanism, that is: the 'head of the actor' (Garfinkel 1967) him/herself. The suggestion is hence that the observed differences are due to cognitive processes - 'focal concerns'. And there, too, yet another black box makes its appearance, as the authors distinguish between a transparent part of that 'head of the actor' - the conscious - and the opacity of the unconscious, where bias resides.

For sociologists, these remarks on the performativity of the Leiden study are doubtlessly exemplary of a broader criticism of statistical methods. They have a history: for instance, Becker suggests that statistical analysis, although having some use, is of limited value precisely because it reduces the richness of life-as-lived: 'it's only *your* analysis that produces the abstract and discrete variables which then have to be put back together' (Becker 1996: 56, emphasis added). What the fieldworker in contrast 'sees is not variables or factors that need to be "related" but people doing things in ways that are manifestly connected' (id.: 56). In so doing this specific argument has the tendency to separate the vagaries of everyday life from the 'premature quantification' (Thomas and Thomas 1928: 567) associated with statistical methods. The appeal is more or less explicitly naturalist, so that a distinction between the richness of everyday social life and the cold formalisms of statistical analysis is erected. This *methodological romanticism*, if I may call it that, does little justice to the fact that statistical analysis is itself a productive and concrete practice - that, I repeat, can and should be studied in its own right. As soon as statistical analysis is contrasted with the 'actually

occurring', lost from view is the fact that statistical analysis is *itself* 'actually occurring'. Indeed, while such objections are cast in a register of lack and failure (to measure, to adequately grasp), they do *productive* work as well. As a consequence of lumping and splitting and black-boxing, several 'collateral realities' (Law 2009) are made. These 'collateral realities' are best conceived of as realities that may not be the delineated object of study - the outcomes of judicial decision-making in this case - but realities that are made as a side-effect of investigative work. That is, they are a kind of ontological fall-out to the ways knowledge is made. So what does the study's emphasis on aggregates do in the production of a specific conception of criminal law? And *who* or *what*, secondly, are its subjects?

Distributing Justice, Sorting Population Groups

The Leiden study approaches criminal law as a *distribution* and *sorting* machine. It distributes justice in the form of punishment, and it sorts people by attributing them differential statuses. Indeed, the conception of criminal law enacted here has affinities in Hasenfeld's conception of organizations more generally as 'people-processing organizations' which are defined as organizations

> attempting to achieve changes in their clients not by altering basic personal attributes, but by conferring on them a public status and relocating them in a new set of social circumstances (Hasenfeld 1972: 256).

Importantly, it is precisely this approach that renders criminal law, at least conceptually, comparable to other 'people processing organizations' - e.g. to medical practices or to educational practices. This is a significant advantage: for instance, it then becomes possible to look for differences in the performance both within these machines - between, for instance, individuals courts - and between them, for instance when one is interested what role

is played by different institutions or organizations in the reproduction, exacerbation, or mitigation of social inequalities. Yet this same advantage translates into what Hart would call the 'extreme point of view' (1994 [1961]) that has little to say about what distinguishes criminal law from other distributing and sorting machines. What, in other words, sets criminal law apart from other institutions that similarly operate to distribute a collective good and similarly sort people? This is a specific performative effect that happens whether or not fact actual differences (discriminatory effects) are found to result from the machine's operations. The very problematization of criminal justice as a 'sorting machine' ensures that little *legal* is said about the exercise of Law. There is, to be precise, one place where 'the legal' can be said to play a role: in the distinction between case characteristics deemed legally relevant and those deemed legally irrelevant. Crucially, however, those factors deemed legally relevant - in particular the kind and severity of the individual case - are precisely delegated the status of a *control* variable, so that the 'legal' is enacted as a *context* to the actual substance of 'social' distributing and sorting processes.

Social Order: Factors, Populations Groups, Nature and Nationality

Now, if this study enacts the criminal justice process as a distribution and sorting machine, then who are the object of such sorting and distributing work? The short answer is: naturally occurring, always already there, groups within society, or: population groups [*bevolkingsgroepen*] of which individual defendants are understood to be a member. This operation is evident in the way the study disaggregates, and assembles anew, individual court cases. Enacted in the Leiden study is the case as a collection of factors, some of which pertain to the offense in question, some of which pertain to the offender in question. In this distinction, it echoes the judicial distinction characteristic of offender-focused jurisdictions like the Dutch[5] between the

offense and the 'personal circumstances' (or 'person of the defendant'), but it is also typical of studies in the sociology of sentencing more generally (Mears 1998; Tata 2007).

At the same time, the 'person of the defendant' figures not as a judicial category but incarnates sociologically. That is, the 'person of the defendant' is the location of a set of imputed, arguably 'social' qualities. Gender is one of these presumed qualities in the Leiden study, but perhaps more interesting is the strange and slippery way it enacts differences tied to defendants' degree of 'Dutchness'.

That 'Dutchness' is of prime importance to the authors' analysis goes without saying: drawing on a binomial logistic regression analysis, the authors need a reference category against which to measure the relative likelihood of other categories of people. Of course, the choice for what category constitutes the reference category is statistically arbitrary, and the authors - as is often the case, see Boersma and Schinkel (2015) - have elected to use 'Dutch-looking and Dutch-speaking' as the reference category against which variation is measured. The interesting question here is how precisely this category is made; that is, how presumed differences in the population are made consequential to their measurement of 'social factors'. While the authors variously refer to 'ethnicity' (e.g. Boersma and Schinkel 2015: 727) or the distinction between 'allochthons' and 'autochthons' (e.g. id.: 728), something a little more complex is happening in the Leiden study. Remember that the study does not draw on officially registered data on the ethnicity or allochthon status of defendants appearing in court (indeed, that information is, in the Netherlands, not registered at all either by courts or other actors, even though there are efforts to categorize those registered as *suspects* using several databases, see e.g. Blom et al. 2005).[6] Instead the Leiden study relies on student assistants' observations in court. However, the article itself is curiously silent about how these observers make differences between defendants according

to their 'foreignness' or 'Dutchness', and does not elaborate on how such foreignness and Dutchness is to be operationalized. So *what* do these student assistants observe, precisely?

According to the official publication in the Dutch Jurists' Magazine, the students have observed whether or not the defendant 1. Speaks Dutch and 2. Has a 'foreign' or 'Dutch appearance'. The second measure of 'Dutchness' is particularly interesting: it seems to enact Dutchness and foreigness as something completely and common-sensically evident, visible at first glance to the untrained eye of student observers. In that sense, it enacts Dutchness and foreignness as a 'superficial', immediately legible difference of the body and the face. Indeed, in a 'fact-checking' blog of April 17, Schuyt tells us that with regards to this measure of difference, 'one could think of having a moustache, black hair and brown eyes' (FHJ Factcheck, 2012, April 17).

This collection of differences awkwardly combines the cultural - a preference for moustaches most commonly associated with foreign men - and the biological, congealing into *phenotypical* mode of doing difference. The individual's body, there, is a collection of biological and cultural signs. Interestingly, Schuyt here makes no mention of that marker most commonly associated with difference, that is, skin colour. This hesitancy speaks perhaps to the 'absent-presentness' of biological race in contemporary, Western-European speech about difference (M'charek, Schramm and Skinner 2014; M'charek and Skinner 2014). At the same time, difference remains something legible on and of the body: mobilized are moustaches, hair and eye colours as markers of difference.

However, complexities continue to multiply. Whether or not a defendant had a 'foreign' or 'Dutch' look, the authors tell the NRC,

> was checked in the context of the hearing with reference to the defendant's birth country and the defendant's [migration] history (NRC 2012, March 14).

Here, the plot thickens: birth country *and* 'the defendant's history' have also played a role in the categorization of defendants. Does this mean that the in-court observers have 'checked' their *own* observation of the defendant against what is now presumed to be his or her *actual* foreignness, a foreignness which is here tied to defendants' birth place and migration history? Now, the article or other sources do not detail how such 'checking' took place and how observers have prioritized different 'measures' of foreignness: for instance, what if their observation was wrong and the person was, indeed, born in the Netherlands? Which 'measurement' of foreignness would they have prioritized?

Replying to precisely this question raised by Weijters and Leeuw (2012), the authors explain that the distinction between allochthon and autochthon was based particularly on the defendants' birth country (which is always mentioned in court) (Wermink et al. 2012b). However, as one of the study's authors further explained, this measure of 'foreign-ness' was complemented by a second:

> The students received instructions for that variable to code people born abroad as foreign, and to code people who were born in the Netherlands *but look foreign* as also 'foreign' (Wermink 2016, 27 June).

The study's author suggests that this procedure ensured that '2nd and 3rd generation allochthons could also fall into the category "foreign"'. Here a third mode of doing difference enters the picture: the distinction between allochthons and autochthons. This is a distinction quite particular to the Dutch context (but see Geschiere 2009 for its use in African settings). The category allochthon, introduced as a way of speaking about immigrants in 1971 by Verwey-Jonker and formalized, in part, by the Central

Bureau for Statistics (CBS), refers to people with either one or two parents of a foreign nationality.

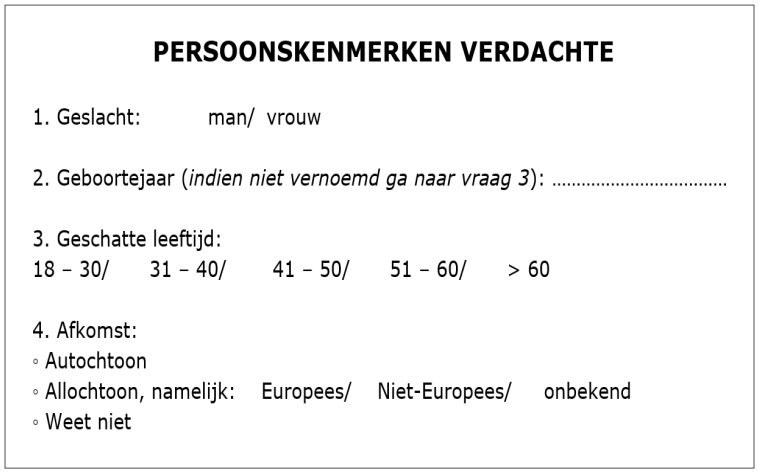
Thus we encounter a third mode of doing category work: the distinction between autochthons and allochthons, a recurring one in the Dutch context. In this one measure of difference, in other words, three different ways of making population groups are at work: first, there is reference to nationality; second, there is reference to phenotypical looks, self-evidently present on the surface of the body; third, both are drawn on to categorize people into the categories of allochthony and autochthony. These are registers of difference that pivot on different markers: the first, birth place; the second on phenotype, while the third, allo- and autochthony, combines a logic of soil - where one is born - with descent - where one's parents come from (see Geschiere and Jackson 2006).[7]

And indeed, the form the students were required to use during their in-court observations speaks not of looks, nor of birth country, but directly aims to register the defendants' 'background' [*afkomst*]. It provides the following three categories (see Figure 1 for the materials in Dutch. I have only translated the relevant answers of question 4, here):

1. Autochthon
2. Allochthon, namely: European / Non-European / Unknown
3. Don't know

First the nation, then the body; first nationality, then phenotype: this is how the Leiden study enacts differences between individual defendants, who are from now on either slotted as allochthons or autochthons. This enactment of difference, then, is spectral, drawing on phenotype, soil, and blood simultaneously. If Law is enacted as a sorting machine, the operation of sorting assumes and enacts a self-evident difference within the population; a difference, furthermore, at once administrative and phenotypical. At play is a very particular enactment of difference,

and it must be said it is one not entirely disconnected from racial imaginaries of biological difference that happen to map onto geography and territory. 'Face' and 'place' are here tied up with each other, and if they are not aligned - in case someone is born in the Netherlands but 'has' a foreign look - it is 'face' that is the deciding factor in this politics of belonging (Cf. Geschiere 2009).



PERSOONSKENMERKEN VERDACHTE

1. Geslacht: man/ vrouw

2. Geboortejaar (*indien niet vernoemd ga naar vraag 3*): .....

3. Geschatte leeftijd:
18 – 30/ 31 – 40/ 41 – 50/ 51 – 60/ > 60

4. Afkomst:
◦ Autochtoon
◦ Allochtoon, namelijk: Europees/ Niet-Europees/ onbekend
◦ Weet niet

Figure 1: Selected questions on the observation form used in the Leiden Study; courtesy of H. Wermink

Now, it is well-known that variations and differences within populations have historically emerged as prime objects for both knowledge-production and government (Foucault 2004); it is also well known that the history of statistical analysis and its concern with the population is deeply intertwined with the advent of 19th century evolutionary biology and, of course, eugenics (Desrosières 1998). Yet it is equally important to note that explicitly *racial* modes of enacting difference within the populations have, for obvious eugenic reasons, not fared well in Western Europe post-World War II (even though, it must be

said, that the explicit absence of 'race' makes *racism* by no means an impossibility (Balibar and Wallerstein 1991)). Yet it is important to not simply draw the conclusion that 'race' is therefore a thing of the past, or else mere fictitious, only a social construction. M'charek (2013; or see M'charek et al. 2014; M'charek and Skinner 2014) in particular points to the continuing relevance, but absent-presentness, of 'race' in contemporary knowledge practices, for instance in genetics and forensics. 'Race' is relationally enacted within highly specific sites and practices, 'gaining in reality' when geneticists draw distinctions between populations, or when forensic scientists try to 'give face' to an individual suspect using genetic materials (M'charek 2015). There, too, specific relationships between 'race' and 'population' are forged, and there, too, are differences enacted between populations. With the Leiden study, we encounter the phenotype once again coupled with the notion of the national population - this time in the knowledge practices not of forensic scientists or geneticists, but that of social scientific inquirers.

5 Returning to the Charge of Racism

This chapter has demonstrated a mode of analysis that concentrates on the reality effects of social-scientific interventions. In so doing it has paid attention not to the politics of its stated effects - discrimination - but rather the politics that inhere in its enactment of judicial decision-making, criminal law itself, and the population over which it distributes punishment. These enactments of the Law as a distribution machine, decision-making as a matter of information inputs and outputs, and the objects of the Law as an internally stratified population, I argue, are political through and through: they pertain to the question as to how we order, sort, and make worlds. With Mol (1999: 75) I would point out that this reality, after all, does not precede 'the mundane practices in which we interact with it, but is rather

shaped within these practices'. In that capacity, the term politics is apt, precisely because 'it underline[s] this active mode, this process of shaping, and the fact that its character is both open and contested' (id.: 75).

This question assumes importance in a specifically Dutch context, within which we can discern several modes of dealing and non-dealing with difference more generally. Addressing practices of presumably illegitimate modes of difference-making, my emphasis on the study's performativities is one way to engage with the question as to whether 'we are equipped to recognize our racism' (van Reekum 2014: 92). This question contrasts sharply with arguably more dominant social-scientific approaches to difference that posit difference as the *source* of social problems and the *medium* (Mitchell 2012) through which these should be measured and governed (Essed and Nimako 2006). Indeed, van Reekum (2014) insists that it is precisely this political and epistemic question - are we equipped to recognize our racism? - that was overshadowed, in the Netherlands in the late 1980s and beyond, by the attempts of social scientists, decision-makers, and intellectuals to create a realist consensus about a 'multicultural society', within which it was most notably 'them' - 'ethnic minorities' or 'allochthons' - and their difference from an autochthonous 'us' that was the target of knowledge production and governance. This proliferation of research about 'them' throughout what has been called the 'Dutch minority research industry' (Essed and Nimako 2006) has entailed a symmetric move away from 'critical explorations of the historical and ideological underpinnings and ramifications of Dutch constructions of "race" and "ethnicity"' (id.: 284). It is in this context that the Leiden study's authors' attempts may be welcomed as an opportunity to not speak only about 'them', but precisely as a way of engaging with racism on the part of the Dutch self. There are some indications that the Leiden study is cited as evidence of racism in Dutch society, e.g. in Amnesty

International reports on ethnic profiling (2013), or in articles by those seeking to criticize the Dutch denial of slavery and racism (e.g. Özdil 2014). However, my treatment of this study has suggested we be a little more cautious, specifically in our choice of 'equipment'. That is, how do our concept and methods render racism intelligible and visible? And, what do they *not* do?

Due Diligence

First, some caution is warranted because of its reliance on a vocabulary of unconscious bias. On the one hand, the researcher's operationalization of meaningful difference as, first and foremost, a question of nationality and second, of phenotypical difference, seems a plausible mode to construct an object of 'unconscious bias'. Their reliance on this notion of unconscious bias is, of course, not directly supported by their own data. After all, the discriminatory effects witnessed may, for instance, be the consequence of *conscious* discriminatory attitudes. Indeed, the imputation that certain differences in outcomes are due to *unconscious* bias presents a palatable, but ultimately quite unsatisfying, modality of shaping the conversation about racism. Moreover, while it is doubtlessly important to make people aware of largely implicit but biased notions they may share, the terms of the discussion leave little room for an appreciation of racism as a structural effect, rather than a mental preference - a well-known problem in the study of racism (see e.g. Fanon's warning that racism cannot adequately be grasped as a merely mental quirk or flaw (Fanon 1956)). In a context where racism seems to become 'debateable' yet again, it is important, then, to note the work an emphasis on unconscious bias is doing in narrowing down the notion of racism itself.

Furthermore, in relation to issues of structural racism, it is important to note also that an emphasis on the 'hidden variable' that would explain away discriminatory practices in judges' sentencing decisions might inadvertently bar questions as to the

operations of criminal justice more generally. For instance, were we to find, through sophisticated measurement and statistical manoeuvring, that ethnic or racial bias in the outcomes of sentencing decisions can be explained with reference to other, heretofore unmeasured variables - for instance, these ethnic minorities' lower educational attainments, lower labour market participation rates, lower 'integration' in society or weaker 'social bonds' - we might be happy to show that racial or ethnic bias does not exist *as such*. Note that this is precisely the suggestion made by researchers affiliated with Scientific Research and Documentation Centre (WODC). When the then Minister of Security and Justice Opstelten asked them for a critical appraisal of the study, their reply suggested that surely the researchers have overlooked an underlying variable that explains these differences and outcomes (Weijters and Leeuw 2012). In any case, following this procedure we would have lost the opportunity to ask the question how it is that criminal law seems to target in particular already deprived social groups at all; and by extension, how racism does not have to be present in the heads of individual actors for a system to *work out in racist ways*.

Further caution is warranted because there is something quite specific in the study's enactment of difference. If critical race scholars treat 'race' as an *effect* of racism, the study instead draws unproblematically on the state's categorization practices - the distinction between nationals and foreign-borns - and complements it, in case nationality is suspected to be a flawed measure of presumed to be 'actual' difference, with an emphasis on phenotype. As such, difference is partially naturalized, understood to reside unproblematically on the surface of individual bodies. It is for that reason quite problematic once we assume the interrogation of racism to have to start with an understanding of its performative and naturalizing effects. Then, the problem is one of explaining the self-evidence of both the phenotype and administrative categorization practices, of

indexing where 'kind and kin' are made, and understanding where they are attached to further qualifiers and differences. Such a mode of addressing racism would point out that one of the most salient effects of racism is *race itself*, and that a modality of response to racism would need to denaturalize precisely racism's presumed to be stable referent, e.g. race.

6 Onwards: From Factors to Narrative Typification Practices

Having analysed the study and drawn out its performative effects, it is now time to return to the issue of rapport. In other words: how can we understand the controversial status of the study among the members of the judiciary in light of this analysis? How might we establish rapport between judges and these sociologists?

For a start, I would now point out that the research *was* in actual fact partial, precisely in the sense elaborated on by Haraway (1988): even though it promises political and epistemic detachment, it is both *committed* to the truth, and engaged in making available of specific accounts situated in specific perceptual systems. This is not simply a variation on the charge that the researchers' model reduces complexity - of course it does. With Borges (1972) we know that the only map capable of perfectly representing the territory is a map as large as the territory itself, and we can only imagine how unwieldy, how impractical, such a map would prove to be. Even though the study reduces complexity, my analysis has concentrated on the way it *adds* complexity: that is, how it enacts worlds that are never quite as self-evident as social scientists may believe them to be. For instance, 'Law's promise' of equal treatment may not necessarily be adequately translated into a conception of criminal law as a blind distribution machine taking as its object internally differentiated populations. Moreover, the legal category of the 'person of the defendant', part and parcel of judges' sentencing

decisions and the locus of the imputed discriminatory sentencing outcomes, is precisely established to move away from an arguably *undifferentiated* and precisely *therefore* unjust treatment of individual cases. Yes, criminal law does promise to 'sort people out', but *not* necessarily by sorting people 'sociologically'. I have suggested that Law's promise of equality should not be misunderstood to imply sociological equivalence between population groups, and that the fact-fiction of the 'population group' is doing both productive and perhaps less productive work in the way we conceive of legal practices, of racism, and of 'race' itself. While the assumption that reality is in actual fact singular - that both the researchers and judges are actually talking about the same reality - is dominant in the controversies around the Leiden study, my intervention has drawn attention to the fact that we need not make this assumption. It is precisely by deferring this assumption that rapport becomes an option. Not because it suggests that there are different perspectives on 'the same' underlying reality, but precisely because social-scientific efforts make realities - often in their own terms, using their own equipment.

It is now time to move on and to follow up on the provocative question, posed by the two judges replying to the study, whether the researchers have 'any idea how a judge arrives at a sentencing decision?' (Bade and van der Nat 2012: 973). I aim to read this provocation as an invitation, and in the following I will address precisely how judges go about their adjudicating and sentencing business. If judges do not necessarily 'see' individual defendants as exemplars of sociological 'population groups', how else do they see these defendants? If they do not 'see' cases as bundles of factors, how else do they make sense of cases?

These are questions that run through the remainder of this book. The legal case file, conceived as a material-semiotic 'optical device' (Haraway 1988) for 'seeing cases' is touched upon in Chapters 5 and 6. The following chapter, however, stays somewhat closer to judicial self-conceptions and emphasizes the

role played by in-court interactions between judge and defendant, the centrality of narrative, and evaluations of the defendants' 'remorsefulness'. This chapter shows that while members of the judiciary may be quick to contrast the social-scientific, cross-sectional perspective with their own 'casuistic' approach - within which each case is considered unique and irreducible - we will see that a concentration on the production and evaluation of 'remorse' in the interaction with the defendant illustrates the existence of vernacular, informal typification practices. That is, even though the social-scientific triad race-class-gender is not explicitly oriented to over the course of their decision-making, judges nevertheless make use of informal, narrative typifications that centre on the type of defendant and the type of offense in question. Distinguishing between three 'typified whole-case narratives' - the typical 'drug-addict', the typical 'angry young man', and the typical 'explosive couple' - I show how defendants' demonstrations of remorse are weighed and prioritized differently and tend to have repercussions for the sentence decided on. In so doing I zoom in on the legal category of the 'person of the defendant', but without treating this person as a collection of (sociological) 'factors'. In this I am following up on Tata's admonition (2007) that the practice of judging is not to be conceived mechanically but instead as a matter of 'judgcraft' - an admonition in line with judges' own conceptions of their work practices.

NOTES

1 For judges, experiencing this lack of rapport is nothing new. Throughout my conversations with judges I learned that many of them have very little faith in the broader public's interest in, or understanding of, their practices. There are roughly two ways of misunderstanding their practice, it soon became clear: the first judges associate with right-wing accusations that the judiciary, as a professional group, is far too left-wing, far too rehabilitationist, far too cuddly-feely. The Leiden study represented, in this constellation, a largely

unexpected Charybdis to the Scylla of popular sentiments: in effect it suggested that judges punish at least some groups of people too *harshly*. This perception that neither the wider public nor sociologists knew enough about their practices had consequences for my own research practices, as some of the judges I encountered actively took my research as an opportunity to 'correct the record'. I am not sure these judges have fully mobilized me to their cause, yet the analysis presented in this chapter hopefully testifies to the care I took to not side-line their discontent as mere ignorance or denial.

2 I am aware that my formulations in the preceding paragraph are likely to inspire some confusion in the reader. Interestingly, part of the controversy surrounding this study had to do with its reliance on odds ratios as measures of likelihood. Where the initial NRC article reported that foreign-looking and non-Dutch speaking defendants were twenty times more likely than Dutch-looking and Dutch-speaking defendants to receive an unconditional prison term, commentators of the NRC newspaper were quick to point out that the original study relied upon a logistic regression analysis, which produces not measures of relative chances, but odds ratios (in Dutch: *wedsverhoudingen*). But the NRC editors should have spotted the difference between measures of relative chances and odds ratios; indeed, if foreign-looking and non-Dutch speaking defendants indeed are 20 times more likely than the Dutch to receive a prison term, a quick glance at the original publication in the Dutch Jurists' Magazine would have suggested that this group has the impossible probability of going to prison of 2.2 (or 220 per cent). After all, the Dutch go to prison in 11 per cent of the cases and as such have a 0.11 probability of receiving an unconditional prison term (Table 1 in Wermink et al. 2012a: 730). A more accurate way of stating the researchers' results is to say that the probability of going to prison as compared to the probability of *not* going to prison is 5 times larger for the group of foreign looking defendants than the probability of going to prison as compared to the probability of not going to prison is to the Dutch defendants. The *actual* relative probabilities - not the odds ratios reported in the study - are, according to some commentators, more likely to be somewhere around 2.5 (or 0.25 per cent), but this is a conclusion based on a table in the original study that does not yet control for other important variables (see te Grotenhuis cited in NRC 2012, 31 March).

3 Both quotes are from Minister Opstelten's answers to Recourt's set of questions; Opstelten referred the other members of Parliament to his answers to Recourt's questions, see Ministerie van Veiligheid en Justitie 2012: 1-6).

4 Latour (1999) speaks of 'black-boxing' in the context of scientific work in a slightly different way than I am using it here. For Latour, black-boxing is a

way of speaking about the way scientific or technical work is rendered invisible precisely because of their success (1999: 304). In that sense, it is a notion akin to that of infrastructure, sunken into the background of expectations (see e.g. Bowker and Star 1999). I however am using it to speak about the effect of statistical analyses such as the one discussed here. Black-boxing, in that sense, is an artefact of an analysis that renders the 'internal complexity' of judicial decision-making only intelligible in terms of its input and output.

5 'Offender-focused' is my translation of the Dutch term 'daderstrafrecht', which is often contrasted with 'daadstrafrecht', offense-focused criminal law jurisdictions. The difference pivots on whether judicial decision-maker are allowed, even required, to take into account the personal circumstances of the defendant or whether only the type and severity of the offense can be weighed in deciding on a verdict.

6 It should be noted that there is, of course, quite a difference between a defendant whose case is appearing in court (who, furthermore, may be found not guilty) and a suspect registered by the police: of those suspects, some may never be charged at all, and when they are charged, cases may be deposed.

7 Throughout the text, reference is also made to ethnicity, although this specific mode of enacting difference is not part of the researcher's measurements or operationalizations - for which reason I am not discussing it here. However, the ostensibly smooth slippage between these three registers of difference - allochthony/autochthony, phenotype, and ethnicity - should alert readers to the unique challenges attending to any measurement of population difference, and their tendency to become linked or mapped onto each other (both in social-scientific accounts and in public understandings of Dutchness and citizenship).

4 Situating Remorse

1 Following up on the Leiden Study

The preceding chapter demonstrated the 'reality effects' of some social-scientific, statistically-oriented approaches to criminal justice practices. With Law (2009), I have argued that these kinds of approaches are not to be understood as reductive (only) but as productive: they enact the object of study - judicial decision-making - in a specific way, and simultaneously mobilize and enact multiple collateral realities, most notably a population that falls apart into distinct population groups and judgment as a question of informational inputs and outputs.

Having spent time on the 'reality effects' of the Leiden study, I turn now to effects of a different kind, that is the way the study affected judges and my own collaborations with them. In this chapter[1] I suggest that the Leiden study's mode of doing legal practices contrasts with the emphasis judges place on their own intuitions, their craft, the specificity of individual cases and, especially so, the uniqueness of the 'person of the defendant'. Aiming to follow up on judges' emphasis on 'their own way of dealing with cases', I trace here the kind of judgments judges make about this 'person of the defendant', and pay specific attention to defendants' 'remorsefulness'. Far from an unproblematic, binary given as something either present or absent (Tombs and Jagger 2006), I show how judges' appraisals of defendants' remorsefulness are a doubly-situated accomplishment. It is situated, first, within the legal and moral space of the courtroom, where legal requirements and moral demands may clash and place interactional burdens on the

defendant in his or her demonstrations of remorse. Second, the accomplishment of remorse is situated not only in the space of the courtroom but also narratively: that is, within not just the specifics of the case but within vernacular, informal 'typified whole-case narratives' (Tata 2007) which judges draw on in their sense-making. For instance, facing either drug-addicted defendants or domestic abuse charges, judges tend to weigh and prioritize defendants' demonstrations of remorse differently. While judges may not work with stereotypes concentrated on population groups, then, their practices nevertheless show some measure of typification, particularly when it concerns their appraisals of the value and importance of defendants' remorsefulness. In other words, I will show how judges do difference (between defendants, between cases) *differently* than the authors of the Leiden study.

Based upon observations in court as well as case-specific conversations with judges, this chapter emphasizes (much like judges themselves) specific cases chosen for their strategic and demonstrative value. In doing so this chapter offers both a discussion of a specific topic of theoretical concern - the 'practical grammar' (Dupret and Ferrie 2015) of remorse, particularly as a both legally and narratively mediated accomplishment - as well as a discussion of my travails in relation to the often-postulated opposition between sociology's cross-sectional approaches to legal practices as well as judicial, casuistic self-conceptions. I will conclude this chapter commenting on the situatedness of my own collaborations with these practices as these took place within the largely oral proceedings in court.

2 Contrasts and Questions

Let's go back again to that spring of 2012. My first encounters with judges around that time were very much shaped by the publication of the aforementioned Leiden study. In a series of

exploratory conversations with retired or practising judges, the study had a habit of popping up in our conversation. The aforementioned Judge Beech (see the preamble) was perhaps most vocal about her disagreement with the study's findings:

> This does not do justice to the way we tailor sentences. […] It's all a matter of taking various steps. You start with the offense in question - is it punishable, is it proven -, then you move onto the circumstances surrounding the offense and then you move onto to the defendant and his or her circumstances. […] We might have our weaknesses and our little frustrations [with individual defendants], but we learn to reflect on them to take them into account. But the suggestion that we punish some defendants more harshly than others is just insulting. We have our rules, our procedures, and we look at cases individually. The defendant is part of that. Every case is different, every defendant is different, but we follow the same rules.

I have no doubt that some of the discomfort, evidenced here in Judge Beech's words, was in fact partially due to its (implicit) accusation of discrimination, even racism. Yet this discomfort is suggestive, too, of the sometimes fraught relationship between sociological-statistical enactments of judicial work and judges' own conceptions of these practices. This chapter is a way to engage with these discomforts. Sensitized by Judge Beech's rather vehement disagreement, I took her admonition to take seriously judges 'own ways of dealing with cases' to heart. That is: if they are not satisfied with the Leiden study's results, how would they say they usually deal with cases?

I would learn that this question is both the right and the wrong question: right, because judges' *modes of response* to it cast light on both judges' self-perceptions and their modes of justifying their practice; wrong, because it was asked in a register their answer tended to disavow. That is, while the question is cast in a general and descriptive mode, judges' answers emphasized intuition over 'science' or 'legalism', the specific over the general, and the

'whole case' and the 'whole person' over the fragmentation introduced by statistical modelling.

Craft, Intuition, and the Unique Case

Telling in particular were the moments I would introduce my research to individual judges. Casting my research as an intervention aimed to do justice to 'their ways of dealing with cases', I often faced a sympathetic but slightly weary audience. 'But so much of it has to do with intuition', one of the judges objected. How would I be able to describe these intuitions, especially when part of these intuitions is obscure to judges themselves? For instance, Judge Dempsey suggested that 'much of it is unconscious', suggesting that his thinking surprises even himself at times. Conscious or unconscious: with judicial practices, judges asserted, comes a trained, juridical intuition, a cultivated prudence that is not easy to make explicit even to oneself. In evoking the centrality of intuition, these judges tended to agree with Scholten's appraisal of judicial practices as involving, ultimately, an unexplainable 'jump' [*sprong*] 'that is always courage' (*'die altijd durf is'*, see Scholten 2010; see also Hartendorp and Wagenaar 2004). This also means that judicial practices are 'not exactly science', to speak with Judge Jamison, and especially so in the relatively minor cases appearing in the Police Judge Court. Neither agreeing with the dictates of rigorous 'science', nor with the demands of pure legalism, Judge Jamison thinks of their role as comparable to 'village elders': 'we arbitrate conflicts, and that's it'. The contrast between cultivated prudence and the more rigorous character of 'science' was a recurring one in judges' accounts of their practices. Helpfully pitting judicial practices against formalism of another kind is Judge Emerald's assertion that 'none of this is higher mathematics'. Although judges 'have an ugly power, the way we can shape people's lives', some of it, Judge Emerald asserted, is 'very simple' - that is, as long as judges are trained in the exercise of their prudential

sensibilities. 'Of course that intuition can be a pitfall as well', Judge Jamison commented, 'the risk is that you're working on auto-pilot, as it were. But it is a craft nevertheless.'

Other judges refrained from drawing explicit contrast between this emphasis on the specificity of the individual case and the aggregate level analysed in the Leiden study, yet their discomfort with the generalization inherent in my questions would become evident in their *mode* of response. For one, some judges perceived the question 'how do you deal with cases' to be an inquiry into different legal principles with regards to punishment, including a concern with the proper relationship between the state, the individual, and community. In such cases conversation would swiftly move to more abstract ideals of justice and legal-philosophical questions - should judges aim for retribution or rehabilitation? Whose interests must a criminal judge serve, and how can these be balanced and weighed against each other? - as well as matters of court organization and bureaucracy. When drawn back to their everyday 'doings with cases', hesitations and qualifying statements characterized their answers. 'It all depends', or a variation thereupon would usually preface their response, and the following answer would usually concentrate on a specific example: a case yesterday, a case last week, a difficult case some months ago … In any case, 'it's difficult to say anything general about it' (Judge Curtis). My general questions were either met with equally general concerns with the ideals of justice and the purpose of punishment; or else, once I returned them to their work practices, these generalizing questions were answered only with help of hesitant qualifications and with specific examples.

The Person of the Defendant

These exploratory conversations were helpful, then, precisely because they pointed out the limitations of generalizing questions themselves.[2] However, these conversations also pointed me in the direction of the 'person of the defendant' as both a matter of

concern and a locus of the specificity and uniqueness of the case. Some judges made the connection between the unicity of the case and the 'person of the defendant' explicitly, arguing that their practice is first and foremost one of tailoring the decision to the specific person of the defendant. Judge Beech, of course, suggested as much when she said that 'every case is different' and that 'every defendant is different' and that their practices is one of 'tailoring': 'everything must be tailored to fit' [*alles moet op maat*]. Mobilizing conceptions of 'individualized sentencing' (Hutton 2013; Tata et al. 2008), judges suggested that prudential judgment does not only take into account the consequences of the criminal offense for the victim or society at large, but must be 'tailored' to the specific defendant. In order to make a correct and proper sentencing decision, judges asserted, it is absolutely vital to arrive at a comprehensive 'picture' [*beeld*] of the personal circumstances of the defendant in question. For instance, does a defendant have debt that would cause a fine to be more punitive than called for? Is he or she physically and mentally capable of doing a community service, should that be a sentencing option? Does the defendant risk losing his or her job when sent to prison?

Importantly, however, judges' concerns also incorporate an appreciation of the defendant's character and outlook on life: do they take responsibility? Are they sorry? Do they have specific and concrete plans to combat that which made them end up in these dire straits in the first place? In a conversation over lunch, several judges comment on the importance of demonstrations of regret and remorse (again with reference, now a familiar gesture, to a specific case):

> The question is, are they really sorry? Are they *really* shocked with what they did? I had a really nasty case some time ago, with a couple of young guys charged with the armed robbery of a store. In court they were trying their best to appear as laconic as possible, making themselves out to be such cool guys. Look, if they tell me they saw the videotapes of their robbery and would say something like,

> "Gosh, is that really me? I didn't know I was capable of doing such a thing!" But they were indifferent, they didn't see the gravity of what they had done. Needless to say I sentenced them accordingly …

Apologies and sincere 'shock' is what this judge was looking for; finding it lacking, she saw no reason to opt for a mitigated sentence. The 'person of the defendant', then, is both a legal and a moral being: not only someone possibly legally culpable, but also ideally morally responsible.

The Court Session

Now, where are such judgments routinely made? Judges often pointed me to the court session as a salient site to such appraisals. 'It all depends on what is said in court', Judge Clarens commented on a specific case:

> If he shows up and if he has a clear story and tells me he wants to try and better himself, maybe I'll give him a second chance. There are always extenuating circumstances.

Not only do Judge Clarens' comments underscore the importance, for defendants, of showing up in court (after all, they are not legally obligated to do so), they also hint at the storied texture of courtroom practices. In a later lunch conversation, her emphasis on 'the story' found resonance among other judges. 'It helps to talk', their consensus was: one judge asserted that 'when there is a lot of evidence it helps to talk to the police, it comes across a lot more cooperative.' Laughing, she added, 'Unless the evidence is bad, then you're better off remaining silent!' Judges often assert the value of a 'good story' - suggesting that remorse is not only expressed in words of apologies and shock but also expressed in defendants' willingness to talk at all. These evaluative judgments are, again, subject to that same, prudential intuition: 'you work with your image [of the defendant], I have developed an intuition for that sort of thing' (Judge Peters).

3 Studying Craftwork and Remorse

All in all, then, judges' emphasis on trained capacity for prudential judgment sensitive to the specificities of individual cases contrasts sharply with the Leiden study's enactment of these practices. First, judges emphasize the specific and the unique rather than general regularities. Second, their conception of the 'person of the defendant' as a both legal and moral being is at odds with the disaggregation of the 'person of the defendant' into presumably 'social characteristics' such as class, gender, age or 'race'/ethnicity effectuated in the Leiden study. Third, to them, a decision is not the function of informational 'input', but rather a practice of prudential, sometimes intuitive judgment tailored to the specifics of the case and the specifics of the 'person of the defendant'.

It is for this reason that Tata warns against the use of statistical analysis reliant on 'factors' in understanding legal decision-making practices:

> Cognitive-analytical work has tended to equate "factors" with case "facts". So not only does factorial explanation ignore how "facts" are identified or not, it also ignores their contingent, fluid, synergistic, and constructed nature. Yet […] the meaning of facts is contingent on the ever-evolving nature of the case (Tata 2007: 435).

Like the judges mentioned here, Tata (2007) prefers to conceive of judicial practices as a kind of 'craftwork': a mode of work that relies upon interpretation of 'the ever-evolving nature of the case' rather than isolation and the measurement of 'case factors'. Retaining its contrast with the often-evoked counterpoint of 'science', 'craftwork' is a productive notion as it is suggestive of training and practice rather than detached 'know-what' or 'know-why'. It evokes situated evaluations of specific cases, and in a fashion similar to the notion of bricolage, and prioritizes local modes of problem-solving over the seamless and unproblematic

application of rules or plans, introducing a sense of practicality into our conceptions of judging. It is for that reason I wish to mobilize this notion in my effort to follow up on the aporia produced in the Leiden study. If its mode of enacting legal practices fails to address legal practices in terms judges' recognize and identify with, the notion of craftwork promises to apprehend these practices in more acceptable terms. Drawing on this notion, I will follow up on judges' emphasis on intuition, on the 'whole case', and on their concern with the 'person of the defendant'. Specifically, I zoom in on judges' concern with defendants' 'remorsefulness' in order to give flesh and bone to their practices of decision-making; after all, it is the moral quality of the defendant judges tend to point to as an important topic of evaluative concern. In that capacity, it is a local matter of concern capable of casting light on judicial concerns with the unique case.

Remorse as a Local Matter of Concern

Now, remorse has a particular history in criminal law. Its importance to judicial decision-makers is contingent upon a rather Western and modern conception of the criminal subject. Where Roman Law, for instance, did not treat (criminal) acts as a manifestation of individual intentions, modern Law instead 'assumes a subject that is answerable for its acts in the world' (Pottage 2014: 153; see Thomas 1977), as it considers deviant acts 'expressions of some complex authorial psychology' (Pottage 2014: 153). It is only with such a more modern conception of criminal subjects that remorse can enter the picture, as being bound by one's action one now *can* and *has* to relate oneself to them. This, of course, is what Foucault points out when he sketches the rise of a modern, juridical concern with the 'soul' of the deviant subject (Foucault 1977). This 'soul' features both as a locus of threat and a site of intervention. And indeed, there are strong indications that judicial decision-makers incorporate in their judgments a concern with the defendant's remorsefulness

(see e.g. Bandes 2015; Duncan 2002; Eisenberg et al. 1997; Everett and Nienstedt 1999; Martell 2010; Proeve and Tudor 2010; Sundby 1998; Wood and MacMartin 2007).

Although the importance of remorse to judicial work practices is well-established in social-scientific literature on the topic, remorse tends to be isolated from the on-going practicalities of judicial work practices. For instance, although the Leiden study includes a measure of the defendant's remorsefulness, it is largely unclear upon what specific behaviours or accounts the researchers based their measurement of defendants' remorsefulness. In so doing it fails to address the ways judges *themselves* attribute, weigh, and evaluate defendants' remorsefulness. Moreover, it treats remorse in a binary fashion as something unproblematically present or absent (Wermink et al. 2012a). A similar emphasis on the supposedly binary character of 'signs of remorse' is evident in Tombs and Jagger's (2006) study of sentencers' accounts of their decision-making practices. While 'signs of remorse', coupled with 'signs of hope' may sway sentencers to mitigate their sentences, it is yet unclear how sentencers in specific cases attribute remorse to individual defendants, and how these attributions are weighed and evaluated. Reifying and dichotomizing 'remorse' this way in these kinds of approaches allows little room to inquire into the way remorse, as a practical and situated matter of concern, is established or challenged: that is, how it is 'marked by negotiation, contestation, surrender and opposition, claims and counterclaims' (Weisman 2014: 8). It also fails to address the salience of what judges call 'the good story' in relation to remorse: that is, the role of narrative and story-telling in court. Narrative is commonly understood to denote a way of connecting events and people into a temporal and causal arch (Ewick and Silbey 1995) through the device of 'emplotment' (Ricoeur 1992). Here, I put centre stage the moral uses of such emplotment: that

is, the way defendants' remorsefulness is both narratively accomplished and narratively understood by judges.

'We'll have to see what he has to say in court': judges' concern with the interaction with the defendant points to the courtroom as a site pregnant with moral possibility. Their emphasis on the 'story' suggests this concern with remorse to be played out narratively and interactively. That in-court communication matters more generally has indeed been the lesson of studies concerned with narrative, story-telling, and interaction in court (see e.g. Atkinson and Drew 1979; Bennett and Feldman 1981; Conley and O'Barr 1997; Jackson 1988, 1996; Komter 2000; Matoesian 1993; Travers and Manzo 1997; for an overview of the field, see Dingwall 2000). Curiously, however, studies of 'doing and telling' of remorse have not as of yet situated remorse within such courtrooms. While there have been important efforts to understand the role of remorse historically and conceptually, and while empirical efforts have concentrated on materials as wide-ranging as narratives in media, in highly publicized court cases, and in written verdicts, there has been little focus as of yet on its narrative production within courtroom dynamics (see Bandes 2015: 5). This neglect is all the more striking, as the courtroom can be a rather fraught space for defendants. They may be unfamiliar with legal standards and formats, and - as Dutch criminal law combines, in one setting, both adjudication (fact-finding and judgment) and sentencing - defendants have to navigate both the court's legal and moral demands (Komter 1994).

In an effort, then, to dereify remorse I emphasize both its 'practical grammar' (Cf. Dupret and Ferrie 2015) and its situated, interactional character. Questions central in this chapter are: what do judges understand to constitute 'remorse'? How does the interaction with the defendant in court inform judges' attributions of remorse? How do judges weigh and evaluate, moreover, the presence or absence of what they understand to

constitute remorse in specific cases? With judges' emphasis on the 'good story', I am first and foremost interested in the storied texture of remorse: how, in other words, the interaction with the defendant in court allows attributions of remorsefulness, and how judges draw on narratives themselves to make sense of individual cases, including defendants' demonstrations of remorsefulness.

Shadowing Judges, Tracing Cases: A Case-Specific Approach

Aiming for general answers to general questions does not, I had learned by now, assist inquiry into judges' craftwork. An emphasis on specificity - 'it all depends', 'we'll have to see what happens in court', 'maybe he has a good story' - thwarted the ambition to arrive at some general sense of judges' 'ways of dealing with cases', particularly in relation to the presumed uniqueness of each and every defendant. Having learned, then, that the 'general question' is not the most productive question, I opted instead for a more case-specific approach to judicial work. Concretely, this meant that instead of relying on more or less structured interviews, I started to ask individual judges if I could 'shadow' them in their work practices (see also Halliday et al. 2008) so that I was in a better position to ask them questions about specific cases. Often, I would ask these questions either throughout judges' pre-trial file-work (about which I have more to say in Chapter 5) or before and after specific cases in court, where I was permitted to observe and transcribe the interactions between the various parties to the trial. As the setting within which judge and defendant come face-to-face, where apologies are offered or elicited, and remorse is demonstrated, the courtroom is the primary location of this chapter. While I at first sat in on the court's public benches, in a later phase of the research I was permitted to seat myself - properly attired in robe and bib - at the judges' table next to his or her assisting clerk. There I was able to transcribe the proceedings and conversations

on the PC's located on these tables, and there I was in a unique position to ask the judge brief questions in breaks between cases. It is there that I observed the interaction between defendant and judge; and it is there that I would elicit reflection and evaluation from judges on the cases they had just decided on. My efforts to 'situate' the question of remorse in judges' work practices, was then itself situated largely in the space of the courtroom - a situatedness upon which I will comment in the concluding notes to this chapter.

4 Showing and Telling Remorse: Judge Mason and Jenny Carpenter

By way of an entry into the relationship between judges' concern with the person of the defendant, their evaluations and interpretations of defendants' remorsefulness, and story telling in court, let's consider the following case involving Judge Mason and Ms. Carpenter:

> On a dreary morning in October 2013, I find myself in a well-lit and unadorned courtroom. Judge Mason is judging 10 cases today, of which Ms. Carpenter is the 6th defendant scheduled to appear in court. Ms. Carpenter, or Jenny, I have learned, is accused of throwing a glass of beer at one of her friends. The glass had broken and the victim had sustained rather severe injuries to her face. Judge Mason told me prior to the court session that she expected to see a pliant defendant in court today. It seemed to her that Jenny 'is not trying to lie, and she hadn't immediately requested a lawyer but was just telling the police her story.' She also pointed out that Jenny had attempted to get in touch with the victim after the offense, and approvingly noted that 'girls like this are all in the same group of friends, it is so important for them that they can continue to get along'. These meetings also mean, to Judge Mason, 'that she never really meant to hurt anyone that badly. This really shows something about her as a person, it tells me something about her willingness to talk.'

Enter, then, Jenny Carpenter.

> Jenny is short, quite thin, and strikes me as visibly intimidated by the court setting. She has arranged no legal counsel, nor is she accompanied by family members or friends. Judge Mason commences the inquiry in court by asking her a series of questions about the event in question. 'Yes, it happened', Jenny immediately confesses, and goes on: 'But I just think it's weird that she [referring to the prosecutor's summary of the legal charges] is using the words, "purposefully". I never meant to do this! I had to spend a night in jail, then sought contact with the victim and we talked a lot, and I've felt bad about it a long time. I even offered to pay her health insurance costs! It was such a difficult period for me back then …'

I remember looking at both the public prosecutor and Judge Mason, a little afraid for Jenny's fate: I had seen defendants chastised before for their supposed lack of 'remorse', and it seemed to me this was about to happen to Jenny as well.

> Judge Mason is growing slightly irritated. While she goes on to ask further factual questions - what had you been drinking? Why did you do it? - Jenny seems to have a way of reorienting Judge Mason's factual questions back to the hardships she herself had faced during and after the offense. While unequivocally emphasizing that she is sorry and has done all she can to make up with the victim - volunteering to pay her insurance costs, for instance - Jenny seems to continue to rub Judge Mason the wrong way. After a few of these back-and-forths, Judge Mason intervenes, and tells Jenny sternly, 'I see. But I must say, you seem to lack an appreciation of the severity of what you have done here, Miss Carpenter'. The prosecutor, seeing her chance, chimes in: 'Because this really is about something terrible, isn't it? [Turns to the judge] I don't think Ms. Carpenter is showing a lot of understanding of what she has done, and the consequences of what she has done for the victim, to be honest'. Jenny, shocked with the stern tone of both judge and prosecutor, has now started to cry silently: 'But, I never expected this …'
>
> Judge Mason, unmoved by Jenny's story or tears, finds her guilty and sentences her to 100 hours of community service - 'conforming'

> in her sentence decision to the prosecutor's demanded sentence. Over lunch after the court session, Judge Mason tells me, still somewhat annoyed, 'Look, she was talking about *herself* all the time, about how difficult this has been for *her*.' Rather than a meek and cooperative young woman, Judge Mason faced what she perceived as a self-centred and self-pitying defendant. And even though Jenny echoed Judge Mason's perception of her as someone who 'didn't mean to hurt anyone that badly'. Judge Mason could not, then, in good conscience, mitigate the prosecutor's demands.

This case, I think, is particularly suggestive of the centrality of remorse to judges. It shows the courtroom not only to be a site pregnant with legal narrative, but also as a setting saturated in explicitly moral concerns, questions, challenges and judgments (Cf. Emerson 1969: 204); a setting perhaps even of a 'status degradation ceremony' both legal and moral in character (Goffman 1956). More specifically, not only does it show remorse to matter, but also that it matters to such an extent that both judge and prosecutor aimed to actively *elicit* it from Jenny Carpenter.

But this observation also complicates understandings that would attribute to remorse the status of a given, a 'sign' either present or absent (Tombs and Jagger 2006). While judges (and lay-juries, for that matter) may regularly draw distinctions between the 'remorseful' and the 'remorseless' (Tombs and Jagger (2006)), and while its role is well-established in the literature (see Bandes 2015; Duncan 2002; Eisenberg et al. 1997; Everett and Nienstedt 1999; Martell 2010; Proeve and Tudor 2010; Sundby 1998; Wood and MacMartin 2007), this case demonstrates that 'remorse' is far from a straightforward 'sign'. Indeed, this case is suggestive of precisely the *uncertainties* that accompany such judgments of remorse: on the one hand, some of Ms. Carpenter's actions were understood to be indicative of her remorsefulness, yet others - specifically the way she objected to the public prosecutor and emphasized her own suffering -

bespoke of someone not entirely appreciative of the consequences of her actions. In other words, even though she immediately confessed, Jenny seemed to Judge Mason unaware of, and oblivious to her own responsibility for the offense in question.

In this sense, this case suggests that 'doing remorse' is crucially different from either taking legal responsibility through confession or from offering apologies only. Indeed, judges often point out that while 'it helps to talk', provide a 'story', and to express 'shock' or sincere apologies, remorse is not solely established by what the defendant does and does not say. Matters are more complicated, for there is always the danger of insincere expressions of remorse: 'after all', Judge Emerald laconically comments, 'we are among the most lied to professional groups in the Netherlands, and remorse tends to come only after the fact [*berouw komt na de zonde*]'. Because criminal justice settings are coercive, ritualized, and characterized by unequal power-relationships between participants, 'there is always the possibility that expressions of self-condemnation will be more strategic than authentic, more calculated and ulterior than spontaneous' (Weisman 2009: 51). As these expressions of remorse are always already aimed at an interested audience, it is by that definition other-directed and taken to be potentially untruthful. Often, then, judges need further proof that defendants' remorsefulness is a sincere expression of their authentic and 'real' selves. In Jenny Carpenter's case, for instance, Judge Mason had been impressed with her efforts to seek contact with the victims: a sign of contrition. Indeed, judges tend to look for evidence that the defendant has taken concrete steps to reduce his or her risk of recidivism. For instance, have they found a job, combatted their addiction, and sought help for any psychiatric issues? This initiative is especially important given what judges perceive to be the defining feature of much of their clientele, that is their shared marginalization. One judge sighed and told me, 'Our clients. Well.

They have all had a bad childhood. They all have some sort of personality disorder. At a certain point you're familiar with all of it.' Judge Kingsley similarly characterized the group of defendants judges encounter on a daily basis:

> They tend to have so many problems. Financial problems. Problems in the relational sphere. Traumatic experiences in the past - abuse and such things. Things are difficult for them, society is complicated. How would they be able to deal with all that? Think of social assistance: you have policy and laws to work through, you have to find and sign the requisite forms … All that stuff is too complicated, especially if you have difficulties reading or writing. So they struggle, have problems of all kinds.

Defendants' 'own initiative' and their own motivation are valued precisely because these are taken to be 'signs of hope' (Cf. Tombs and Jagger 2006): signs that the defendant, given his or her difficult past and circumstances in life, is taking his or her responsibility. Indeed, while judges have the discretionary room to combine a suspended sentence with the obligation that defendants accept certain rehabilitative interventions (individual or groups therapy), it is preferable if defendants seek help themselves. Judges, then, routinely check if the defendant has sought help for drug- or alcohol related issues, for instance, and gauge to what extent the defendant shows him/herself a 'functioning adult' with a job or else with a 'meaningful way to pass the day' by going to college or through volunteering. After all, this is taken as defendants' responsibility - and their responsibility only. Judge Emerald comments:

> These are people who tend to have ugly pasts. And at a certain point you're done talking. If you don't want help repeatedly, well, then you shouldn't look at me but take a good look at yourself.

Judge Emerald's insistence on defendants taking responsibility is widely shared among the judges studied here, and resonates with the oft-noted distinction between defendants who locate

responsibility for their crimes externally - that is, locate it outside of their own control - and those who locate responsibility 'internally' (Bridges and Steen, 1998; Mascini and Houtman, 2002). Remorse, then, is about telling a 'good story', about expressing apology or shock, and importantly: about 'taking responsibility for one's actions', preferably on one's own volition. Doing remorse, then, requires both a 'showing' and a 'telling' (see also Weisman 2014). In the absence of either one of these, defendants tend not to be deemed remorseful: hence Jenny Carpenter's fate.

5 Situating Remorse I: Courtroom Catch-22s

Jenny Carpenter's case is but one case where the doing and the telling of remorse did not exactly line up with each other. While Jenny may have 'showed' remorse in her actions, she failed to 'tell' it, instead painting *herself* the victim and in so doing raising the suspicion that she was insufficiently appreciative of her own responsibilities. Even though remorse is most adequately understood as both a 'showing' and a 'telling', the 'telling' part still matters a great deal.

Importantly, that telling often takes place in the courtroom - a curiously understudied site in the production, demonstration, and contestation of remorse (Bandes 2015: 5). Indeed, the ample literature on courtroom dynamics (e.g. Atkinson and Drew 1979; Bennett and Feldman 1981; Conley and O'Barr 1997; Jackson 1988, 1996; Komter 2000; Matoesian 1993; Travers and Manzo 1997) sensitizes one to the narrative and interactional texture of courtroom practices and points to the rather intricate tensions that often develop between vernacular language and legal language (see e.g. Conley and O'Barr 1997). Yet how the courtroom as a both legal and moral site shapes the local, practical grammar of remorse is a question not well-attended to.

The courtroom, conceived as a both legal and moral space, is where I seek to further situate remorse.

A second case, chosen again for its strategic and demonstrative value, will help to identify the precise issue at stake here. Read in juxtaposition with the case involving Jenny Carpenter it offers ways to tease apart just what is expected from defendants in court, and demonstrates how both legal and moral demands of the courtroom may clash in practice. Enter Judge Starr and defendant Harrison.

Defendant Harrison: Self-Defence or Self-Excuses?

> I am seated next to Judge Starr at her desk. She is about midway through the files making up tomorrow's court session and turns to Harrison Smith's case file. Harrison is accused of assaulting another young man just outside a well-frequented bar in the centre of town. Even though she notes small discrepancies between various witness statements, she does not conceive of this case as particularly complex: 'I know enough', she says after a few minutes of studying the file, 'it's all quite typical. Guy goes out, has a few drinks, gets angry for some reason, and gets violent.'

The next day, we find ourselves in court. Harrison is young and well dressed, and seems eager to tell the judge his own story. Like any court session, the time available for Harrison's case is divided into two stages: first the facts of the case will be dealt with, after which Judge Starr turns to questions about his personal circumstances and offers him, as is customary, the 'last word' (often an opportunity for defendants to say or reiterate they are sorry). Harrison is obliging. Unlike some defendants I have observed he does not, until the second phase of the court session, talk about himself much. Neither does he deny the charges. He simply tries to answer Judge Starr's questions factually and carefully.

> While Judge Starr guides Harrison through the events with help of temporally and causally-oriented questions like, 'what time did you arrive?', 'then what did you see?', and 'then what did you do?', Harrison provides a neat narrative. That night, Harrison elaborates, he went out for a drink, and while in a bar had accidentally bumped into the victim. The victim had reacted aggressively and had gathered his friends. 'Then, they threatened to kill me', Harrison tells Judge Starr, 'so I went to nearby police officers and asked them for help, but they said they couldn't help, so I went back to my friend, but those guys approached me. And that's when I felt very threatened, one of them was getting so close-by … and that's when I head-butted him. I shouldn't have done it.'
>
> Throughout his answering of the judges' factual questions, Harrison refers a few times more to the threats issued by the victim and his friends and emphasizes his anxious response to such a threatening environment, all the while connecting his statements using temporal and causal sequential markers such as 'and then', or 'and that's why'. Moving onto the 'personal circumstances', defendant Harrison opens up and tells the judge that he has sought psychiatric help: 'for my aggression, you see. I have been attacked a few times and I realize that I can come across as very aggressive when I feel threatened.' He emphasizes that he has sought help from a psychologist to deal with his anxieties. The rest of his time he spends in school: he is working towards a second degree. His lawyer, too, suggests that Harrison's behaviour is best thought of as self-defence. Reiterating the threats issued by the victim and his friends, she suggests that Harrison should not be found guilty on the grounds that his actions constitute self-defence. Given the 'last word', Harrison states that he is sorry about what happened and that he is aware that he shouldn't have reacted the way he did.

At first sight, Harrison both takes responsibility *and* has taken steps to mitigate that which made him react violently in the first place (that is, he sought help for his anxiety). Not only does he express apologies and regrets, he also has a 'meaningful way to pass the day' and has sought help on his own accord. However,

> Judge Starr is not so sympathetic to this defendant. She is dismissive of what she understands to be Harrison's 'self-excuses' and his appeal to 'self-defence', and posits that Harrison 'was not justified in his feelings of being threatened.' Instead she concentrates on Harrison's lack of responsibility. Even *if* his reaction was due to factors outside of his control - either the threats of the victim and his peers, or his (then) untreated anxieties in certain social settings - he nevertheless had the responsibility to not put himself into such a situation. Indeed, Judge Starr suggests that, given his anxieties, he might have chosen to stay at home. Judge Starr admonishes Harrison: 'You are an adult man who is expected to take responsibility for his actions.' Not mitigating her sentence, she sentences him wholly according to the judicial 'orientation points'[3], that is, to 120 hours of community service.

We see a by now familiar insistence on 'taking responsibility'. But while Harrison seemed at first to 'tick all the boxes' with his meaningful way to pass the day, his initiative in seeking treatment, and his professions of regret and apology, Judge Starr chastised Harrison for failing to take responsibility. She did not see self-defence, but rather: self-excuses.

This case, I suggest, is demonstrative of the tensions between the courtroom's legal and moral demands. On the one hand, it is the setting within which events are to be qualified legally, and in legally consequential ways. Self-defence is one such a legal qualification, and might have led the judge to dismiss the case. In order to assist such legal qualification, Judge Star herself led Harrison through a long series of factual questions. Emphasizing the messiness of the situation, the role played by the victim and his peers, Harrison aimed to sketch the outline of the chronology of that evening and the circumstances leading up to the offense. On the other hand, the courtroom is the setting where Harrison is expected to show contrition, take responsibility, and in doing so express remorse. Indeed, the problem for defendants such as Harrison is one of both trying to cast a story that would be a legal

ground for dismissal and - if that argument should fail - demonstrating sufficient levels of remorsefulness. This is a slightly different dilemma than that outlined by Komter (1994), who diagnoses a tension, for defendants, between appearing both cooperative and defensive. In Harrison's case, he faced a Catch-22: for how can he both claim - as is his legal right - that the offense was self-defence, *and* to project sufficient levels of responsibility?

Given these intricacies, some argue that remorse should not be incorporated into sentencing decisions at all (Ward 2006) or at least be excluded from consideration in cases involving particularly vulnerable defendant populations, for instance adolescent defendants (de Haan and Hielkema 2005). In such discussions it is often pointed out that defendants who deny the charges or who choose to remain silent cannot, like their confessing counterparts, similarly 'take responsibility' and express regrets, for which reason remorse should not play a role in decisions about those who do confess (even if those are qualified). As we have seen, not just denial or remaining silent but also legal lines of argument - that of self-defence - may interfere with judges' appraisals of the defendants' remorsefulness. Interactional dilemmas of this sort are by no means rare. 'Staying factual' does not rarely mean a defendant is forced to talk about other people's role in the escalation of the offense in question; yet it is also a strategy that, to judges, can cast doubt on the extent to which defendants take sufficient levels of responsibility for the offense in question.

6 Situating Remorse II: On Narrative Kinds

Now, Harrison's case may seem rare - but to judges it is not. Judge Starr herself had suggested it was 'all quite typical: Guy goes out, has a few drinks, gets angry for some reason, and gets violent.' It was 'just fighting' [*gewoon knokken*]: a formulation in

Dutch that does not suggest so much that she treats this fighting as insignificant, but rather that it is something not unusual, something not so unique. Other judges, in their work practices, concur. In a similar case of physical assault, taking place under similar (intoxicated) circumstances, Judge Dempsey notes that the defendant is 'playing up' his fear of (what would become) his victim. Adopting a purposefully whiney voice, Dempsey reads an excerpt from the interrogation with the defendant:

> He says [whiningly], "I was afraid he was going to hit me, and something clicked in my head, and then I hit him. I really thought he was going to hit me!" With a sardonic smile, Judge Dempsey looks up and adds, 'and that's when I started to cry!' In his normal voice, he glances at me sideways and says, 'well, alcohol destroys more than it is kind [*alcohol maakt meer kapot dan je lief is*], doesn't it?'

Cases like Harrison's - 'guy goes out, has a few drinks, gets angry' - are, to judges, recurring ones. Often, these are cases of physical assault in public [*openbare geweldpleging*], and involve similarly young, similarly intoxicated defendants. That Harrison had been drinking, that Harrison was provoked, that Harrison resorted to physical violence: all of these aspects of the case make it a more or less 'typical' incident: these are young men with 'difficulties regulating their aggression' (Judge Clarens). One judge comments that it is not uncommon for such defendants to feel treated unjustly: in the circumstances leading up to the offense, there is in actual fact little that distinguishes the aggressor from the victim: both may exchange increasingly heated words, both may push and shove each other … All is unclear, until the situation spirals out of control and becomes the object of investigatory work. Only then, the distinction between victim, defendant, and witness is retroactively drawn: 'sometimes they say, the one who is there as a defendant is the one who won the fight', Judge Dempsey commented on such 'typical' cases. Harrison's appeal to self-defence, then, did not come necessarily as a surprise; indeed,

it is not uncommon for similarly charged defendants to concentrate on the role of the victim in the altercations. Neither is it rare for judges to emphasize that it is nevertheless the defendant who is on trial; the victim 'is not the one being judged here today', Judge Carol pointedly warned a defendant making a similar suggestion. Judges know, then, on the one hand that the responsibility for these kinds of altercations may in actual fact be distributed over all participants to the fight, yet tend to interpret appeals to self-defence as a refusal to take responsibility for one's own acts.

A *typical case*: here is something important. On the one hand, Harrison's case is an individual unit of concern - after all, there are his personal circumstances to be taken into account. But to Judge Starr it is simultaneously evocative of a kind of story, a narrative type, summarized by Judge Starr herself in the barest form with 'guy goes out, has a few drinks, gets angry from some reason, and gets violent'. Note that Judge Starr is hence working not only with a 'type' or 'kind' of offense, but with a skeletal sense of *narrative* that includes the specific offense in question, an appraisal of the kind of defendant (young, male), kind of setting and timing (a bar at night), a specific kind of victim (another young male) and the kinds of interactions and events leading up to the offense in question. Tata (2007, 1997) suggests we think of these narratives as 'typified whole-case narratives'. These are not a simply summations of offender and offense characteristics, but rather a causal, temporal, and explanatory (but not necessarily justificatory) *narrative* that ties these together intelligibly. Drawing on prior knowledge (Emerson and Paley 1992), judges come to recognize some cases as variations upon a similar narrative theme. These typified whole-case narratives, Tata (2007) suggests, are important to judges because they provide a 'narrative template' and in so doing reduce complexities and impose order. Such narrative forms, Ewick and Silbey (1995) argue, share at least three characteristics, all present in this specific case:

narrative relies on the 'selective appropriation of past events and characters' (200); furthermore, these characters and events become linked in a temporal order: they have a beginning, a middle, and an end. Last, such persons and events are linked not just in temporal terms, but also within 'some overarching structure, often in the context of an opposition of struggle' (id.: 200). Narratives hence offer intelligibility: connecting (imputations of) 'character', motive, circumstance and events, the operation of 'emplotment' (Ricoeur 1992) ensures meaning and sense. Yet these narratives also reduce *moral* complexities: not only does it render intelligible Harrison's appeal to self-defence, but also informs Judge Starr's suggestion that there is no excuse: he simply could have walked when provocations started. Knowing very well that these kinds of incidents are 'messy' (Judge Dempsey), it is the judge's task to focus on the defendant's own responsibility.

Now, not all cases are so easily 'typified': many cases surprise judges and thwart them in their sense-making. Nor is the kind of whole-case narrative outlined here the only kind. Let's turn to two other salient kinds of typified narratives and the role defendants' demonstrations of remorse plays in these.

Narrative Kinds: Typical Junkies, Typical 'Explosive Couples'

The narrative kinds I am alluding to here are, first, the 'typical junkie' engaged in petty theft, and second, cases of domestic violence involving 'explosive couples'. I concentrate on these two narrative kinds as judges' appraisals of defendants' remorsefulness plays a different role in these cases than they tend to do in the aforementioned cases of physical assault. That is, while demonstrating remorse and 'taking responsibility' is of utmost importance in public assault cases like Harrison's, judges attribute much less importance to defendants' demonstrations of remorse in these cases, albeit for different reasons.

Let's start with the 'typical drug-addict' engaged in petty theft. Drug-addicted defendants, according to judges, make up a relatively large part of their caseloads (an over-representation exacerbated, some of them say, by recent budget cuts on psychiatric healthcare and homeless shelters). Often, judges note, these defendants are homeless and are 'known to the police' (and sometimes to judges as well) and generally have long criminal records with similar property-related offenses. Morally, this typified whole-case narrative reveals some tensions. On the one hand, as the life circumstances of these defendants are particularly dire, judges may find it difficult to attribute absolute moral responsibility to the defendant. Commenting on the host of problems usually plaguing such defendants, Judge Curtis tells me that these are people 'without ties to society':

> They are addicted, without a job, no education or family around him, well, then it is important at least something is done about that addiction. Of course you can say, he is responsible, and of course you can put him in a cell …

But Judge Curtis is not necessarily satisfied with such a solution. Nor is it always possible. After all, 'I can only offer help when they are convicted. Without a conviction I can't do anything.' Judge Peters is similarly concerned with 'doing something'. Commenting on a middle-aged, female defendant charged with petty theft, he sighs and tells me,

> Wow. She's born in 1962 even. You don't see that often - to be addicted at that age! Well, this is another one of those cases that isn't about the offense as much as it is about the question, what are we to do with you?

However, judges' rehabilitative impulses tend to be thwarted by these defendants' behaviours. If these defendants do not show up in court, for instance, it may be difficult to hear 'their side of the story'. Or, if they do not accept help, or if they have not accepted

help in the past, there might be little judges can do. 'You can't force someone', Judge Clarens insists, 'if they are not motivated you're just done. It has to be possible and feasible. If you don't take that chance you'll have to sit it [the sentence] out [*moet je maar je straf uitzitten*]'.

Yet even in cases where defendants try their best to show up, apologize, and take concrete steps to 'better themselves', such demonstrations of remorse tend to be treated with weary suspicion. Judge Peters for instance recognizes that people may make promises, but that 'their addiction is much stronger than their resolution.' A case in point is the encounter between defendant Clarence Jones and Judge Emerald. I had not before observed such an overtly contrite defendant, and his investment in his own future seemed, at first, quite laudable.

> Clarence has been addicted to crack cocaine for over six years, he tells judge Emerald in court. During that time, he frequently stole small items from supermarkets and corner shops: crimes for which he was repeatedly charged and convicted. Clarence comes across as quite genuinely remorseful: he looks not only nervous, but ashamed. Clarence is deeply unhappy with the 'choices he has made', blames himself for everything that happened the last few years, and tells the judge that he has been seeking treatment with help of his parole officer, whose testimony is also present in the file. Yet that previous attempt to combat his conviction had failed: he had returned to his habit. 'I really need help. I … I really want to do my best. I am sick of the drugs. That's not me. It's my life, but things are starting to go wrong. I really need help'. Pleading for a conditional sentence, Clarence tells Judge Emerald he is not afraid of any sentence, as long as he can continue working with his parole officer. Judge Emerald is not swayed. 'You tell me it is your life we are talking about. Well, I tell you to focus on the opportunities you've had. It is your own responsibility. You are 43! Not 18 anymore. I need to take control of your own life, and that is not your parole officer's job. The only person capable of making a change is you, not me.' Sentencing Clarence to an unconditional custodial sentence, Clarence is on his

> own - without help of parole services, his addiction might be excessively difficult to combat.

After the court session, Judge Emerald agrees with me that this was a particularly pitiful case. But:

> Well, certain of these defendants are certainly pitiable. But what we see every day is a virtually unceasing torrent of pitiable people … And those people have been warned before. Better to be clear, then.

In this typified whole-case narrative - that of the typical drug-addict - defendants' remorsefulness - even if it is established by both a 'doing' and a 'telling' - is not necessarily consequential to judges' sentencing decisions. At a certain point, the suggestion is, defendants can't ask for yet another 'second chance'. After all, their drug-addiction makes them particularity vulnerable to going back to their old habits and tends to eclipse their sense of 'personal responsibility'. 'We all know people who try to quit smoking all the time', Judge Fielding comments. It's difficult and they keep falling back into their old habits. 'That gives you some sense of how pernicious this is.'

Let's compare, then. The 'angry young man', exemplified by defendants Harrison, *must* show remorse - even if that threatens his legal defence. There is no excuse: even if in actual fact responsibility is distributed over all participants in the fight, it is unwise for defendants to point that out to the judge, lest they appear to be taking insufficient responsibility. Drug-addicts *may* 'show' it and 'tell' remorse, but it does not always matter even if they do: their addiction is stronger than their resolutions. And in yet another 'kind' of case, remorse plays yet a different role. These are cases of domestic violence.

Importantly, this kind of typification is one that incorporates neither only the remorsefulness of the defendant, nor only the circumstances leading up to the offense, but the character and responsibility of the (often female) victim as well. Following Judge Roberts, I will refer to this narrative typification as that

involving an 'explosive couple'. Pointing to the role played by the victim in provoking aggressive responses, judges tend to emphasize that these are 'difficult relationships' within which people may think it is 'normal, to push and shove each other like that' (Judge Starr). 'Of course', Judge Starr adds, 'you wonder why these women stay with these men.' For one judge, this tendency to 'stay with him' was tied to 'certain strata in society' [*bepaalde milieus*]: 'Look, if my guy ever hit me I'd be out of there, crying all the way over to my parents but never going back. It makes you wonder, though, why she stays with him.'

'Why she stays with him': this is not an uncommon object of wonder for judges, and in that capacity a question that may cast doubt on the victim's motives. Is the victim as innocent as she makes herself out to be? 'Sometimes you see the facts in question and you think, this must be a real brute', Judge Curtis comments, 'and then in court you see this tiny little man accompanied by this harpy, this huge woman … Well, that changes things.' The victim's physical size is sometimes referred to, but more common are references to her[4] personality. On the one hand, the victim may be conceived as a strategist, for instance when the couple is caught up in legal disagreement over custody. Such a context casts doubts on the impartiality of the victim's account: a conviction for domestic violence, judges say, tends to strengthen the victim's position in custody agreement negotiations. At other times, judges voice the suspicion that the victims are 'difficult personalities themselves', perhaps due to psychiatric disorders - borderline personality disorder is sometimes referred to - or because of their circumstances in life.

Whatever judges may think about these cases in private - and express in conversations with a researcher - does not always matter to their sentencing. For instance, while both the defendant or his/her lawyer may emphasize the difficult personality of the victim, judges may point out his or her own responsibilities. Judge Starr sternly admonishes a young man charged with a case

of domestic abuse to focus on his own responsibility when he argues that 'even my ex told me she knows she hasn't been the sweetest [*geen lieverdje is geweest*].' Sternly, she tells him that 'You're taking this much too lightly. You say in every relationship there are fights like this. Even so you cannot do the things you did'. However, there are some indications that such appraisals of the victim's characters and motivates do in fact inform judges' responses to specific cases of domestic violence. It is in such cases that defendants' remorsefulness is not necessarily a concern.

An extreme case exemplifying this kind of appraisal is that involving Judge Kingsley and defendant Jeremy Stevens: it demonstrates both what this 'explosive couple' typified whole-case narrative looks like, and is suggestive of a particular way of evaluating defendants' demonstrations of remorse.

> The day before the court session, Judge Kingsley is quick to point out that the victim of this incident of domestic violence, Jeremy's wife, seems to be suffering from borderline personality disorder. He bases his diagnosis on a statement made by defendant Jeremy's brother. 'He [Jeremy's brother] is not a neutral party, of course, but I do get the impression the victim is making a mess of things. […] God, those women - borderline they call it. Of course such labels are attached to people too quickly. But borderliners are also very manipulative. That's typical for people with borderline.' He also points out that the couple is caught up in custody agreement negotiations, which to his mind casts doubts on her statements. After all, does she not have a stake in painting her husband as an aggressor?
>
> In court, Jeremy, a pale and heavyset man in his 40s, tells the story of the circumstances leading up to his arrest. He mentions the complicated divorce proceedings in which he and his wife are caught up, and suggests that she filed a criminal complaint to receive custody of the kids. He also tells the judge he has long suffered from his wife's cheating and her mental ailments: 'It hurts. We've been together for 23 years. The first time she cheated on me I tried not to

> care. I did everything, by then: washing up, cleaning, and cooking. I was always careful to not irritate her.' Judge Kingsley, noting a previous conviction for domestic violence on Jeremy's criminal record, asks him about that previous offense. Jeremy tells him that 'Back then, I was just cooking, cutting up some vegetables, and she had half a bottle of coke in her hand, and she empties it over my head! Normally I walk away, but that time I thought, enough is enough.' Judge Kingsley also asks him about the anger-management course Jeremy had taken as part of his previous parole conditions: 'yeah, I did that course. I thought it was me. Therapy and training. Until someone said, it's not you. I'm just a regular guy.'

On the face of it, Jeremy does not seem remorseful: pointing at his wife's role in previous, as well as this particular offense, he suggests that he is a 'regular guy', that 'it's not him'. He even suggests he is the *real* victim of his wife's manipulative ways; the court-ordered aggression-relation course he also brushes aside as not addressing the real problem, which - again - is his wife. At no point does Jeremy 'take full responsibility' for what happened. Strategic or not, this kind of narrative resonates with Judge Kingley's impression of the case:

> Surprisingly, given the available evidence, Judge Kingsley judges Jeremy not guilty: as one piece of evidence was an eye-witness statement by Jeremy's son, he argues that Jeremy's son was too young to testify: 'he's only 12 years old, and you can't expect a 12-year old to testify in such a case without any kind of expert present in the interrogation room.' With this piece of evidence disregarded, left is only the victim's statement - which itself provides too little evidentiary weight, Judge Kingsley argues, to convict Jeremy. Crucially, however, Judge Kingsley later tells the researcher that convicting Jeremy was simply not an option for him, but that this did require some creativity on his part: 'Leaving out the son's statement is a bit of a ploy, really. I could have used it, but I really didn't want to convict.'

Apparently, performing remorse - as consisting of both telling a story through 'taking responsibility' and demonstrating it through seeking treatment - is in such cases not as vital as it is in cases that bear more resemblance to the typified whole-case narrative involving 'angry young men'. In both instances, judges recognize the messiness of the human relationships within which violence takes place, but in domestic abuse cases this does not always translate into the demand that defendants display remorse, that is: take full responsibility and seek help.

7 The Case: A Legal and Moral 'Grasping Together'

Drawing out these 'typified whole-case narratives' - the angry young man, the drug-addict, and the explosive couple - I have demonstrated not only the centrality of remorse to judicial work practices, but also the salience, among the judges collaborated with here, of three different 'typified whole-case narratives'. These typified whole-case narratives may help to reduce cognitive complexities in specific cases, but have been demonstrated to serve moral purposes as well. That is, they allow judges to evaluate defendants' measure of remorsefulness in relation to the offense and offender in question. The notion of narrative is crucial, here: object of typification is not necessarily the offender ('client'), nor the offense itself, but rather the relation between these two. This relation is further typified by including the circumstances surrounding the offense (e.g. time, place), possible motives and reasons for behaviour (intoxication, addiction), and to the kind of victim (a stranger or one's spouse or partner).

Remorse, then, is mediated narratively: first, judges face a narrating subject in court, whose accounts - their 'story' - has the capacity to inform not only their impression of the defendants' remorsefulness, but also their sentencing decisions. The narratives proffered by the defendant face dual and sometimes conflicting demands: a narrative offering temporal-causal

intelligibility, as is the case in those defendants seeking to argue a case of self-defence, for instance, may detract from the successful narration of moral and personal responsibility. Second, defendants' remorsefulness is weighed and evaluated in and through several 'typical whole-case narratives': recurring and typified 'cases' characterized by different modes of emplotment (Ricoeur 1992): different conceptions of what drives people to do what they do - anger, addiction, a bad relationship - different modes of evaluating the degree to which they *are* responsible, and different modes of retaining the normative expectation that they *should* take responsibility.

It is in precisely this sense that an emphasis on narrative is indispensable. While studies of legal practices or bureaucratic practices more generally have demonstrated the existence of client typifications or case-typifications (see e.g. Sudnow 1965; Lipsky 1980; Lynch 1998), the crucial role of narrative cannot be glossed over. Providing the conditions of temporal, causal, and moral intelligibility, whole-case narratives tie the specifics of the offender, the offense, the witness, the circumstances of the offense in question, and the biography of the defendant into a more or less orderly and typified whole. I have drawn out, here, the relationship between such temporal and causal orderings and moral modes of ordering; that is, the way a certain narrative 'plot' allows both for legal and moral judgment. Truth about the defendant, including his or her remorseful 'soul' (Foucault 1977) is produced narratively: 'Narrative constructs the identity of the character' (Ricoeur 1992: 147-8; see also Ewick and Silbey 1995). In so doing this chapter has made some headway in connecting the study of story-telling in legal settings with the role played by remorse: remorse itself is established in narrative and evaluated in and through narrative. These narratives are crucial not only to cognitive, but also moral 'comprehension': the activity of 'grasping together' heterogeneous elements into an overarching narrative structure.

On Narrative and the Question of 'Social Context'

The making of 'whole-case narratives' and their typification is an activity not fundamentally different from other narrative modes of action. People use narrative all the time in making sense of their selves, others, and the worlds in which they move. Given this affinity between these judicial practices and more fundamentally human tendencies to tell stories, a frequently raised question concentrates on the relationship between these in-court stories and the wider social or discursive context.

Critical discourse analyses of legal language, for instance, more generally understand legal narrative to be influenced by and embedded in wider societal discourses. Conley and O'Barr (1997), in their seminal 'Just Words', suggest that the study of courtroom interaction and legal language must be combined with a concern with discourse and power:

> Discourse is a locus of power. Different discourses compete for ascendancy in the social world; one is dominant for a time and then may be challenged and perhaps replaced by another. The dominance of a particular discourse inevitably reflects the power structures of society[5] (Conley and O'Barr 1997: 7).

In a similar fashion, I might point out that the suspicion that the female victims of domestic abuse are 'not innocent themselves', understandings of addiction as not only an illness but a moral failure, or the idea that biology (hormones) or peer pressure are in themselves an explanation for seemingly random acts of male violence, are of course not limited to judges. Exercises in finding resonances between these typifications among judges and more widely shared 'discourses' can certainly be instructive, specifically when they delve into underlying presuppositions that govern both legal and moral conceptions of guilt and remorse. Such exercises, while they are not part of my project here, might also contribute to understanding the mechanisms that produce inequalities in sentencing outcomes (Conley and O'Barr 1997: 13).

However, such approaches do risk portraying these societal or discursive 'contexts' as an unproblematic explanatory 'real' in a gesture not dissimilar to those discussed in Chapter 1, in which I highlighted the metaphysics mobilized in efforts to explain the Law with reference to the social. In doing so we mobilize the ontological primacy of the social real over the surface effect of legal practices and in doing so, may run into difficulties trying to justice the specifically *legal* character of the kind of narrative mediations involved. In other words: while moral responsibility and legal culpability may not always be so easily separated - see in particular Harrison's and Jeremy's cases - the narratives in court are not oriented *only* towards moral judgment in the name of the social. In the ethnomethodological sense of the term, these narratives are produced in reference to legal purposes and in reference to a legal 'overhearing' audience (Heritage 1985). Both the moral and the legal are narratively accomplished. In addition, there is a real risk that we become unable to account for our own situatedness with regards with the practices we seek to study. Schegloff (1997), drawing in deliberate irony on the same critical vocabulary as Conley and O'Barr themselves, warns us that analyses of this kind:

> Allow students, investigators, or external observers to deploy the terms which preoccupy them in describing, explaining, critiqueing, etc. the events and texts to which they turn their attention. […] However well-intentioned and well-disposed towards the participants […] there is a kind of theoretical imperialism involved here, a kind of hegemony of the intellectuals, of the literati, of the academics, of the critics whose theoretical apparatus gets to stipulate the terms by reference to which the world is to be understood (Schegloff 1997: 167).

The point of this chapter in contrast has been to show that 'there has already *been* a set of terms by which the world was understood - those endogenously involved in its very coming to pass' (id.: 167), that is, the three recurring whole-case narratives elaborated

on here. Reducing these 'endogenously involved' terms to 'power', 'discourse', or 'the social' tends to place the sociological observer in an epistemologically privileged relation vis-a-vis the actors studied. However, sociologists are not the only 'reflexive' actors on the block; nor are the people they study mutes incapable of account-giving, of justifying, of rendering intelligible what they do and why they do so. Instead of placing 'behind' these instances of narrative typification a final sociological explanans such as power or the social, the focus has here been on 'the methods people use locally to produce the truth and intelligibility that allow them to cooperate and interact in a more or less ordered way' (Dupret 2007: 82). These methods, this chapter has shown, have narrative dimensions: it is precisely in and through the explicit and narrative evaluation of cases that cases become intelligible both to judges themselves and to the observer at their desk or at the judges' table in court. My efforts, then, have stayed deliberately with judicial typification practices. Tracing the way judges comment on and make sense of cases, the ways they interact with defendants, and their presentation and justification of their verdicts, this emphasis seeks not to privilege the sociological observer over that of those observed. In so doing I have preferred to focus not on imposing social order on these practices, but rather aimed to trace how legal and moral order is narratively enacted.

Looking Back: Casuistry and Sociology's Cross-Sectional Seeing

Emphasizing the ways judges comment on, evaluate, and justify their decisions in specific cases has led me towards a narrative understanding of cases. This specific way of enacting cases contrasts, of course, with both judicial self-description and with socio-statistical accounts of these practices.

Let's concentrate on judicial accounts first. I have illustrated that judges tend to mobilize a casuistic register in their speech about their every-day practices: 'every case is different', 'it all

depends on the particulars'. However, my analysis diverges in two ways from the ways judges themselves speak about their practices. First, while judges may understand themselves to be casuistic creatures par excellence, a closer look at their practices adds complexity to what is often understood as this juristic casuistry. Yes, individual cases are specific and unique. But that does not mean that judges do not link cases to recurring, more or less typical narrative kinds. In working with individual cases, judges are precisely engaged in not only case-making, but *kind*-making; drawing on typified whole-case narratives, judges routinely employ such narratives to make sense of individual cases, and they do so explicitly throughout their preparations. Second, this analysis shows that these kinds of 'intuitions' are not necessarily 'unconscious' - as some judges suggest - not necessarily pre-verbal or pre-linguistic. Indeed, when talking about specific cases, judges draw explicitly on such typifications. The 'social', to paraphrase Hirschaur (2006), is not 'silent' at all, but populated by actors capable of commenting on, accounting for, and justifying their actions. The point is not to sideline self-conceptions, then, but to bring them into relation with the vagaries of practice.

This emphasis on narrative typification practices contrasts, too, with socio-statistical modes of engaging with judicial decision-making. If, for the judges, a case is a narrative entity involving a narrating and narrated character, the fragmentation of 'cases' into factors that is introduced with statistical modelling is bound to alienate. Hence, then, their emphasis on 'all the circumstances', on the 'whole case', on the 'person' and his or her 'story'. This point pertains equally to judges' appraisals of the 'person of the defendant'. In the kinds of narratives just elaborated on, the 'person of the defendant' appears not as a collection of static factors, but rather as a narrative character with a biography, a character relationally connected (or not) to the victim, and a character whose needs, wants, and regrets are to be taken into account (even if these wants, needs and regrets are

then to be sidelined as, considering the defendants' prior biography, they appear unreliable or untrustworthy). This also means that the disaggregation of the 'person of the defendant' into social factors such as gender, age, class and ethnicity or race does not resonate particularly well with judges' way of approaching cases. Defendants appear primarily as typified *characters* in typified whole-case narratives, not as bundles of factors or exemplars of certain population groups or strata in society.[6]

Hence, this account has brought us closer to the conditions for a rapport between judges and socio-statistical researchers. It has suggested that statistical researchers and judges are in fact speaking about two different realities. Both are populated by cases, but the case is a different thing in both. For judges, the case is first and foremost a narrative thing: involving times, places, events and characters inextricably linked both to the offense in question and to their biographies, their previous actions, and the narratives they in turn provide the judge with. In sociology's cross-sectional world, cases are bundles of factors that refer back to population groups. Questions asked of cases are different, too: in the first, the question with regards to the case is: *what's its story?* In the second, the question with regard to the case is the quintessentially sociological question, *what lies behind it?* (see Luhmann 1994). Both kinds of cases - narrative or statistical - also demand different kinds of observers. Judges' familiarity with different whole-case narratives comes as a result of professional intimacy, prior knowledge, and practice: trained, but not necessarily pre-discursive intuitions and narrative capacities that help to distinguish between the relevant and the irrelevant, the remorseful and the remorseless, the typical and the atypical. Its objectivity demands not the *cancellation* of the individual observer in an appeal to mechanical objectivity (Daston and Gallison 1992), but precisely the mobilization of his or her prior knowledge, expertise, and prudence.

8 Onwards: Beyond Narrative

If the preceding chapter has demonstrated the 'reality effects' of some social-scientific, statistically-oriented approaches to criminal justice practices, this chapter has placed emphasis instead on the morally-charged and narrative character of judges' evaluations of the case, the defendant, and his or her remorsefulness. In so doing it has put centre stage the storied texture of legal work practices. It has treated judges as reflexive and accountable actors, engaged in the typification of individual cases in order to assist their legal and moral judgments. As such this chapter has connected an emphasis, in the literature, on story-telling in legal settings (e.g. Jackson 1988, 1996) with that of the production, contestation, and evaluation of remorse (Cf. Weisman 2009, 2014).

In so doing this chapter itself enacts judicial practices in a certain way: it enacts these practices as narratively mediated. And in so doing, it produces its own aporia once again - an aporia rooted in the fact that its emphasis on narrative is itself partially a performative effect of the largely orally-mediated collaborations upon which this chapter is based. Indeed, the observations related to you here are based on moments within which judges told me about their appraisals of cases, or on recorded instances of courtroom interaction: all largely 'oral' moments. This chapter's emphasis on narrative, then, is itself situated within the performativities of oral modes of engaging with the object of study: in asking questions, I place the 'informant' (itself a performative effect!) in a confessional and reflective relation to his or her own actions and thoughts. Such an approach tends to yield comments, justifications, accounts, and: *narratives*. And of course such an account is inevitably limited: not - as is often the argument - because what people *say* they do is not necessarily what they *actually* think. Such a gesture depends for its rhetorical efficacy on the 'head of the actor' (Garfinkel 1967) and is for that

reason not as sociologically relevant. No, this approach to judicial practices is limited precisely because it is grounded in specific collaborations mediated by oral modes of engagement with these practices, that is my question that they *tell* me what they think about this specific case.[7] What happens, however, when I start to observe what they *do* backstage? Taking into account that realities do not await discovery but are enacted *within* such collaborations, is it possible to defer an appeal to the 'really real' and raise another question? What are we missing out on if we remain content with this appeal to practical and narrative 'real'? How can we move on to different situations, different tools, and different collaborations? Are there different ways to enact judicial realities?

The following chapter aims to do precisely this. It emphasizes not narrative mediation in judicial case-making, but instead draws attention to the rather quieter and protracted episodes of routine 'file-work' (Scheffer 2004, 2007) taking place 'backstage'. It raises the question how judges 'visualize' the case: how they order documents, summarize evidence, and produce additional artefacts to help them in their sense making. Based on observations of judicial work practices and their rearticulation as a consequence of a large-scale digitization project in the court, it highlights the case file in its materiality. Concentrating on the case file and judicial documentation practices it emphasizes writing, not speech, and in doing so it departs from more 'phonocentric' (Derrida 1967) approaches that highlight interactions between co-present participants in interaction settings. It draws to a lesser extent on conversations with judges and instead mobilizes observation of their work practices, specifically their pre-trial face-to-file interactions (Scheffer 2005).

NOTES

1 An earlier version of this chapter was published as Oorschot, I. van, Mascini, P. and Weenink, D. (2017), "Remorse in Context(s): A Qualitative

Exploration of the Negotiation of Remorse and its Consequences" in *Social & Legal Studies* 26(3): 359-377.

2 Soon enough I learned to ask more case-specific questions, particularly as I would start to prepare and study individual cases on my own and would observe judges' file-work (see Chapter 5) in a practice of 'shadowing' (e.g. Halliday et al. 2008).

3 These 'orientation points', nationally agreed upon ranges of acceptable sentences for certain offences (see de Rechtspraak 2016), are not to be confused with the 'guidelines' prosecutors use to decide on their demands. The difference between the two terms neatly captures a salient difference between the judiciary and the prosecuting forces more generally: in the emphasis it places on neutrality, the judiciary tends to consider 'guidelines' to infringe on their discretionary room for maneuver - hence the choice for 'orientation points' - while the prosecution does not seem to share such a stance. See for more reflection on the organizational differences between the Dutch judiciary and the prosecution also van der Meer and Rottenberg (2013).

4 I use the pronoun 'her' here not because men are not victims of domestic abuse in general, but because there was not one case I observed in which the genders were reversed (or the same, e.g. a lesbian or gay couple).

5 Although the authors draw on Foucault's work on discourse, their reading disregards some of Foucault's later writings (see Dingwall 2000: 903), and furthermore presents a rather Marxist reading of Foucault. Suggesting that discourse reflects power structures in society (Conley and O'Barr 1997: 7) erects once again is a distinction between the two - a distinction denied of course, in Foucault's emphasis on power/knowledge. Their emphasis on a 'dominant' discourse furthermore resonates much more with a Marxist conception of ideology than with Foucault's emphasis on multiple discourses.

6 Of course, some of these typified whole-case narratives are more likely to be mobilized for certain (what sociologists would call) 'population groups' than others. The 'angry young men' are just that: often men, whose intoxicated violence tends to be understood as triggered by threats to their masculinity. The idea that domestic violence occurs most often in 'certain strata of society' [*bepaalde milieus*] clearly mobilizes classist conceptions about civility and interpersonal relationships, while the emphasis on the moral character of the (often female) victims in such cases of domestic violence sheds a rather sexist light on some of these evaluations. Drug-addicted, homeless defendants tend to be economically marginalized, and given the over-representation of certain 'ethnic groups' among the economically marginalized, a case could be made that judges' punitive stance vis-à-vis

drug-addicted people in actual fact end up reproducing not just economic, but ethnic marginalization. At the same time, such a gesture engages in a 'reality game' similar to the kind I have commented on in reference to critical discourse analysis: what happens, concretely, in legal sites and practices is yet again treated as an expression of an underlying social 'real' (even though that 'real' is one of social facts or structures, not of power and language).

7 It is for this reason that I am not wholly ready to ascribe to Tata's (2007) decidedly naturalist appeals. Writing about judicial practices and contrasting these 'factorial approaches', Tata (2007) not only suggests that a study of typified whole-case narratives offer a unique insight into judicial practices - a methodological point - but draws on an implicit naturalist realism, contrasting the formalism of socio-statistical modelling with the singularity of actual practices. Again, it has to be born in mind that all methods of inquiry have performative effects, and that they all, for that reason, enact realities in specific ways. My concerns throughout this book, then, are perhaps less naturalist, but not one ounce less realist than Tata's (2007).

5 Visualizing Cases

1 From Story-telling to File-Work

Born out of largely conversation-mediated and interaction-based collaborations with judges, the preceding chapter demonstrated the centrality of defendants' remorsefulness to judges' appraisals of individual cases and demonstrated how such remorsefulness is narratively established and narratively evaluated. In so doing it resonates not only with those studies taking seriously the way language and narrative come to matter in legal settings, but also with judges' emphasis on 'a good story'. Guilt, responsibility and remorse are narratively mediated accomplishments - not unproblematic 'signs' or 'case factors'. Legal practices, specifically as they pertain to the remorsefulness of the defendant, have a storied texture.

Yet an exclusive focus on spoken language - both as something *in and of* legal practices, i.e. courtroom interaction, and as a *method* we use in collaboration with these legal practices, i.e. by talking with judges - introduces its own limitations. That narrative and story-telling make up an important part of legal practices cannot be denied. Yet there is a real risk, here, of forgetting that legal practices are not just that. They also, Dupret (2007: 85) argues, 'constitute an activity accomplished on a daily basis, of an overwhelmingly routine character, the place of production and reproduction of professional practices'. Scheffer (2010) similarly warns against the tendency to concentrate exclusively on the verbal production of order (Cf. Atkinson and Drew 1979) or on interactions in court (Cf. Conley and O'Barr 1990). Doing so runs the risk of phonocentrism (Derrida 1967):

of treating as more primary the spoken word over writing. Legal practices are themselves notably phonocentric: many jurisdictions for instance privilege oral testimony over written testimony. Yet there is no reason for us to reproduce this phonocentricity in our accounts - especially not if in doing so we miss out on large swaths of file-work (Scheffer 2005, 2007). In this chapter, I concentrate on these practices of file-work. Instrumental in judges' pre-trial 'visualization of the case', these practices of file-work demonstrate both the centrality of the case file in judicial practices in particular, and the materiality of knowledge practices more generally.

This chapter [1], then, speaks to a curious hiatus in legal as well as socio-legal understandings of legal practices. Focused on the technicalities of legal reasoning (Riles 2005) or on verbal interaction (Conley and O'Barr 1990; Atkinson and Drew 1979), dominant approaches to legal practices tend not to pay much attention to the case file. Reasons for this neglect of backstage file-work are not difficult to fathom. There is a real attraction in the tragedy of the courtroom: promising unity of place, time and act, the courtroom evokes and dramatizes the encounter between the subject and the Law. It also speaks to the sociological imagination, calling upon researchers to understand, in classical fashion, the intricate relationship between personal troubles and public issues (Mills 1959: 226). On a more practical level, courtrooms tend to be publicly accessible and as such raise fewer barriers to curious researchers. Documents, in contrast, do not perhaps make for the most exciting of research objects (Latour (1990: 54) quips they may be among the 'most despised of ethnographic objects'), and in their association with backstage legal practices make their use and operation difficult to access. Nor are different national jurisdictions equally reliant on written materials: Anglo-Saxon courtroom tend to emphasize speech over writing, whereas Dutch criminal law draws more extensively

on the official dossier as a carrier and transporter of evidentiary materials.

'Seeing the Case Clearly'

However, these official dossiers are a principal object of and for work for the judges studied here. Indeed, much of judges' time is spent in their offices, where they try to 'see the case', 'attempting to 'see the full picture', all the while remaining sensitive to their 'blind spots'. While these visual metaphors - like many of such metaphors (Haraway 1988) - seem to suggest this is quite an unproblematic, cognitive operation, their work practices are revealing of active, sometimes fraught, *practices of visualization*; visualization practices, moreover, that take place in relation to the legal case file.

I arrived at these practices not from a vantage point in the courtroom, but rather through the observation of judicial practices of file-work backstage. This place - seated next to the judge, tracing and recording the judges' file-work - afforded me some sense of these practices of visualization. An exemplification:

> This morning I join Judge Roberts in her office to observe her preparation for tomorrow's court session. She is almost ready to start, she tells me, as she drops a large stack of files on a corner of her desk and takes seat behind her desk. 'There are a couple of big ones', she tells me as she points to a set of particularly thick files, 'I hope we have enough time to discuss these in court tomorrow; it looks like they're going to be complicated.' In front of her, she has a smaller stack of single sheets of paper. These are copies of the summons sent out to individual defendants detailing the charges. These copied summons all have hand-written notes on them. I know that these have already been 'prepared' by the clerk who is assisting Judge Roberts with tomorrow's court session. On her left is a small collection of coloured pens, post-its, and yellow markers. I am seated to her right, and glance over her shoulder while she studies the case files. 'Can you see it alright?', she laughs, and starts her preparation of tomorrow's court session.

> Methodically, Judge Roberts first takes a yellow marker and marks certain phrases and words on the summons accompanying the first case file. 'See, you have the tendency to delve right into the file. But it is important to first look at the charges. With that in the back of your mind you then enter the file.' Reaching to her left to pick up one of her coloured pens - a red one - she tells me, 'I like to use coloured pens when I work with the clerk's written preparation on the summons. That way it's clear what exactly I wrote down myself, my own notes stand out.' Opening the case file, she takes out a letter from the defendant's lawyer; with a red pen, she then writes down, on the summons, the name of the lawyer. This type of back-and-forth between the case file and her own notes is repeated throughout her preparation: leafing through the file and reading several documents, she uses her pen to cross off the clerks' notes and occasionally exchanges her red pen for a yellow marker to highlight specific phrases and words in the case file. She says, 'See, I am checking each and every part of the charges now', and shows me how, having found the relevant information in the legal case file, she checks off the location of the crime, the name of the defendant, and the specific acts that were involved with small, v-shaped scribbles on the text of the written charges. 'So what I am looking for is whether the clerk has written everything down and whether all of it is in the file.' Getting ready to close the file she hesitates: 'I forgot to read the parole service report!' Rummaging through the file she halts when she sees a small, pink post-it peeking out from the now slightly messy-looking file. 'Ah, there it is!' Slipping the document out of the file, she reads the concluding section in the parole service report, and mumbles, 'so, this guy probably left the Netherlands again while he was still on parole …' Having taken some notes again on the copy of the summons, she is done with this file. The elastic binder snaps the case file closed.

Taking some 20 minutes, this case was not very difficult to 'see clearly', she told me: the case file was complete, the evidentiary materials mostly in order, and the clerk's preparation was up to par.

Doings with Paper or Digital Documents

What appeared, in Chapter 3, as an input-output system distributing justice, and in Chapter 4 as a highly morally charged, narrative practice, now starts to look slightly more mundane. Seated at the judges' desks to observe their work I learned that judicial work is also a practice of lugging heavy files to one's desk; of ordering documents in the file; of leafing through them, in search of that one piece of testimony or that one expert witness report; and of using pen, pencil and paper to distill, from the file, an operative sense of 'the case'. These judicial practices are practices of extraction (Latour 2010): of extracting from the case file 'the case' it supposedly enfolds. For many court workers, then, 'ordinary case work seems to a large extent a face-to-file interaction' (Scheffer 2005: 75) rather than face-to-face interaction. 'The case' is buried in the file - and the judge's task is to see it clearly.

Such extraction is not always easy. Case files themselves may resist the effort: their sheer size, incompleteness, or their 'messiness' may thwart judges' pre-trial preparations. These little recalcitrances were exacerbated, for judges, when the Court introduced digital case files. Part and parcel of a broader program aimed at streamlining the organization of the Court and its communication with its 'chain partners' [*ketenpartners*], digital files held the promise of reducing administrative personnel costs and, particularly so in civil law cases, of rendering access to legal procedures easier and swifter. Judges however were not quite so enthusiastic about these digital files. Indeed, many lamented the transition. 'I kept thinking, you know, if only I could see that stack of files in front of me!' a judge sighed wistfully when recounting her first difficulties with the digital case files. Her colleague added, 'if only to get that first impression, even! Like, what case files are thick, which are thin, that kind of thing.' Clerks, too, complained: 'It's presented to us as a time-saver. I can tell you, it's not!'. They, too, faced new demands as they were

asked to work digitally, and they, too, only gradually settled into this unfamiliar medium of work.

These observations sketch the outlines of the central problem addressed here: the relationship between the materiality of the case file on the one hand, and on the other, judicial visualization practices. They point towards not only the centrality of the case file as a material entity in, and active constituent of, judicial sense-making and visualizing practices, but also to the ways this materiality starts to *matter* in the migration of one medium (paper files) to the next (digital files) (Lanzara 2009). The question is hence how, through various types of file-work, an elusive 'image of the case' emerges in the interaction between file and file-worker, and crucially, how such taken-for-granted sense-making practices are variously disrupted, rearticulated, or painstakingly maintained when judicial professionals face a shift in the tools of their trade.

2 Judicial Thinking, Seeing, and Visualization

Unpacking the implications of these observation leads not only to a rearticulated understanding of just how we may inquire into 'judicial thinking' (Cf. Possner 2008) or Hart's 'internal point of view' (1994 [1961]); accompanying this effort is also an account of the challenges that attend to our efforts to take the abundance of written artefacts in our fields of research seriously.

In this sense, this intervention takes place against a background of conceptualizations of judicial work that are, explicitly or implicitly, *cognitivist*. Possner (2008), drawing on experimental and survey data, raises the question as to 'how judges think', suggesting that psychological mechanisms or economic incentive structures shape and structure judicial thinking. In so doing, legal decisions are first and foremost understood as a product of cognitive processes upon which other cognitive biases, e.g. psychological mechanisms or economic,

profit-maximizing orientations, exert their influence. A similar emphasis on judicial cognition is present in Wermink et al. (2012a), who suggest that different sentencing outcomes are due to processes taking place in the 'unconscious'. As I have argued in Chapter 3, such an approach to judicial decision-making treats not only the legal system at large as an input-output system; it also places within that black box yet another, explanatory black box: the head of the judge. The implicit assumptions that action is the product of cognitive processes, and that such cognitive processes exist only in the 'head of the actor', contrasts sharply with approaches to cognition that treat it as embodied and situated. Combining insights from a wide variety of sources, e.g. activity theory and developmental psychology, practice theory, and American pragmatism, these approaches treat cognition not as a consequence of detached and unmediated knowing activity, but intimately bound up with the material environment (see e.g. Hutchins 1995; vom Lehn et al. 2001; Orlikowski 2006; Schatzki et al. 2001). Intellectual tasks conceived in this way often 'appear to be highly embodied activities, in which on-going interactions with the immediate surroundings play a key role' (Berg 1996: 504). People think not only with their heads, but with their 'hands', too (Latour 1986). An appreciation of file-work hence defers the necessity to 'black-box' judicial thinking in the 'head of the judge', and treats it primarily as a situated and materially mediated activity. In contrast with a cognitivism that leaves us with a '"dematerialized" understanding of conduct and action' (vom Lehn et al. 2001: 208), this understanding of judicial knowing practices also opens these activities up for empirical inquiry, rather than locking it up in the 'head of the actor'.

Permutations of Perspectivism: Point of View, Vision, Visualization

Some of this situatedness of knowing is attended to in approaches to legal work that draw, like the judges studied here, on a perspectivist register. Judicial thinking is not just any kind of

thinking: there is something uniquely 'legal' about it. It is, according to Hart (1994 [1961]) the attitude of the practical-rule follower: seeing the rule is an immediate and unreflexive *grasping* of the rule (see Shapiro 2006). Not only does this emphasis on the internal 'viewpoint' resonate with judges' own conception of what they are doing when they are doing file-work - after all, they are trying to 'see the case clearly'; it also resonates with those seeking to study 'vision' in relation to specific professional practices. Goodwin (1994), for instance, suggests that different professional practices rely on cultivated and materially mediated modes of distinguishing figure from ground, information from noise. Yet while Goodwin (1994) treats these professional practices as intimately bound up with specific socio-material sites and settings - collecting soil for testing, recognizing and pointing out, for others, 'aggression' in a defendants' behaviour caught on videotape - Hart's perspectivism falls prey to a similar kind of cognitivism: for him, the grasping of the rule is a disembodied, immaterial process.

Hart's internal point of view, however, does allude to something specific to legal practices: that is, the legal rule itself. These are central to legal practices: in ethnomethodological terms, they are to what action 'oriented'. It is through this very act of orienting oneself to the rule that these rules become implicated in action. While legal rules, then, may pre-exist their implication in concrete practices, the very fact that they pre-exist concrete instances of implication does not make their 'hold' on concrete practices unproblematic. For socio-legal scholars, the question remains, for how, *as a matter of practical activity*, are rules oriented to at all? In the social study of legal practices, this problem is also known as the 'missing-what' (Dupret et al. 2015). Lynch summarizes this 'missing what' as born out of a tendency to

> describe various "social" influences on and implication of the growth and development of legal institutions while taking for granted that

> lawyers write briefs, present cases, interrogate witnesses, and engage in legal reasoning (Lynch 1993: 114).

Accompanying this tendency is treating legal categories and rules as self-evident 'prescriptions and proscriptions for action' (Dupret et al. 2015: 4). Yet the practical and concrete question is one that would highlight precisely how legal rules are 'oriented to' at all as a matter of situated and practical activity. File-work, as the location of *coming to the case*, of grappling with it, of turning it around in one's thoughts while browsing the file, is a plausible candidate to start to begin inquiry into this kind of apprehension.

Legal Case Files

Latour (2010) and Scheffer (2005, 2006) are notable here, as they have explicitly traced the 'doings with documents' (Harper 1998: 3) in legal settings. For both, legal practices take place in relation to both spoken word and written text. For both, the case file is a crucial agent in these practices. For instance, Latour (2010) locates the quintessential legal activity of finding the *means* (the legal argument) in the file-workers attempts to build a 'fragile bridge of texts' between the case file and the letter of the Law (2010: 83) in a series of sequentially distributed note-taking and summarizing operations. Especially helpful is his attention to the distributed character of such practices over various kinds of file-workers, and his sensitivity to the sheer amount of work that goes into extracting, 'like diamonds […] from the ore (Latour 2010: 102), the 'case' in its purest form from the case file. Scheffer (2005, 2006, 2007, 2010), too, concentrates on the implication of the documents in the case file in the formation of a criminal defence in his study of defence lawyers' file-work, focusing on the interplay between written and spoken text in the construction of lawyers' defence pleas. Emphasizing the intricacies of file-work, both authors move away from treating case files as unproblematic representational devices: the file does not speak

for itself. At the same time, both authors highlight above all else the *textual contents* of the case file, and in so doing risk reproducing some of the cognitivism or dematerialized perspectivism I have sought to make problematic here. It treats knowing as a product of unfolding and practical 'microformation' (Scheffer 2005), yet loses out of sight the fact that the case file is not only a container of information but a material object as well.

Combining both a concern with the practical ways legal actors orient their action to legal rules and an emphasis on the materiality of such practices, I suggest we think of these practices as *practices of visualization*. With Goodwin (1994), I would suggest that these practices may be rather specific to certain professions or communities of practices. With Lynch (1993), Scheffer (2004, 2007) and Latour (2010), I would suggest the 'missing what' of much socio-legal scholarship lies precisely in its disregard for the practical and material activities of orienting action towards legal rules and categories. Yet the notion of visualization has additional affordances in the study of legal practices. Unmooring it from its dominant coupling with discussions about big data (Halpern 2014) or new media technologies (Mirzoeff 2015), the notion of visualization is suggestive of purposeful and operational modalities of 'seeing' that require active schematization and ordering. It is related to the question of visibilities, that is 'historically stipulated apparatuses for producing evidence about bodies, subjects' (Halpern 2014: 23). Continuing to emphasize the practical and situated character of such practices, I am less interested here in questions about visuality as these are linked to governmentalities or indeed, history. Instead, I want to concentrate on the small acts of apprehending, of coming to the case, as these takes place in relation to the case file. The notion of visualization helps me to do so, as it precisely '*straddles* the actual practices of depicting and modelling the world, the images that are used, and the forms of attention by which users are trained to use interfaces and engage with screens' (Halpern 2014: 23,

emphasis added) - or, as I will show, with an object that is *both* a semiotic surface and a physical thing.

In order to demonstrate what such an attention to file-work may yield, I now take you to the offices and file-rooms making up the court's 'backstage'. I give up my position as spectator in the courtroom and interrogator of judges for an observational mode of inquiry that traces case files from their entry into the court to the judges' desk.

3 Visualizing the Case: A Paper-Specific Account

What does it take, then, to 'see' the case? It takes, first of all, a case file. Gathering together evidentiary materials, expert witness reports, and documents testifying to the specifics of the case, the case file promises to enfold 'the case'. In their paper form case files arrive in the court's administrative offices; there, their arrival is registered in one of two digital registration systems (the older Compas or the relatively new GPS). Administrative workers must furthermore check these files according to a checklist that is attached to their inner sleeve. Among other things, they check whether the case file meets certain procedural demands and take note of its components. For instance, does it include a separate binder for information on, and correspondence with, a possible victim? Does it include a parole service report? Most files, however, are far from complete upon arrival: not only may further reports be added to them once they are sent to the court's administration, but on-going correspondence between the prosecutor or the defence attorney and the Court must similarly be added to the case file. Latour (2010), drawing on colloquialisms shared by the administrative workers in the Counseil d'Etat, speaks of these processes as one of 'ripening'. In the court studied here, files stored in the file-room are considered quite 'open' and even 'alive'.

'Reading' a File: Material Clues

To the uninitiated, files look very much alike. As standardized objects, files are precisely instruments of deindividuation, physically and materially embodying procedural 'equality before the Law' (Cf. M'charek, Hagendijk and Prainsack 2013). Yet seemingly slight differences between them assume importance to both clerks and judges. For instance, paper files in police judge cases may be quite thin or quite thick. Or their sleeves may be worn - when the case has been adjourned, perhaps more than once, in its past - or rather new and sleek. Clerks' and judges' first encounter with their 'cases', then, is visual and perceptual: they simply face a stack of files, which they might have to move from one location (the file room) to their own offices. This stack itself, as well as the thickness and age of individual files, allows clerks and judges to *gauge* the case load, that is, it allows them to assess not just exactly how many cases are scheduled to appear in court in a single court session (done by counting), but also the relative complexity of individual cases. Clerks and judges regularly make distinctions based on the thickness of individual files, as they have come to learn the bigger files are usually more complex cases, with more evidentiary materials: a case of physical assault, perhaps, in which victim's, witnesses', and defendants' statements are notoriously incomplete and contradictory, and in which correspondence with the victims may have generated more paper. Thinner files are perceived differently; these are probably 'simple' cases of petty theft, in which defendants are caught red-handed and (usually) confess.

Once the paper file is opened, the physical qualities of its component parts afford the same intuitive gauging processes to take place, prior, even, to reading one word of its textual content. For instance, a thick folder of evidentiary materials suggests not only that the case is more (legally) complex (as more evidence has been gathered), but also that the judge will be dealing with a defendant who pleads innocent: a clerk explains that in such

cases, 'police officials have to work harder to find the two pieces of evidence we need to convict someone and, well, they use a lot more paper.' The criminal record, as a physical object, is particularly suggestive here, too: it allows clerks and judges acquire an 'image' of the defendant as e.g. a particularly troublesome repeat offender or a one-shotter, which 'image' in turn helps them evaluate punishment options if the defendant is found guilty. Leafing through the file, judge Dempsey, with a surprised look on his face, showed me a particularly thick criminal record: 'Look at this! You can seriously injure someone if you hit him on the head with a criminal record this thick. Well, if he's found guilty we won't have to explore the option of a community service; he passed that station twenty-five cases ago!' Here, the physical qualities of the paper case file become instrumental in conceiving of the case as characteristic of a certain narrative kind. Concerning 'offense types rather than specific individuals' (Dupret 2011: 142), judges' narrative typifications (see Chapter 4) may already be mobilized at this early stage of their file-work. Gauging the physical qualities of the case file and its component parts provides file-workers with a set of material clues instrumental in structuring and timing their pre-trial preparations. Their informational value is not limited to their textual or graphic content: case files are both texts and physical objects.

Of course, it takes experience to be able to make such distinctions. For a novice, the case file is utterly bewildering. Looking all very much the same on the outside, their insides are a jumble. Documents are not necessarily ordered chronologically. Folders within folders raise the question what logic guides their inclusion into each other. And what are all these scribbles about? Why all the stamps? What do all these abbreviations mean? 'Reading' is a word ill-suited to describe my first studies of the case files; 'struggling with' being an arguably much more astute nomer. Case files very much resisted a 'politics of immediation'

(Mazzarella 2006) that expects immediate and unproblematic access to 'what really happened'. Judges and clerks, then, have developed ways to 'tame' the file in order to extract the case.

Taming a File

Before the file arrives at the judges' desk it has first passed through the hands of an assisting court clerk. These clerks are tasked with making the file a more easily-navigable and structured object. Kirsch calls these practices 'informational jigging': these are practices in which 'an agent will arrange items (consciously or sometimes unconsciously) [in the material environment] to draw attention, to cue cognitive events or processes in himself or herself or another agent' (Kirsch 1995: 38). Coding, for instance, is the practice by which court clerks physically mark some parts of the paper file with colour-coded stickers. Showing me his selection of red, orange, blue, green and pink post-its, clerk Lee explains:

> So what they want from us is to mark the documents in the case file, so that they can switch to whatever documents they are interested in right away when they are preparing cases. So we use orange for the criminal record, red is for his statement in the police interrogation, blue is of course for the police findings [referring to the colour of police uniforms], the victim's statement is marked green and then there is the pink sticker for the parole service report. That is if there is a parole service report present.

Showing me a drawer full of these coloured stickers, he chuckles and adds, 'By the way it is really annoying when we run out of these post-its, so I and some other clerks are hoarding them'.[2] Here, clerks' coding practices assist judges' future navigation of the case file. Court clerks may also draw out relevant passages from the police observations or interrogations by highlighting, with a pencil, certain important words and sentences in the case file, hence directing attention to those 'sensitive text zones'

(Fraenckel et al. 2010) in which the judge is anticipated to find answers to questions of legal relevance: 'it's just to sort of underline the things a judge might be interested in, like the defendants' statement or a witness' observations, stuff like that', a clerk tells me. In their highlighting, they also 'transform the future reading of the copy' (Scheffer 2006: 308), drawing attention to salient phrases or accounts.

Judges, too, engage in such informational jigging activities - although they, unlike clerks, may prefer to use yellow markers in their highlighting practices (see Figure 2).

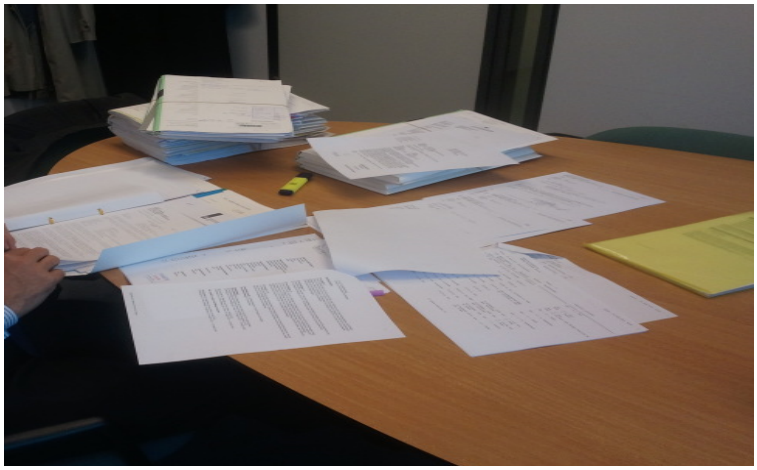


Figure 2: Juxtaposing conflicting accounts, a yellow marker ready

Assisting both clerks' and judges' 'reading' of the file is yet another affordance of paper files, that is the fact that component parts can be spread out on a desk. Especially in cases involving multiple witness accounts, the 'ecological flexibility' (Luff et al. 1992) of paper files allows file-workers to easily switch between different accounts. In, we see a judge engaged in precisely such highlighting and juxtaposing work.

Making a Summary: Disentangling and Assembling Work

Throughout their gauging, jigging, and juxtaposing work, clerks and judges are first and foremost concerned with the extraction of 'the case'. Their extractions [*uittreksels*] are always geared towards the official charges: these they use to 'apply a filter' (Judge Beech) and to distinguish signal from noise. These charges are legal-formulaic in nature, and are drawn up in order to cover various modalities of the crime in question (e.g. whether the person committed the crime alone or in association with others, whether the person hit or merely slapped a person), e.g.:

> That he, on or about the [date] in [place] together with and in association with others, or alone, maliciously maltreating a person or persons, hit/kicked a person [name victim] multiple times (with force) on/against the head and/or back and/or leg/legs and/or on another part/on other parts of the body, as a result of which [the victim] has suffered pain and/or injury.

These charges are, to speak with Latour (2010), a tentative *bridge* between the case file and the letter of the Law. They fold within the formulation of the legal rule - 'maliciously maltreating' - the specifics of the offense in question - the date and place of the offense, the name of the victim, and the precise alleged actions, i.e. 'hit/kicked […] on/against the head and/or back/ and/or legs'. The file, once ordered and jigged, is read and summarized in relation to these summons. These charges, one judge emphasises, 'anchor' her navigation practices.

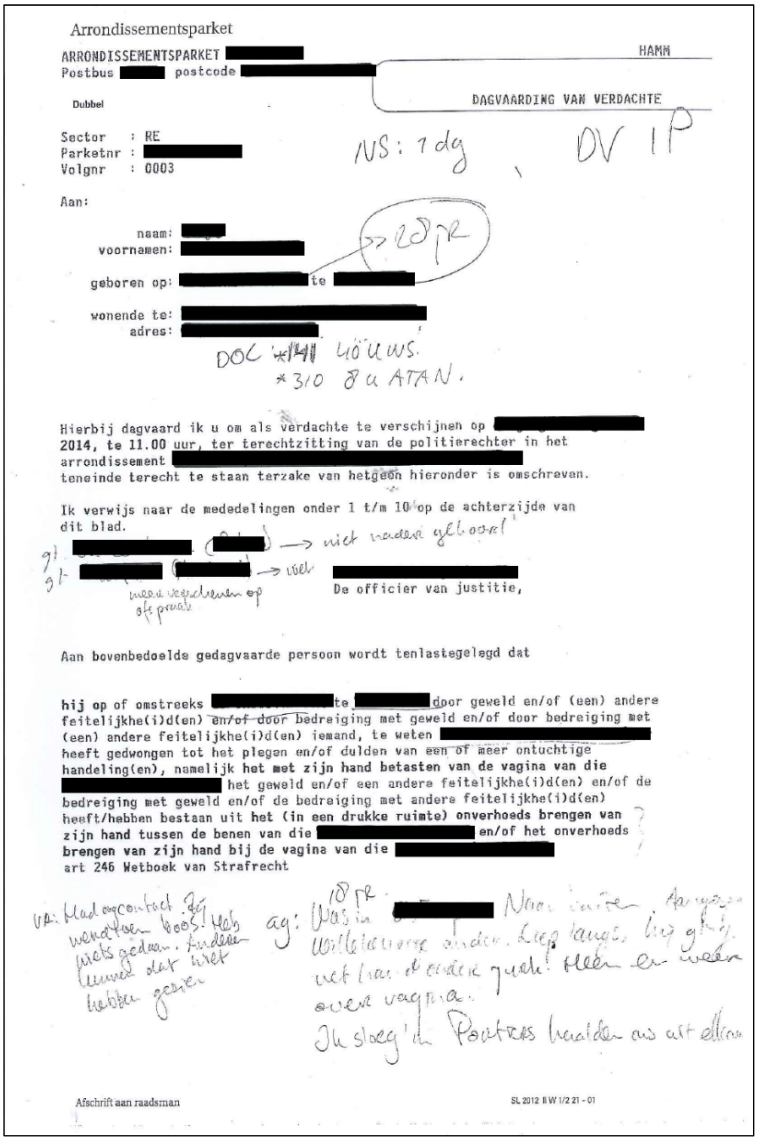
Some judges additionally *visually draw out* the case as a more or less provable entity using the text of the charges on the copy of the summons. Translating the information in the file into an 'image of the case' may for instance be done through the marking of specific terms, or crossing through terms in the charges that the judge expects cannot be proven, superimposing the facts of the case onto the formal charges:[3]

> That he, on or about [date] in [place] ~~together with and in association with others,~~ or alone, maliciously maltreating a person or persons, hit~~/kicked~~ a person [name victim] multiple times (with force) on/against the head and/or back ~~and/or~~ ~~leg/legs and/or on another part/on other parts of the body~~, as a result of which [the victim] has suffered pain and/or injury.

Yet the surface of the summons is not only instrumental in extracting the case-as-event. Further bits and pieces are added to it, in particular information with the case as a procedural entity and information with regards to the 'person of the defendant'. Often, these bits and pieces are spatially clustered on the surface of the summons. Take, for instance, the anonymized copy[4] of one of the judges' notes in Figure 3.

Here, we see in the right hand corner information with regards to procedural elements of the case. This specific defendant has spent 1 day in custody, the judge notes ('IVS: 1 dag'), and the summons have been handed over in person ('DV: IP'). It also includes a brief summary of the defendant's criminal record ('DOC'), which has in this case two counts specified with use of the Dutch Criminal Code's numbering: one, a count of public assault ('141') and another of theft ('310'). Detailing, too, the specific sentence decided on (e.g. '40 u ws' means 40 hours of community service), this preparation form allows the judge not only to place the current event in a more or less criminal history, but also to take into account the (relatively new) rule stipulating that defendants do not receive a community service for a similar offense within five years after their first conviction.[5]

Moving on, what appears is information with regards not to 'the case' as a procedural entity, but as an event. The judge has noted that two witnesses ['gt' - *getuige*] to the offense - a case of sexual assault - have only been heard *in situ*. Below the charges, we also find a brief summary of the defendant's words, drawn from the process-verbal of his interrogation: 'had eye-contact. She got angry. Did not do anything. Others could not have seen it'.



Arrondissementsparket

ARRONDISSEMENTSPARKET [redacted] HAMM
Postbus [redacted] postcode [redacted]

Dubbel

DAGVAARDING VAN VERDACHTE

Sector : RE
Parketnr : [redacted]
Volgnr : 0003

NS: 1 dg DV IP

Aan:

naam: [redacted]
voornamen: [redacted]
geboren op: [redacted] te [redacted]
wonende te: [redacted]
adres: [redacted]

>> 20 jr

DOC #141 40 u ws.
*310 8 u ATAN.

Hierbij dagvaard ik u om als verdachte te verschijnen op [redacted] 2014, te 11.00 uur, ter terechtzitting van de politierechter in het arrondissement [redacted] teneinde terecht te staan terzake van hetgeen hieronder is omschreven.

Ik verwijs naar de mededelingen onder 1 t/m 10 op de achterzijde van dit blad.

gl [redacted] → niet meer gehoord
gl [redacted] → veel meer verschenen op afspraak

De officier van justitie,

Aan bovenbedoelde gedagvaarde persoon wordt tenlastegelegd dat

hij op of omstreeks [redacted] te [redacted] door geweld en/of (een) andere feitelijkhe(i)d(en) ~~en/of door bedreiging met geweld en/of door bedreiging met~~ (een) andere feitelijkhe(i)d(en) iemand, te weten [redacted] heeft gedwongen tot het plegen en/of dulden van ~~een of meer~~ ontuchtige handeling(en), namelijk **het met zijn hand betasten van de vagina van die** [redacted] het geweld en/of een andere feitelijkhe(i)d(en) en/of de bedreiging met geweld en/of de bedreiging met andere feitelijkhe(i)d(en) **heeft/hebben bestaan uit het (in een drukke ruimte) onverhoeds brengen van zijn hand tussen de benen van die** [redacted] **en/of het onverhoeds brengen van zijn hand bij de vagina van die** [redacted]
art 246 Wetboek van Strafrecht

Afschrift aan raadsman

SL 2012 II W 1/2 21 - 01

Figure 3: The product of a judge's case-extraction on the (copied) summons

Included, too, is a rudimentary version of the victim's account. Its use of both the first- and third person (not second-person) evokes the activity of stitching together both the first-person account of the victim and the third-person summarization of the judge while simultaneously allowing the judge to distinguish between the victim's statement and his own summary: 'was in [bar name]. Went outside. Addressed by random person. Passed her, he put hand under dress, rubbed her vagina. I hit him and security guard intervened.' In extracting the basic informational coordinates of the offense in question, judges may sometimes take care to summarize the offense as a narrative. For instance, Judge Roberts adds to the summons the following note:

> big fight, two stages. Def.[endant]. issues threat, tapping knife on window, throws table through door -> police. Def. sleeps. Again fight + verbal threats, grandmother and daughter now present. Kicks in front door.

Yet not all judges do so, as it may render it more difficult to keep apart exactly what was said by whom. Drawing distinctions between the account of the defendant and victim, as visible in Figure 3, assists judges especially in cases where different accounts diverge significantly.

The case as event, and the case as a procedural entity: both are now neatly separated. While this judge has not included notes on the defendant's personal circumstances, many judges do so in the lower corner of the copied summons. If the defendant is found guilty, these notes assist judges in accounting for the defendants' personal circumstances in crafting a suitable sentence. Judge Dempsey, including information about the defendant's addictions to heroin, cocaine, and alcohol, notes down the following on his preparation form:

> her/coc, alc, no fixed income, daughter, debts up to 30.000 euros.

The case's 'microformation' (Scheffer 2006), then, is a practice revolving around a move from a 'first glance' towards a more specific 'seeing': a 'seeing' that distinguishes between the case as a procedural entity, the case as an event, and the case as involving an individual defendant. Yet together, these three spatial clusters also do something more: they *mutually elaborate* each other (Berg and Goorman 1999). They are not discrete bits and pieces of information, but are interpreted together. For instance, whether the summons has been handed over in person or not is important in a legal-procedural sense; at the same time, this legal-procedural element of the case structures judges' expectations with regard to what kind of defendant they will be dealing with: If the summons has not been handed over in person, judges know that the defendant is probably homeless - an association, we know by now, that evokes not only drug-addiction, but petty theft as well (see Chapter 4). Similarly, the precise nature and modality of the crime charged may (or may not) seamlessly 'line up' with the type of defendant into a more typical narrative. For instance, assembling the information from the defendant's criminal record, a parole service report, and the specificities of the event in question, judge Roberts, having taken some notes giggled and told me:

> See why I am laughing? He's still on parole for a previous offense, and part of his parole conditions was participation in an anger management course … So him kicking in that door [one of the offenses in question] doesn't come as a surprise!

Jigging, coding, highlighting, juxtaposing and summarizing work, then, produce what we may call a 'story-before-the-trial' (Cf. Jackson 1988, 1996). Then, one judge proclaims, 'you can send me into the courtroom with this one piece of paper!'

4 Digitization: Struggling to Visualize

Against this background of socially textured and materially mediated practices of visualization, the digitization of case files was met with hesitancy and frustration. Judges lamented the presence of computers in court, suggesting that these notorious slow computers perched on the judicial desk would significantly hamper their interaction with defendants. But backstage, too, the digitization of case files led to some confusion. On the one hand, paper case files continued to trickle in; linked to an older registration system (Compas), these paper case files tended to be part of the prosecution's backlog of cases. As such, the court was not, at any point of my fieldwork, wholly without paper case files.[6] Yet more and more cases were not delivered to court in the form of paper files, but rather 'made available' through the new file viewer, Divos 2. Throughout my fieldwork, these digital files were all scanned copies of paper files; only in a later stage of digitization will all documents in the file be produced digitally.

I received access to these digital files as part of a broader digital access to the court's computers. While judges and clerks could use Divos 2 to check up on their own caseloads, I had access to all PR caseloads through Divos 2. While this slow but sure 'infrastructural inversion' (Bowker and Star 1999) would present court workers with practical hurdles in visualizing cases, it turned out an unexpected, methodological boon for me. As clerks and judges were able to highlight passages in the file and draw up digital, rather than paper, preparation forms, I now was able to trace (even in real-time) clerks' and judges' preparations. Divos 2 rendered available and visible especially clerks' preparation practices and their both formal and informal standardization over time. While the preceding observations are based, then, on close observation of work practices - the 'shadowing' of individual judges - the following part of this chapter draws additionally on these digitized preparation forms.

Let's first discuss the digital file-viewer. First of all, working with digital files is no more or less material than working with paper files: it still requires of judges that they be seated in a particular place and engage with specific materials (desk tops, desk chairs, computers). However, the file-viewer quite radically disrupted judicial methods of gauging cases in relation to the look and feel of individual case files. Instead, the perceptual field of an as-of-yet unknown caseload is materialized as a digital interface in the digital file viewer, Divos 2 (see Figure 4).

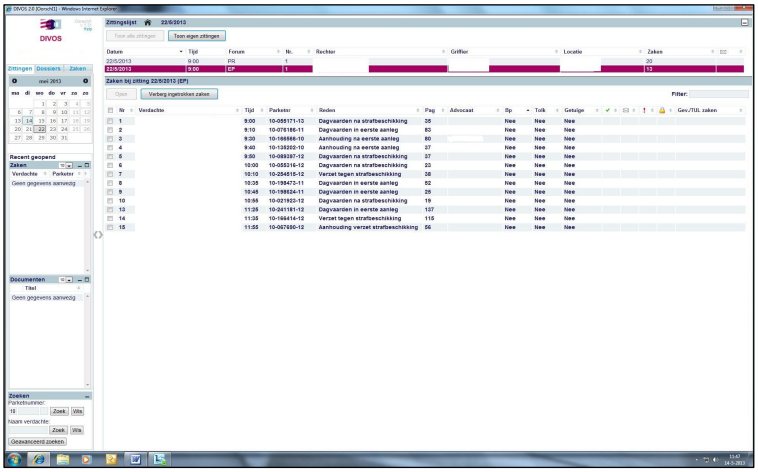
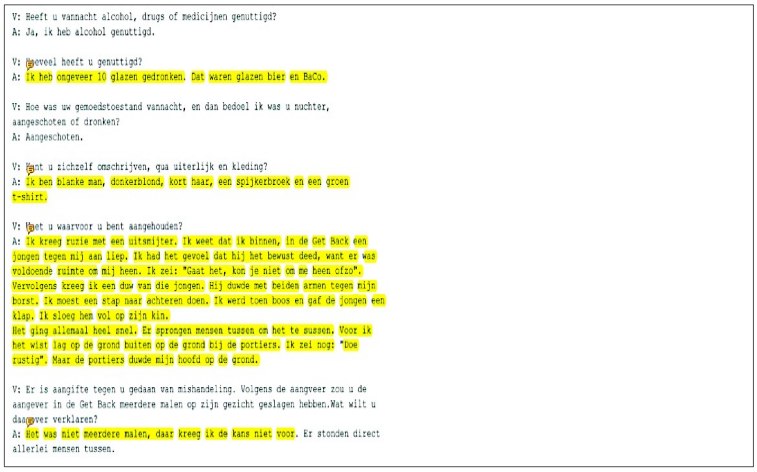


Figure 4: Screen shot of Divos 2 displaying one caseload, anonymized

Note that the file-viewer indicates only the number of pages as an indicator of the file's 'severity' or 'complexity'. In fact, this indication was only added to the software after judges expressed discomfort with an earlier version of Divos 2. Without any clue as to how thick the file would be, judges had difficulties structuring their workflow. Yet even the number of pages in the file detracted from the more immediate gauging afforded by the

physical look and shape of the file. Both clerks and judges reported having difficulties translating the number of pages of a digital file into a sense of how thick or thin the paper equivalent would have been. Similarly, the component parts of the case file - a criminal record, the evidentiary folder of the police - lack a material 'body' or physical substance. In a similar vein, judges and clerks were not always happy with the software as it disallowed their 'navigation-by-thumb'. Capable only of displaying two separate documents at the same time, the file viewer did not allow its users to juxtapose more sources of evidence - a technique especially useful in cases involving more than two pieces of evidence.

The file-viewer did, however, allow them to 'tame' the file in ways not dissimilar to what they were used to. For instance, it allowed its users to digitally highlight selected sentences and words in the various components that make up the case file. When selected and highlighted, these phrases and words are marked in yellow (see Figure 5).


V: Heeft u vannacht alcohol, drugs of medicijnen genuttigd?
A: Ja, ik heb alcohol genuttigd.

V: Hoeveel heeft u genuttigd?
A: Ik heb ongeveer 10 glazen gedronken. Dat waren glazen bier en BaCo.

V: Hoe was uw gemoedstoestand vannacht, en dan bedoel ik was u nuchter, aangeschoten of dronken?
A: Aangeschoten.

V: Kunt u zichzelf omschrijven, qua uiterlijk en kleding?
A: Ik ben blanke man, donkerblond, kort haar, een spijkerbroek en een groen t-shirt.

V: Weet u waarvoor u bent aangehouden?
A: Ik kreeg ruzie met een uitsmijter. Ik weet dat ik binnen, in de Get Back een jongen tegen mij aan liep. Ik had het gevoel dat hij het bewust deed, want er was voldoende ruimte om mij heen. Ik zei: "Gaat het, kon je niet om me heen ofzo". Vervolgens kreeg ik een duw van die jongen. Hij duwde met beiden armen tegen mijn borst. Ik moest een stap naar achteren doen. Ik werd toen boos en gaf de jongen een klap. Ik sloeg hem vol op zijn kin.
Het ging allemaal heel snel. Er sprongen mensen tussen om het te sussen. Voor ik het wist lag op de grond buiten op de grond bij de portiers. Ik zei nog: "Doe rustig". Maar de portiers duwde mijn hoofd op de grond.

V: Er is aangifte tegen u gedaan van mishandeling. Volgens de aangveer zou u de aangever in de Get Back meerdere malen op zijn gezicht geslagen hebben.Wat wilt u daarover verklaren?
A: Dat was niet meerdere malen, daar kreeg ik de kans niet voor. Er stonden direct allerlei mensen tussen.

Figure 5: Highlighted text in a digitized process-verbal

Also, the file viewer anticipated existing summarizing practices: it provides the option to open and save a digital preparation form, in which information can either be typed out or copy-pasted from the digital file. Last, the digital file-viewer offers its users a way to *code* the information using hyperlinks, which appear as underlined and blue text in the digital preparation form (e.g. 'statement defendant', 'parole service report'). Clicking on a hyperlink, the user will open the hyperlinked file in the right half of the screen, in which the hyperlinked phrases will appear highlighted (see Figure 5).

Yet these digital affordances, while they seem ways to meet existing practices and 'user-demands', in effect had significant consequences on the *social distribution* of these work practices between clerks and judges. Take, for instance, clerks' preparation forms. In the case of paper files, clerks' tended to write these by hand, either on a separate sheet of paper or, like judges, on a copy of the summons. Judges could then either start their own preparation practices with a 'clean' summons or, often using a different colour pen, add their own notes to the prepared summons.

The paper-based preparation of clerkperformed through manual note taking onto the copy of the judicial summons, had as an advantage that it tended to be *brief* and *to the point*. After all, writing can be rather arduous and slow, and the physical space on the paper copy of the judicial summons is simply limited. The graphic layout of the preparation form, and the informal routine of presenting information in two or three separate spatial clusterings, further assisted the visual extraction of the case. However, faced with the affordances of the digital preparation form, clerks tended to present significantly more information and text. Not only is typing less arduous than writing and the space on the digital preparation form unlimited, the file viewer also rendered it possible to copy-paste whole swaths of texts into the digital preparation form. Copying and pasting text from the file

into the digital preparation form is easier than writing a summary oneself, while the digital preparation form can incorporate as much information as the clerk deems necessary - the space it offers is, in principle, unlimited. While some clerks used headings and subheadings to present the information, the preparation form would often take the visual form as a *list* (of bullet pointed bits of information or quotes) or a *text*. Some clerks, too, would neglect to incorporate the charges itself - hence requiring judges to navigate not only the documents 'in' the case, but also to keep yet another document in sight, that of the official summons.

The possibility to present large swaths of texts, sometimes literally copied from the texts in the digital file, met clerks' user-needs very well - their task, after all, consists of *being complete*. However, used in this particular fashion it failed to meet those of judges, some of whom in turn missed the brevity, clarity, and spatial clustering of information on the one-sheet, paper preparation forms had offered them. Without the brief and visually-concentrated presentation of the facts of the case, the digital file viewer in effect shifted more of the summarizing work to judges, who now not only had to navigate the wealth of information in the file, but the large swaths of text in the digital preparation form as well. It was only as a result of feedback from individual judges and the introduction of summarization guidelines for clerks that clerks started to strive once again for brevity. Commenting on a clerks' preparation, Judge Jamison

> What I like about these here is that they include the charges in the same [digital] field: that way, I immediately have some image of what we're talking about. Very good is also her brevity, in particular her summation of the defendants' criminal record. Some clerks in contrast simply copy all kinds of texts, while I will still have to check in the file whether that is all the relevant material. Copying like that, by the way, is a sure way to make the preparation form almost as unclear and extensive as the file itself - that doesn't work for me at all.

Taking the shape of a list or a text, the digital preparation form was not, furthermore, spatially clustered in two or three visual fields. In response to what they perceived as overly-extensive preparation forms, then, judges tended to continue to work with their own copies of the summons. Perceived as more trustworthy than the digital preparation form, the paper copy of the summons continues to be the preferred way for judges to prepare their cases - even though some judges were slowly 'settling' into the new medium (Cf. Lanzara 2009). However, the fear that the computer may fail them in court motivated many judges to continue to rely on their own note-taking on the summons. Perceived as more 'comfortable' and 'stable' to work with, the paper summons continued to act as the surface of the visual concentration and mutual elaboration of information. It also supported judges' reliance on manual note-taking and their interweaving of reading (the digital file) and writing (by hand) without having to switch screens on their computers (Cf. Sellen and Harper 2003), which, seeing as the computers in court are notoriously slow to operate, significantly speeded up their preparation practices.[7]

It is salient that the use of paper preparation forms came over time to be reserved mainly for the judges. Clerks' digital preparation forms were not completely sidelined: some judges would print these out and read the digital file in relation to both the paper summons and the clerks' preparations. Checking their own work against that of clerks was also deemed necessary when the digital case file had been highlighted and hyperlinked digitally. On the one hand, these digital hyperlinks facilitate a 'horizontal' and flexible navigation through the file, jumping immediately from digital preparation form to the information the clerk has highlighted without the necessity to scroll through the entirety case file. Similarly, digitally-highlighted text allowed judges to arrive at crucial bits of information almost immediately. Yet some judges remain hesitant to only use the clerks' digital directions:

after all, a clerk may overlook a piece of information or fail to select (and hyperlink) an important passage in the file. In paper files, this is not necessarily a problem: the feel of the file affords some sense of how much text preceded salient information in a witness report or a transcription of the interrogation of the defendant. After all, it matters, to judges, whether a defendant confesses at once or is guided towards confession; it also matters whether a victim or witness has important things to say about the circumstances leading up to the event, or is rather brief about these. Post-its and pencilled highlights, coupled with a tactile sense of the number of pages preceding a confession or description of the event assisted judges in their visualization. Yet precisely this tactile dimension was lost: left only were the hyperlinked, but dematerialized and decontextualized passages. It is for that reason judges expressed some hesitancy in following only the clerks' digital 'directions': it would disallow precisely such judgments about the 'con-text' of the case. That is, using only the clerks' hyperlinked passages might mean they not only fail to read salient texts presented in other parts of the file; it would also means they might not fully understand the context of the offense itself. Pointing, for instance, to a defendants' off-handed remark that he always carries a knife in the process-verbal of the defendants' interrogation, Judge Masons suggested that it is precisely these bits and pieces that inform her 'image' of the case:

> This is important. It isn't related to this specific case, perhaps, but it strengthens the idea that there are significant problems there, that he moves in strange circles [*milieu*].

As these bits and pieces - the 'context' - are instrumental in building that 'image' of the case, judges rarely rely on these hyperlinks only.

Of course, over time and with practice judges and clerks seemed to slowly but surely 'settle into' (Lanzara 2009) the new medium. For instance, while clerks may have copy-pasted long

swaths of texts, the digital preparation forms are slowly but surely decreasing in length, and judges may ask of clerks to make use of the newly introduced standardized digital preparation form. The relationship between specific individual clerks and judges may also play a role in how judges work with the (digital) file: when judges have worked with a specific clerk before, and were satisfied with his/her performance, the selection of information made by the clerk is trusted, while in other cases the clerks may not have a particularly good reputation, or such trust may as of yet not had a chance to develop (with new clerks). Both these inter-professional claims to professional legitimacy, control, and ownership of the judicial decision, as well as individual relationships between judges and clerks are without doubt to play a role in the further development of digital work practices.

5 Visualization and 'Doings with Documents'

The preceding pages have demonstrated how cases, over the course of practical face-to-file work, are visualized; how, in other words, caseworkers render both the truth of the matter and its legal qualification visible both textually and graphically. In doing so this chapter 'materializes' our understanding of both legal practices of truth-telling and practices of legal qualification: that is, it treats these practices as materially mediated. Apprehending the case is coming to an operational sense of 'what really happened' in relation to the letter of the Law. The paper summons operates, in these practices, as a both conceptual and physical 'bridge' between the text of the file and the text of the Law (Latour 2010). 'Micro-formation' (Scheffer 2005) of cases is enacted over the course of distributed and materially mediated activities of glancing at files, of gauging them, of ordering and taming them. If Hart's internal point of view (1994 [1961]) is that of the practical rule-follower making his or her intuitive leap into the rule-governed dark, judicial work practices first and foremost

suggest that 'visualizing the case' is a practical activity that unfolds over time, that is helped along or thwarted by the specific affordances and recalcitrances of case files, and that is distributed over judges and clerks. It is not a purely textual practice: instead, it draws on the para-textual and non-textual affordances of (paper) case files. In emphasizing these distributed, materially mediated practices of visualization it makes problematic both cognitivist appeals to 'how judges think' as well as an insistence on a dematerialized 'point of view'.

Praxio-graphy: A Practical Understanding of Writing and Infrastructure

Such an emphasis on practices of visualization, rather than on points of view or ways of thinking, would necessarily demand of us a practical understanding of the production and use of artefacts in the sites we study. Bureaucratic settings, to be more specific, are rife with files, documents, and administrative forms. The problems they pose are diametrically opposed to that of the metaphorical anthropological fieldworker who confronts a 'society without writing' (Levi Strauss 1961: 292). These are settings that, in contrast, depend on and hang together by virtue of writing: the rule of the desk (Weber 1978 [1922]) alludes precisely to the desk, where files are compiled, ordered, and processed. Yet a decidedly 'phonocentric reflex' (Cf. Derrida 1967) remains tempting. In other words, there is a tendency, within social inquiry, to not spend too much time on these artefacts, and instead to focus on the richness of face-to-face interactions. It is this same tendency, I think, that makes the court's 'frontstage' such a well-studied setting relative to the court's 'backstage'. As a result of this phonocentric reflex, the fact that bureaucratic actors *themselves* are very much concerned with administrative forms and artefacts can hence be glossed or itself be made into an exotic curiosity: look at how they fetishize these objects! Look at how they place excessive trust in writing! Such ironic readings, in my view, do little to appreciate just how

much of bureaucratic or legal practices hang together *not* or not only because its human members share a professional world-view or culture, but by their shared (if diverging) engagements with the bureaucratic 'mutable mobile' (Cf. Latour 1986) of the case file. Speaking of Prussian bureaucracy, Latour marvels that:

> The "rationalization" granted to bureaucracy since Hegel and Weber has been attributed by mistake to the "mind" of (Prussian) bureaucrats. *It is all in the files themselves.* […] The "cracy" of bureaucracy is mysterious and hard to study, but the "bureau" is something that can be empirically studied, and which explains, because of its structure, why some power is given to an average mind just by looking at files. […] Common sense ironically makes fun of these "gratte papiers" and "paper shufflers", and often wonders what all this "red tape" is for […]. In our cultures "paper shuffling" is the source of an essential power, that constantly escapes attention since its materiality is ignored (Latour 1986: 26).

The centrality of these travelling documents in these settings also means that 'the social' is not mutely awaiting a researcher to give it voice (Hirschauer 2006). In contrast: bureaucratic practices are shaped and structured by their own many documentary secretions. Taking organizational documents seriously, however, is not always easy. Garfinkel (1967) notes for instance that organizational documents are quite difficult objects in and of study. They are drawn up with specific audiences in mind and produced in reference to specific organizational contexts, and the researcher hoping to learn from them may be very much disappointed to learn he or she was not among the intended audience. Berg (1996) similarly draws attention to medical records, which have different organizational uses and as such cannot simply be used to 'learn more about the patient'. Representation of 'a case' may be only one, and even subservient, of the purposes of a document. Those interested in textual or graphic 'inscriptions' (Cf. Latour and Woolgar 1979) in various

settings may surely take this to heart: *representation is not necessarily the organizational point*.

Nor is 'representation' an unproblematic given. Even if documents may 'want' to represent - in this case, we could say that these case files have as their purpose the transportation of the event in question - this chapter shows that these case files still have to be 'brought to life' (Berg 1996: 501) through organized and distributed practices. A case file never 'speaks for itself'. Successfully navigating its information relies on material work, like highlighting, coding, and summarizing practice; the 'case' as such interactively *emerges* and is not in any simplistic way 'contained' in the case file. Case files may mediate epistemic access to a specific event in history, but it requires a professionally-situated set of techniques to organize this access to be able to 'see like a judge' (Cf. Law 2009; Scott 1998). In these kinds of 'epistemic practices' (Lynch 1993), documents are better analysed as concrete 'technical objects' that are deployed in making out a more abstract 'epistemic object', that is 'the case' (Ewenstein and Whyte 2009). What is more, the file is operational in ways that have nothing to do with its textual content proper, but instead with its material properties (wear and tear, its thickness, weight). Approaching documents in this non-representationalist manner allows us hence to put the senses back into our conceptualizations of sense-making activities, and appreciate the relevance of these sense-making activities for practitioners faced with high caseloads and the requirement to efficiently 'get things done' (Garfinkel 1967). If there is one thing to learn from this chapter it is that such representation takes not a simple glance or reading, but a specialized kind of 'professional vision' (Goodwin 1994) or rather, *professional practices of visualization*, to make case files do representational work at all. It is only by becoming familiar with these objects, and through developing ways to 'boil them down', that it becomes possible to 'read' them representationally and visualize the case.

The emphasis I have placed on digitization as a potentially disruptive event should interest researchers at the intersection of knowledge practices and digital artefacts more generally. In a context where digitization is increasingly understood as both a money-saver and a catch-all solution to public services' presupposed lack of transparency and efficiency, this chapter is in many ways a cautionary tale. An understanding of documents that treats these as transporters of information may do little to apprehend how knowledge practices are both profession- and medium-specific and implicated not only in individual, but also collective work practices. For instance, case files are, as I have shown, subtly implicated in the reproduction of the professional boundary between judges and assisting clerks (see for a similar case in medical settings, Berg and Bowker 1997). For instance, judges may use yellow markers to highlight text while clerks use erasable pencils, and continue to use the paper summons while clerks are expected to adapt to the digital files. These observations also point to the way technologies not simply mediate individual sense-making practices, but are deployed in 'rich, densely structured landscape[s] of identities and working relations' (Suchman 2002: 141). Also, at stake in intraprofessional struggles over control and legitimacy is in this case not merely the question as to who can 'legitimately see' (Goodwin 1994), but also: who, and with help of what specific instruments, can 'legitimately *visualize*'. At the same time, it is important to avoid a technological determinism that treats human activity as fully dependent on its material parameters. While following digitization some work practices become irretrievably lost, other practices are rearticulated or maintained. Indeed, digital practices may also come to exist alongside paper-based practices that to participants simply feel more comfortable, reliable, and flexible (Sellen and Harper 2003). And even where such digital media may attempt to replicate paper-based practices (e.g. the coding and highlighting affordances of the file viewer), work practices may not 'naturally

and unproblematically adapt to the new technology', nor will workers automatically 'take advantage of the 'obvious' benefits afforded by new computer based systems' (Heath et al. 2000: 301), as existing practices are maintained or rearticulated. In other words, materials matter - but where, how, and to whom are questions badly-attended to in either overtly human-centred or technology-centred accounts. The trouble is, as always, in the middle: in the relations between files and file-workers.

6 Onwards: Matter and Time

The preceding pages have demonstrated what an attention to materiality may do to our understanding of legal practices. That is, an attention to the medium-specificity of judicial work practices has assisted us in taking seriously the material mediation of both judicial 'thinking' and 'seeing'. I have paid specific attention to the various affordances and recalcitrances of case files. As physical objects, they allow for an intuitive gauging and sequential operations of 'taming' of the case; as digital objects, they lose some of these recalcitrances - their internal order may be standardized, for instance - yet they gain some, too: digital files remain difficult to gauge and summarize.

Case files, then, matter. That is: their materiality is consequential in and material to judicial visualization practices. Yet case files have yet another mode of mattering: not in the spatial sense of the term, but in the temporal sense. That is, their purpose is rendering the there-and-then of the event in question available in the here-and-now of judging activities; their role in allowing action-at-a-distance is one of creating a passage from the court setting towards the event in question. If they duly perform this task, time is folded: the there-and-then rendered accessible in the here-and-now. But they do not always succeed. Drawing attention not to the time and place of the event in question, but rather to their own history of production, case files may fail to

mediate this temporal folding. The following chapter concentrates on the ways case files mediate this folding of time - and what happens when they fail to do so. As such, it is both a discussion of the temporalities in and of objects more generally as an account of the enactment of procedure in this legal setting. In order to make this point, I stick to no place in particular but am led only by *legal procedure*: I switch from file to courtroom and back again, tracing the ways time, histories and futures are implicated in the making of a here-and-now of the decision.

NOTES

1 An earlier version of this chapter was published as Oorschot, van I. (2014a) "Seeing the Case Clearly: File-Work, Material Mediation and Visualizing Practices in a Dutch Criminal Court" in *Symbolic Interaction* 37(4): 439-457.

2 Judges may similarly keep coloured post-its ready to hand. One of the judges I shadowed was quite proud to show me a flat, wooden post-it dispenser with room for five or six different colours of post-it notes. He had made it himself over the Christmas break.

3 These routine techniques resonate in striking ways with the more fundamental role of the act of crossing through in the history of legal practice. Vismann (2008), for instance, concentrates not on writing, but rather the crossing through, the cancellation, of writing as constitutive of legality. The chancellor is quite literally, she shows, the *canceller* of provisions, stipulations and legal texts.

4 All identifying characteristics of the case - names of the defendant, victim, witnesses - as well as the place and time of the offense and court are struck through.

5 This rule (art. 22b Wetboek van Strafrecht) has been operative since January 3 2012 and as such was still quite a novelty for the judges during my fieldwork. It stipulates, most importantly, that offenders cannot be punished with community service once they have been punished for a similar offense with community service in the last five years. Many of the judges I spoke with were quite unhappy with this rule, not only because it set a limit to their own discretionary space for manoeuvre, but also because they perceived the rule to be born out of an overtly punitive political attitude many of them did not share. Faced with this rule, some judges I worked with would, counter to the punitive 'spirit' of the rule, not opt for a prison sentence (perceived to be

more punitive than a community service) but for a fine (perceived to be less punitive). If I have spoken, briefly, of the kind of political, often right-wing, pressures judges perceive themselves to be subjected to (see Chapter 4), this strategy amounts to a subversion of that kind of pressure.

6 Although the dictum that 'everything is digital now' was the 'official line', this insistence sometimes bordered on the absurd. For instance, when a new assisting clerk was introduced to the administrative offices, one senior administrative worker proudly proclaimed that 'there are no paper files anymore. We do everything digitally now' - while standing right next to a trolley loaded with paper files.

7 One judge told me that his colleagues in *kantonrecht* - a field of Law incorporating minor civil and criminal law cases - face up to caseloads of 80 cases per day and had quickly returned to paper files, as opening and closing the digital files on the Court's computers in session had proved to be too time-consuming. I have not been able to verify this story, however.

6 Folding Times, Doing Truths

1 From Here-and-Now to There-and-Then

The preceding chapter suggested we think of judicial work as materially and socially textured practices. Distributed and sequentially organized practices of visualization extract, from the file, an operative sense of the case. Active in, and constituent of, judges' visualizations of the case, case files matter both materially - as physical or digital objects - and semiotically - as containers of texts. This kind of action, of course, is oriented towards the courtroom future. A *good* visualization is a helpful, productive visualization that serves both communication and fact-finding goals in court, allowing a decision in the here-and-now of the court session to be made about the there-and-then of the offense. It is in this sense that the case file is not only a mediator in the 'spatial', physical sense, nor only a semiotic object. It is also active in allowing retroactive truth-finding and future-oriented courses of action. In other words: it is an object that renders available different times and places in the here-and-now of the decision (Scheffer 2010).

Sometimes, however, such temporal bridging is barred. Take the court cases involving defendant Jack Ross. He is accused with the breaking and entering of his ex-girlfriend's house and additionally charged with the damaging and theft of some of her belongings. According to the prosecutor's version of the events in question, Jack climbed into his ex-girlfriend's house through a rooftop window in the summer of 2013 while she was vacationing abroad. Jack is quite young - 24 years of age - but does not make a nervous impression when he is questioned by

the judge. After all, his lawyer has prepared an elaborate closing argument. His lawyer begins his plea:

> Your honour. I will start by saying that there is only one witness to the breaking and entering, and [the statement] is far from sufficient. This witness does not describe any of my client's defining [physical] characteristics. So how can we be sure that it was indeed my client who was seen entering this apartment? The police never organized a line-up either, so we can't quite identify the person who was seen breaking and entering yet. Then there is this other statement, the statement made by the affected party. Well, this statement is completely contradictory: [the victim] mentions different time periods in which she would have been abroad, for instance. And some of her statements are simply incorrect: for instance, she told the police she did not know that my client, her ex-boyfriend, had been under electronic house arrest. But she *did* know, because she has previously assisted with the electronic surveillance of my client [after a previous conviction], that is, when they were still together! Baffling are also the damage claims she filed against my client: in her first statement she never talks about what goods had been stolen, while, all of a sudden, she speaks of stolen goods with a value of 1000 euros in the damage report she later filed. As for the damaged goods: in the case file I don't see pictures anywhere of those electronic appliances that my client allegedly damaged.

Referring, again and again, to the evidentiary materials in the legal case file, Jack's lawyer aims to cast doubt on the public prosecutor's version of the events in question. The legal case file is implicated in his story-telling, focused on answering the question: what really happened? And who, precisely, is behind it? Can we rely on the identification made by the affected party's neighbour, if this neighbour - who is supposed to remember and know the defendant, who lived together for a while with his now ex-girlfriend - tells the police that he *recognized* the defendant, but has not explicitly *described* the defendant's physical characteristics? Can we trust the statement made by the victim, considering the fact that she denies any knowledge of her ex-boyfriend's previous

conviction while she must have known very well he had been convicted earlier? Does it furthermore not seem she is frustrating the court's truth-finding, as she sees the trial as the opportunity to claim money? And was she not caught lying about the period she spent abroad? Seen in this light, can her statements be considered trustworthy enough to merit conviction of the defendant? What can these statements tell us about what really happened?

Jack's lawyer, however, goes on:

> Besides, when we look at the process-verbal of the interrogation with my client, I see, typed down, in the middle of one of my client's questions, the phrase, "theft, unqual.", which arguably stands for "theft, unqualified". But my client would never express himself this way, nor would other defendants, presumably. *So who is speaking here?* The police officer or the defendant? Furthermore, the victim has told the police, and I quote, that "all the neighbours have seen it". So why was their testimony not taken? I think the police has indeed talked to these neighbours, but that they [their statements] are not present in the case file. My last point is that the police suggest, in the file, that they would further investigate the site for traces of my client's presence, but the results of this investigation are curiously lacking from the case file. It seems to me that exculpatory evidence has been excluded from the file, so that the evidence is wafer-thin.

Jack's lawyer here enters a different mode of asking questions about the 'truth-value' of the file. Here, he does not only offer an interpretation of the different stories present *in* the file; he also tells us a story *about* the file. This lawyer first challenges the neutrality of the written transcription (process-verbal) of the interrogation with the defendant. He suggests that the police officials have been so set on shaping and rewriting his client's words that it has now become unclear who precisely is speaking - something clearly at odds with the demand that defendants' statements must be 'verbalized' [*geverbaliseerd*], that is, written down, in accordance with the defendant's 'own words' (see art.

29 lid 3 Wetboek van Strafvordering). If police officials *complement* his client's words with phrases like, 'theft, unqual.', then how can we be sure that the rest of the client's statements in this process-verbal are truly *his* - and not added by zealous police officials? Secondly, this lawyer suggests that the case file offers only a partial rendering of the full police investigation: the police, he suggests, have indeed spoken with more witnesses but these statements never made it to the legal case file. Police officials also mention additional investigation into traces of his client's presence in the house, yet he cannot find the results of such testing anywhere in the file. Does this imply that the prosecution failed to exercise due diligence? At stake, at this point in his plea, is not a set of statements or stories *in* the file, but their *absence.*

All in all, a smooth transportation from the here-and-now of the court session towards the time and space of the offense is barred: not only because the individual witnesses are necessarily unreliable (although according to Jack's lawyer, they are that, too), but also since the case file is the product of specific modes of translating oral statements into written evidence and of practices of partial inclusion and exclusion. In other words: the case file itself has a history, and it is that history Jack's lawyer mobilizes in his attempt to thwart conviction.

In this chapter[1] I am interested precisely in the case file's status as both a neutral transporter and carrier of evidence and a non-innocent, perhaps treacherous, object that inevitably transforms reality, an object with a complex history. As such this chapter does not highlight its material and physical recalcitrances, but its temporal ones. It asks the question, first, *how* the case files manages to build a bridge between offense and court session, and secondly, how *traces* of its own disavowed histories allow actors - most notably defence lawyers - to question the validity of the facts it presents. It is interested in the relationship between legal procedure and fact-finding, yet refrains from treating legal procedure as an unproblematic 'legal context' to practices of fact-

finding. Instead, it highlights how both 'factuality' and 'procedure' are enacted in and through the case file. The notion of the 'folded object' (M'charek 2014) is particularly useful in doing so: offering a vocabulary within which to begin to understand the multiple and dense temporalities of objects, it is especially suited to inquiry into the relationship between Law, truth and time.

2 Law, Truth, Time

In its concern with the histories and uses of the legal case file, this chapter is meant as a respecification of dominant approaches to the relationship between legal procedure and legal truth-making.

'Guarded by Procedure': Procedure as a Frame

There is a clear connection between procedure and legal modes of truth-making, especially so in Dutch criminal law. While civil legal procedure may work with a more 'virtual' sense of the truth - the truth of the matter is simply and a priori established by virtue of agreement between parties - criminal law has a more subtle and hybrid relationship with the truth. Cleiren (2001: 16) for instance notes that 'the criminal process is aimed at finding truth in order to punish those guilty. Verification of the facts of which the accused is charged is therefore prime goal of the criminal process.' But because there is a real danger of convicting innocent suspects, such 'verification' must be safeguarded procedurally:

> the function of criminal law is to be formulated hybridly: on the one hand, it is the finding of truth in order to punish transgressions of material law, and on the other hand, the protection of citizens against far-reaching governmental breaches of their constitutional rights, understood to include the prevention of the punishment of those innocent (Cleiren 2001: 18).

On the one hand, then, the truth of the matter is carefully guarded by procedure - not *all* facts may come to bear on the matter at hand, for instance when evidence is attained by illegitimate means. On the other hand, it is not entirely up to the affected parties to deliver the facts and agree, among each other, on the delineation of the case: it is the judge, in Dutch criminal law, who decides on both the facts (their admissibility and relevance) *and* the Law.[2] The 'material' truth matters, and precisely because it matters so much its establishment is guarded by procedure.

It is tempting, within this rather general mode of addressing the relationship between legal procedure and the production of legal facts, to treat procedure as an unproblematic 'context' to the production of legal facts. Procedure then functions as a 'frame': something that both *structures* and *contains* practices aimed at the truth of the matter.

Doing Truth and Procedure Together

Such an approach effectuates several things at once. First, it glosses over the question how 'facts' with regards to the specific offense in question are made, and made to matter to the decision at hand. In other words, it treats the 'facts' as already established and of equal relevance and weight to the decision at hand. Of course, facts may be contradictory - as was the case in Jack's case, within which different witness statements did not cohere very well - but they are already there nevertheless. In doing so such an approach fails to address the question of *how and where such facts are made*, and *how these are made to matter to the decision at hand*. This question, crucially, is precisely the question Jack's lawyer raises with regards to the case file as a producer of facts: how is the case file made? What is lost? What is distorted? Not only does this vignette alert us to the intricacies involved in 'doing procedure' and 'making truth'; it also points to the case file as a central artefact in the production and contestation of the 'facts'. Second,

and vice versa, treating 'procedure' as a context risks treating that same context as similarly 'already there' as a stable frame and container for practices of legal truth-telling. But did not Jack's lawyer precisely implicate a concern with procedure in his plea? That is: is not 'procedure' drawn on, evoked, made consequential within and to the decision it is supposed to merely 'enframe'? Procedure, then, does not enframe 'the truth' in any straightforward matter: it is a 'moving horizon' (Scheffer 2010: 45). Both truth and procedure, then, have to be done somehow, somewhere.

Procedure and Time

Taking the simultaneity of 'doing procedure' and 'doing truth' seriously positions this effort also in relation to questions about legal temporalities more generally. As such it draws inspiration from approaches to legal temporalities that treat temporality not as a backdrop or temporal container of practices - in which legal events happen 'in' time - but rather as something that is effectuated within practices, giving rise to multiple and specific ways of making pasts, presents, and futures. Latour (2010) points for instance to Law's strange 'timelessness'. The Law, he states, never fundamentally changes. Law-making, among the counsellors of state, is always understood as a practice of *finding* Law, not *creating* it. Law only evolves - but it does so always with reference to precedent, that build-up of past decisions. But taking place in reference to precedent does not quite make Law a historical being itself: as something that can be found, it was *always already there*, a timeless totality that places itself outside of chronological time. Law knows no beginning or end; only a perpetual now. Yet this sense of timelessness, of a-historicity, contrasts with the slow pacing of the counsellors' work practice, Latour notes (2010): there, predictability is ensured through doubting, through hesitations: that is, by not *hurrying*. The timelessness of capital-L Law contrasts with the temporal pacing

of its practices; both are specific ways of 'doing time'. Luhmann's efforts resonate to some extent with those of Latour. If Latour emphasizes the production of predictability, Luhmann (2004) emphasizes normative expectations. Legal norms, according to Luhmann, presuppose an unknown future. In relation to this unknown future, they make the promise that whatever may happen, the legal norm will hold. As such legal norms allow for the stabilization of expectations in an operation of 'time-binding' (Luhmann 2004). It is, by the way, in this 'time-binding' that the legal subsystem contrasts sharply with the political subsystem, being concerned not with the stabilization of expectations but precisely the articulation of future possibilities. Grabham, in taking seriously the temporal *products* of legal regulation, instead turns her attention towards specific modes of analogizing of time spent working and time spent off work in work-life legislation (Grabham 2011, 2014). Legal practices, then, both *take* and *make* time.

The Case File: Mediating Time and Truths

With procedure and facts, we hence enter the problem of legal temporalization: the way pasts, presents, and futures are made and remade in legal practices. In doing so it treats neither procedure nor time itself as a container of or for action; instead, it suggests that chronological time and procedure are themselves the outcome of specific modes of 'sorting time' (Latour and Serres 1995). In doing so my efforts diverge somewhat from Latour's treatment of temporalization: while he concentrates on Law's 'timelessness' and contrasts it with the diachronic pacing of file-work, I am interested instead in the way the case file *itself* folds time - and how such folds create the very possibility of unfolding and refolding in other sites, in other times.

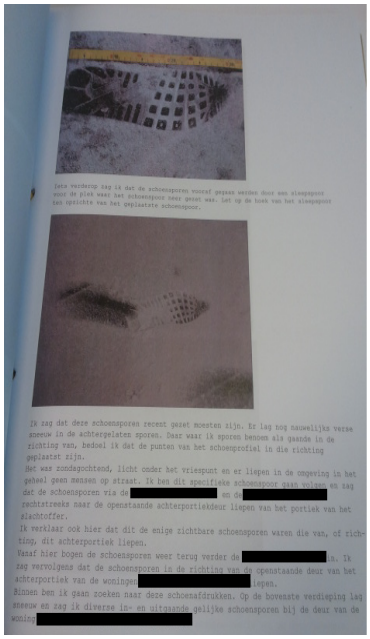
In so doing, I follow up on M'charek's (2014) crucial contribution to the study of temporality: that is her suggestion that objects are not to be understood solely in spatial terms, but

in temporal ones. With help of three narratives on the history of the first genetic map of human beings - the Anderson sequence - M'charek illustrates how objects fold time within themselves. Folded into them are their histories, which in turn are entanglements of places and times: 'the essence of the folded object […] lies in the intricate ways in which it gathers heterogeneous spaces and temporalities together' (M'charek 2014: 33). This Anderson sequence is unproblematically used in some practices, for instance in laboratory practices where it allows comparison with other genetic sequences. At such moments, it hides the places and times that have become entangled within it, and have been folded into it: 'Once made, they appear to be independent of human action, "thrown at us" and assuming an allegedly stable state' (id.: 30). M'charek (2014) further argues that the times and places folded into objects remain, however, present - perhaps absently present. A folded object 'indexes and enacts its history' (id.: 29) even though that history may not be immediately visible. M'charek's analytical work consists precisely of attempting to unfold this object and trace the times and places within it. Where and how is this object made? In what precise ways have various times and places become entangled? But also: where and how does this object make its own history invisible, and where and how does it inadvertently betray itself by showing traces of its past?

With the folded object, then, we are closer to understanding the relationship between the sorting and folding of time and the making of legal truths. It suggests that objects are not simply used 'in time', but that they both enact and render invisible different times themselves. Drawing on this notion, I am interested, first, in how the legal case file folds within it multiple histories in its effort to render history - the offense in question - available; and second, how the case file may itself become the object of un- and refolding practices in the making and remaking of that same historical event. The following is an elaboration.

3 How to Transport an Event: Traceable Materials

'We weren't there when it happened', one public prosecutor insists. 'And that is why we press the world onto paper.' The Dutch phrasing '*op papier persen'* is not only suggestive of the preferred medium of storage - paper - but simultaneously evocative of reducing something, of transforming something into something else. Indeed, this is the case file's first method of rendering an event available in the future. Entrusted to paper are heterogeneous entities such as spoken words, observations, traces of blood, plastic bags of weed, video materials and decisions made by police officials and prosecutors. Indeed, while digitization may have plagued judicial 'end-users', not much has changed in these sites of production (yet): all these various kinds of things are translated into paper documents (which are only later scanned and digitized). Case files are hence 'comprehensive recording devices that register […] events, voices, gestures, appearances' (Vismann 2008: 10). They do so through the medium of writing, through schematic and graphic materials, and through photography. Written materials - e.g. witness statements, expert reports, transcriptions of the interrogation with the defendant - as well as printed maps or photographs of crime scenes or injuries are added to the file. Together, these materials must allow its users access to 'what really happened'. Both written and visual materials require an almost forensic sensibility: the ability to trace clues, to connect statements, to consider the plausibility and reliability of these various human and non-human witnesses. Figure 6 and Figure 7 - evidence, in an age of CSI and post-modern genetic 'silent witnesses' of the persistence of proverbial 'good old-fashioned police work' - is suggestive of the kind of forensic sensibilities required of the file's users: arriving at 'what really happened' is practice of tracing clues and of re-tracing (sometimes literal) investigatory steps.



Ik zag dat deze schoensporen recent gezet moesten zijn. Er lag nog nauwelijks verse sneeuw in de achtergelaten sporen. Daar waar ik sporen benam als gaande in de richting van, bedoel ik dat de punten van het schoenprofiel in die richting geplaatst zijn.
Het was zondagochtend, licht onder het vriespunt en er liepen in de omgeving in het geheel geen mensen op straat. Ik ben dit specifieke schoensporr gaan volgen en zag dat de schoensporen via de [redacted] en de [redacted] rechtstreeks naar de openstaande achterportiekdeur liepen van het portiek van het slachtoffer.
Ik verklaar ook hier dat dit de enige zichtbare schoensporen waren die van, of richting, dit achterportiek liepen.
Vanaf hier bogen de schoensporen weer terug verder de [redacted] in. Ik zag vervolgens dat de schoensporen in de richting van de openstaande deur van het achterportiek van de woningen [redacted] liepen.
Binnen ben ik gaan zoeken naar deze schoenafdrukken. Op de bovenste verdieping lag sneeuw en zag ik diverse in- en uitgaande gelijke schoensporen bij de deur van de woning [redacted]

Figure 6: Photographic evidence of the traces of the suspect's shoes

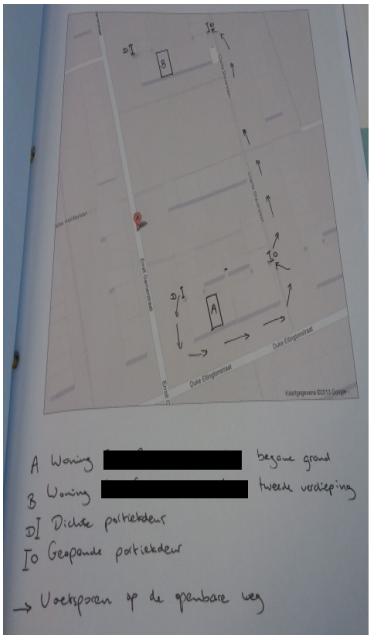


Figure 7: A map tracing the direction of the suspect's footprints

However, sheets of paper are not quite documents yet - that is, they have not yet acquired a status as 'evidence in support of a fact' (Briet 1951: 7; see Buckland 1997). In order to allow access to the event in question, the case file must *trace itself*. That is, it must account for its own history of production as proof 'procedure' was followed. This tracing has two modalities. On the one hand, *correspondence* between the evidentiary materials itself - a spoken word, a trace of blood on a curtain, plastic bags of marijuana - and its paper 'double' needs to be carefully traced. The legal case file ensures such correspondences by tracing precisely where, how, and by whom the piece of evidence was

found, elicited, or investigated. Tracing these 'chains of reference' is key to ensuring the 'chain of custody' (Lynch and McNally 2005): the case file must ensure these small correspondences between, for instance, that trace of blood on a curtain, a numbered sample of this trace, and a report of the Dutch Forensic Institute that matches this trace with a known offender (see also Toom 2010).

A second kind of tracing is that of authentication. Sheets of paper become *evidence* through signatures of the various (human) actors contributing to the file: witnesses, defendants, victims, police officials. Stamps, furthermore, meticulously trace the dates documents were sent, received, or filed. Copies of original documentation are similarly stamped with 'copy conform original', and in rare cases, these stamps themselves need to be authorized with a signature. The case file's production needs to be accounted for, procedure 'observed': that is, procedure must be *enacted* by testifying, in writing, how, when, and where an investigatory 'act' has happened. Only then are statements able to become legally relevant. The case file as such participates in 'a specific social economy' (Kozin 2007: 195), an economy concerned with the attribution of statements to 'authors', or rather, 'authorizers' (Pottage 2012: 177). Considered in this light, the etymological connection between 'act' and 'enactment' is surely no coincidence (Cf. Vismann 2008).

The case file as a whole also traces its own development: within it are not only primary documents testifying to the case at hand, but also documents that offer official notification of decisions made throughout the investigation. On its paper surface, the case file's travel through the legal-bureaucratic networked is traced by, again, stamps, signatures, and stickers (see Figure 8): 'Signs of its history are continuously and deliberately inscribed upon the artefact itself' (Hull 2003: 296). As such, the case file is a 'chronicle of its own production, a sedimentation of its own history' (id.: 296).

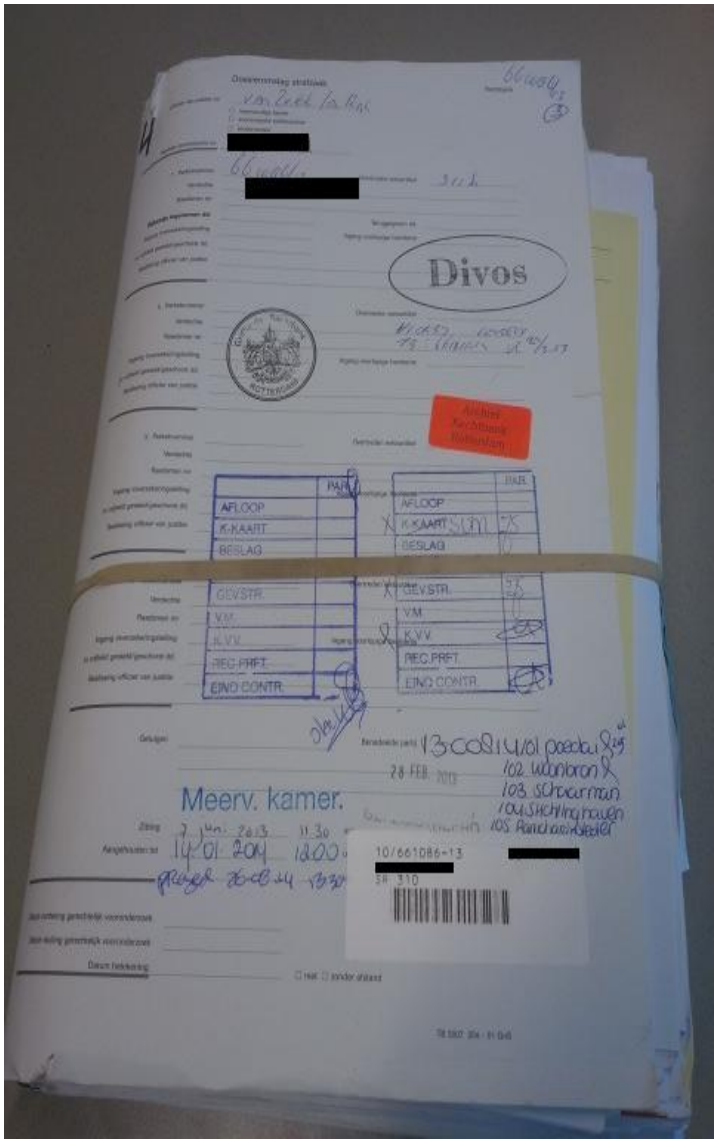


Figure 8: Stamps, signatures, and stickers testify to the file's trajectory

Through these techniques, which allow decisions to always be traced back in time and place, the case file also becomes compatible with its anticipated future use in court. Only if it has carefully traced small correspondences and attributed accountabilities it can be employed in the investigation in court. This way, it folds both history and future within itself. Tracing is a crucial way to 'index and enact' its own history (M'charek 2014). Rendering available, through documents, acts in the past the case files allows both retroactive tracing of past events and ensures the file's forward push along legal-procedural paths.

Writing Up in Anticipation of the Future

However, the case file has another existence, too: 'it is [both] and object and a story' (Kozin 2007: 195). And in the stories it tells it similarly anticipates its future, and similarly produces its own visibilities and invisibilities.

Take the process-verbals in the case file. These process-verbals are documents, often composed by police officials, which report on the police's findings, witness statements, or interrogations with defendants. These process-verbals are written in a field of tension: on the one hand, victims, witnesses and defendants are required to tell their stories in 'their own words'. Only if the document permits no doubt as to *who* precisely said, saw, or witnessed what, can it be used in court. On the other hand, these documents have to be able to make clear precisely how the event in question - 'what really happened - can be related to one (or more) of the formal description of illegal activities found in the letter of the Law. In other words: these process-verbals must anticipate the operation of legal qualification, i.e. the question whether 'what really happened' can indeed be subsumed under a description of illegal activity in the criminal law code (see for this point Komter 2002, 2003, 2006). These two demands produce very particular visibilities and invisibilities. Take the following fragment from a process-verbal reporting on a criminal

complaint, lodged by Nancy Carr, female victim of domestic abuse:

> I wish to lodge a criminal complaint of assault against my ex-boyfriend, named Stan Dwyer. I will tell you exactly what happened this afternoon. This afternoon, Thursday the 3rd of May, around 3:15 p.m., I was at the TileStore shop on Regent street number 70 in [place]. […] I went outside and saw that Stan was indeed in front of the door. […] Stan said he really wanted to talk to me. I told him I did not want that. Stan asked me if it was really over between us. I told him that I thought it had been over for a while. […] heard that Stan repeated to me that it was really over then. Subsequently I saw and felt that Stan hit me with a flat hand on the right side of my face. I felt an enormous pain on my face.

Reporting on her story this way, the process-verbal anticipates the criminal charge of physical assault with criminal intent, this being defined in the Dutch criminal code as the 'intentional infliction of pain or injury or other physical harm or suffering onto the body of a person'. First, the victim reports that it was *Stan* who hit her (and not someone else); she reports that she *felt* his hitting, which she felt on the right side of her face (the hit was hence directed against her body); and she reports having felt pain. This report also localizes the event in space (a specific address in) and time (the 3rd of May, 2012). This, too, is legally relevant, as the formal charges have to similarly describe the event along these spatio-temporal coordinates. Indeed, the charges read as follows:

> that he in **[place]** on or about the **3rd of May 2012**, intentionally abusing a person (namely **N. Carr**), has **(forcefully) hit/slapped in/on/against the face multiple times or at least once**, as a result of which this person has suffered injury and/or pain.

Note how the bold text, original to the documented charges, refers to the particulars of the event in question: they refer to the time, place, name of the victim, and the specifics of the event,

which here cover slightly different accounts. The regular text refers to the formal definition of assault as found in the Dutch criminal code. As such these charges weave together both event and criminal code. In this case, like in other cases involving material damages or physical injuries, additional photographic material of the injured body part is included in the file (materials I have, for obvious reasons, not reproduced here), adding to the victim's statement that she felt pain also the visible fact of injury.

Let's take a closer look, however, at the victim's statement. This process-verbal has effectuated a couple of things. A dialogue taking place at the police station has been translated into a written, first-person narrative. The dialogue itself however has been rendered invisible: we only know *that* it took place, but the particular ways police officials elicit this story have been rendered inaccessible. These prompts and suggestions, of course, are precisely how the story becomes formatted to anticipate the criminal assault charges (see for this point Komter 2002, 2003, 2006). Komter (2006) hence argues that 'considering the way in which this text has emerged, it will be clear that the interrogator's activities are "noticeably absent"'. Or perhaps: *absently present*. In this translation of talk into text a certain history has been written - a particular story about 'what really happened' on the 3rd of May 2012 - but another history - the history of a conversation between police officer and victim - is at first sight erased. But is it lost?

Working towards the time and place of the court hearing and the text of the Law while tracing actions and times in its past: this is how the case file mediates access to 'what really happened'. Making the event in question 'judgment-compatible' (see Latour 2010) here consists of rendering histories visible as well as invisible. It is precisely these temporal in/visibilities that allow the case to proceed, that is: move forward in time and space. Yet all its histories - even the 'invisible' ones - are not lost: 'history', we will see in court, 'can strike back capriciously' (M'charek 2014: 31).

4 The File on Trial: Times-in-Use

The case file folds within itself multiple histories: a historical occurrence which is simultaneously a potentially criminal event; the bureaucratic time of legal acts; the times and places in which written and graphic materials are made. If all goes well, these temporalities are kept separate and partially invisible, so that the time of procedure functions smoothly as a frame, the time of the file's production is conveniently glossed over, and the historical event of the alleged offense becomes an object of concern.

The question, then, is how to keep these temporalities separate; how, in other words, to trace some histories while forgetting others. Within the court, such practices are distributed over various court workers. When a case file arrives in the court, administrative workers for instance check whether the file meets a set of procedural requirements - work that in many ways is both 'logistic and legal' (Latour 2010: 79). It consists of tracing signatures, stamps, and dates: when did the file or document arrive in the court? Where is the authorized process-verbal of the interrogation with the magistrate judge? Is the original 'process-file' - the sub-file that reports on the criminal investigation - present, and, if not, at least a properly authenticated 'copy conform original'? Clerks and judges similarly take note to trace the file's histories, knowing full well that in its legal-bureaucratic temporalities lay possibilities for the undoing of a case. In particular, the presence of a document testifying to the receipt of the summons is crucial. The court must know that the defendant knows he or she is charged. Hence, in the previous chapter, the judge's care to include on the paper summons the note that the summons had been handed over 'in person' (on the form, this is abbreviation to 'IP'). Only if the case file, and the documents within it, has correctly traced its procedural path can the file be used in court.

It is however on the court session I wish to concentrate here, as it is there that the case file becomes implicated in a complex *intertextual field* (Lynch and Bogen 1996; Scheffer 2006). The judge in criminal justice practices 'inquires mostly paper testimony and technical reports' (Otte 2015: 102) which, in court, are added to, challenged, or given new meaning:

> There is hardly any gathering of new evidence, but rather the gauging of the value of the already gathered evidence. […] if witnesses are heard at all, those tend to be witnesses who have, throughout the earlier investigation, have been heard before (van Veen 1985: 3-4 cited in Otte 2015: 103-104).

In this intertextual field, written and photographic evidence are weaved together with the spoken accounts of the defendant. Written testimony here structures the interaction between prosecutor, defendant, lawyer and judge in a practice that Lynch and Bogen, nodding to Garfinkel's 'documentary method of investigation' (1967), have coined 'documentary methods of *interrogation*' (1996). It is in this setting that the case file sometimes remains folded - and is employed as a neutral container of evidence, allowing for smooth travelling between the here-and-now of the court session to the there-and-then of the offense - while at other moments, it is unfolded, that is, employed as a material object with a complex history. At such points its 'truth-function' (Vismann 2008) is endangered in the here-and-now of the court session.

Histories of Production

Take yet another case, that of Martin Galloway, a private security guard of a nightclub. Martin was charged with the physical assault of a young woman, which offense he allegedly perpetrated in his capacity as a security guard. This woman, Helen Amis, had been quite drunk and rowdy, and had resisted Galloway's attempts to isolate her from the small crowd outside the nightclub. Having

restrained her Galloway tried calling the police, at which point the woman tried to escape from his hold. In the brief, physical struggle that ensued, Galloway allegedly hit her in the face, which the public prosecutor sought to qualify as physical assault. The case file includes some contradictory accounts of various eyewitnesses: two accounts of bystanders, and two accounts of colleagues of the accused. Galloway himself strenuously denies that he hit the victim: in the struggle that ensued, he argues, she tried to hit *him*, while he only tried to ward off her assaults.

Let's listen closely to the way in which these statements are used in court. Take, first, the prosecutor, who concentrates on the two witness statements from Galloway's colleagues. These two statements may appear exculpatory, the prosecutor suggests, but she has an explanation for their content:

> Yes, your colleagues tell us that they didn't see anything untoward in your conduct. Well, I've seen things like this before, where people in your business stick up for each other. Bearing that in mind I can't say that these are, strictly speaking, exculpatory accounts.

Here, the prosecutor expresses her reservations with regard to the truth-value of these two documents. She casts doubts on the impartiality and hence reliability of the two witnesses. They may, in other words, be lying. Of course, Galloway's lawyer draws on precisely the same two documents to argue the opposite: these two statements clearly contradict the victim's account. While both know that the process-verbals are not 'exact representations' of what was said to the police, the prosecutor and the lawyer nevertheless treat these documents as 'at least […] reflection[s] of what has been said in the interrogation room', or indeed at the scene itself (Komter 2006: 222). And precisely because these process-verbals are relatively truthful reflections of 'what was really said', they enable the production of potentially competing, but ideally plausible and coherent accounts of 'what really happened'.

Yet this kind of use of the file does not exhaust its possibilities. The histories of the case file itself can become implicated in lawyers', defendants', and even prosecutors' truth-telling activities. In such cases, these parties do not concentrate on the stories *in* the file, but rather tell stories *about* the file, bringing to life its partially invisible histories. Galloway's lawyer leverages precisely this strategy when he commences his concluding plea, which concentrates on the eyewitness account of the victim's friend:

> My client insists that he has only warded off her attempts to assault him. One of the Miss Amis' friends says here [pointing to the process-verbal] that she saw the movement of my client's arm, but it must be said she did not see that mister Galloway indeed hit Miss Amis. Things like this have to do with the way police officials write things like this down, you see. They will ask, "did you see the accused hitting her?", and then the eyewitness might say "no", or something else. But the police will write down, "did not see *whether* the accused hit the victim". Which makes the statement neither an exculpatory, nor an incriminating statement: this way, it just seems that the eyewitness simply didn't see anything. But it *could have been* an exculpatory statement: maybe the eyewitness saw *that* something or other did not happen, and then we would have ended up with an exculpatory statement.

Here, the interrogation of the accused about the events in question shifts to an interrogation of the document itself (Cf. Lynch and Bogen 1996). Placing us in the interrogation room, where police officials are busy translating talk into text, the lawyer suggests that the statement can be read in two competing ways: either the eyewitness saw *that* Galloway did not hit the victim, or the eyewitness did not see *whether* he hit the victim. In this case, the exploitation of this ambiguity in the process-verbal *works*: the judge, 'unwillingly' (sic) declares the defendant not guilty. The process-verbal reporting on the conversation with the eyewitness is no longer successful in corresponding to 'what was really said',

so that it can neither tell us something about 'what really happened' at that nightclub some months ago.

How Police Officials Write Things Down: Institutional Writing in a Bind

Galloway's case casts 'the way police officials write these things down' into sharp relief. As we have seen, these writing practices take place in a zone of tension: on the one hand, police officials must aim to retain people's 'own words' and 'own observations'; on the other, these process-verbals need to render the event in question judgment-compatible. This is their conundrum: emphasizing the naturalist portrayal of interaction as it actually took place risks not only including swaths of irrelevant material; the risk is also that parts of the charges cannot be substantiated. Focusing, on the other hand, on massaging the text to be able to meet legal rules and definitions may lead the document to betray its own history of production. Judge Fielding commented ironically:

> Some things they can't seem to write down anymore. They never say [write], "I felt I was being hit", but rather say something like, "I saw and felt I was apparently receiving a blow to my body." It's a kind of fear - after all, they know how we work.

The problem is magnified, for judges at least, when police officials write down their *own* observations in the official, 'ambtshalve' process-verbal [*proces-verbaal van bevinding ambsthalve opgemaakt*]. These kinds of process-verbals tend to be used more widely as indications of what the police officials in question observed when arriving at the scene of the alleged offense, but may also be used to write down observations of what they heard (or overheard) the defendant say after the offense. Such process-verbals may include incriminatory utterances by the defendant without his or her counsel being present or without the defendant even knowing that certain words are committed to paper (for instance, the defendant tells someone else in a

temporary holding cell that he did it; this comment is overheard by a police official checking in). Aside from the obvious legal implications of such 'overheard talk' committed to writing, judges tend to comment largely on the *practical* difficulties that accompany reading, evaluating, and using such process-verbals. For instance, as police officials tend to work in pairs, such process-verbals tend to be signed by two persons. Of course, the question is whether both or merely one of the two officials saw an incriminating act - a question that that may come up in Court. At the same time, police officials are to be believed at their written word, even if that written word does not specify the observations individually: the relationship, Judge Jamison suggests, is one of necessary and 'institutionalized trust'.

Graphic Materials: Photography and Film as Mediators

Similar concerns - both among judges, and in court - play out in relation to the evidentiary value of photographic materials. While photography - less fallible than human memory - has historically promised transparency and visibility to decision-makers in legal settings (Mnookin 1998), like written materials it, too, can either be mobilized as a neutral carrier of evidence or an active transformer in itself. It is not uncommon, especially in cases of physical assault, for court actors to focus their attention on what is and is not rendered visible in the photograph taken of the victim's injuries. The fact that copied versions of the file are in black and white adds to the problem: if the victim's injuries - e.g. a swollen lip, a bruised nose - are not immediately visible on the photographs in the file, does that mean that there was in effect no injury, or that the photograph merely distorts the actually existing injury? It is not uncommon for lawyers to request they see the photographs in colour; requests judges summarily deal with by showing them the relevant photographs in court. The transforming character of photography can also play a role in different kinds of cases, for instance the case of Abbas. Abbas,

having a long history of migration from the African subcontinent to the Netherlands, had been charged with carrying of false identification papers. In a routine check, his passport had come up as non-existing in the national registry. Abbas' lawyer went to great lengths to describe the way Abbas had requested a renewal of his passport in his home country and had received the document that would prove later to be falsified. As 'things are done differently there', meaning in his home country, the lawyer argued that Abbas could not have known that the passport he received was tampered with; as such he was not to blame either. Based upon Abbas' testimony and a scanned copy of the falsified passport, the judge acquitted Abbas. Later, the prosecutor suggested it was a shame the actual passport was not present in the courtroom: the judge could have seen that its first page seemed tampered with, 'as if someone just glued something on top of it'. Even if Abbas had not himself falsified the document, these obvious marks of falsification should have alerted him to the possibility that his passport was falsified.

Both writing and visual materials, then, introduce into the court session not only a concern with 'what actually happened', but with the times and spaces of their production. These times and places, absently present in the file, may be successfully mobilized: 'history is never lost' (M'charek 2014) indeed.[3]

Unaccounted Histories: The Decisions Not To

A third way within which the file's hidden histories of production are rendered relevant in the here-and-now of the court session is in its erasure of the decisions to *not* act. For instance, while the case file always traces its growth - by attributing authorship to, and hence accounting for every step in the criminal investigation - it does *not* similarly account for the decision to *stop* the criminal investigation or to *refrain* from undertaking certain investigatory actions. In other words, while the case file accounts for the evidentiary materials present in the file, it does not similarly

explain the absence of other pieces of evidence. These unaccounted decisions, inaccessible to the parties in the courtroom, may come to 'haunt' the proceedings in court. For instance, the lawyer in the introduction of this piece suggested that the police had actively barred competing and exculpatory eyewitness accounts from the case file. Defendants, too, may level similar objections to the judge, like for instance this young man accused of stealing a mobile phone in a bar:

> So why have they never checked the phone for fingerprints? They tell me I would have been the last to have it in my hands before they found it in my vicinity, according to their story, but they never bothered to check. And by the way, it's a bar, there must be security camera footage they could have checked? Again they didn't bother. All this seriously hurts my defence!

The 'decision not to' is unaccounted for in the file - even though the file itself, having moved from prosecutorial offices to the court, is pretty much an indication of the case file's presumed 'completeness'. As files become inserted into the intertextual field of the courtroom, their supposed completeness may however be cast into doubt. A partial file inexplicably missing crucial pieces of potentially exculpatory evidence, for lawyers, is proof that the prosecution has failed to exercise due diligence. Sometimes, lawyers couple this line of reasoning with a request for additional witnesses to be heard, or security camera footage to be collected. These appeals are, at times, successful in that they lead judges to require additional evidence to be gathered. However, lawyers may also be quick to point out that hearing additional eyewitnesses is not going to help the defendant in his or her defence much: after all, (*chronological) time* has passed since the offense, human memory is fallible, and witness testimony is likely to become less trustworthy over time.

When judges grant requests like this, concerns with the correct 'folding methods' take centre stage again: not any document can

be folded into the case file. Decisions like these are recorded by assisting clerks and later expanded into a formal document testifying to the reasoning behind these decisions. Having been signed by the presiding judge, these documents will be added to the file while the file itself will await additional documentation, like authorized process-verbals drawn up by police officials or expert witnesses. The case files are then kept 'open' and 'alive', that is, until the newly appointed court date. All in all, defence practices do not only consist of coming up with a 'better story'. They also consist of playing with the case file's temporalities, of leveraging invisible and inaccessible histories to thwart a guilty verdict in the here-and-now, or at least, to adjourn the case; to allow the case file to proceed further into a deferred and uncertain future.

5 Making Facts, Unmaking Cases, and Temporal Interferences

The preceding chapter has been an attempt to start accounting for the intricate relationship between Law, time, and truth. In the previous pages I have attempted to show how struggles over 'what really happened' in courtrooms do not simply draw on the stories present 'in' the file, but that such interpretative struggles are extended to the file itself. Understanding how and why this happens is assisted by a conception of the legal case file as an object that has folded times, places and actors within itself that nevertheless may come to 'haunt' the procedures in court: 'history can be can be recalled in objects. History is never left behind' (M'charek 2014: 3). A focus on these histories - either explicitly accounted for, or made absently present - allows one to carefully trace the way the case file mediates epistemic access to the event Law seeks to judge. That is, it takes seriously the way the case file builds correspondences with 'what actually happened', while it simultaneously underscores how this

particular way of building correspondences and tracing histories offers the parties to the case unexpected possibilities to make or unmake a case. This way, the legal construction and deconstruction of cases is shown to be not only a matter of 'disturbing the *social* and *cognitive* networks that surround and strengthen […] [truth-] claims' (Fuchs and Ward 1994: 482); the making or unmaking of cases extends itself precisely to the *objects* in these practices: 'the strength of the case usually depends on the careful choreography of several witnesses, expert testimony, [but also] physical evidence, documents, and so on' (id.: 487).

It is in this sense that this chapter diverges from Latour's treatment of case files and the 'legal mode of existence' (2010, 2013). As elaborated on in Chapter 1, Latour (2010, 2013) quite rigidly distinguishes between the legal and the scientific mode of existence ([LAW] and [REF] respectively). Delegating all factual questions to the mode of existence [REF], his purified sociology of Law becomes unable to attend to precisely the ways truths are legally made, and the ways procedure and the case file's history of production become themselves objects of epistemic attention in court.[4] Of course, differences between 'legal' and 'scientific' modes of making facts cannot be glossed over. For instance, scientific truth-making often relies on what Latour and Woolgar (1979) have coined the 'deletion of modalities': the deletion of contextual qualifications - among which are authors' names! - that make simple statements into facts. The case file draws on a similar kind of operation when it renders invisible the context of the interrogation, that is, in the transformation of a complex face-to-face interaction into a written document. However, legal truths can only be made when other kinds of qualifications and 'contexts' - literally, semiotic artefacts like autographs and stamps accompanying these texts - remain present, at least until the hearing. Certain precise dates, times, persons and bureaucratic 'authors' (or rather: 'authorizers') *can not* be deleted, as the case

file is not only active in the transportation of evidence, but also in the enactment of procedural justice (M'charek et al. 2013).

Furthermore, this chapter has made problematic a rigid distinction between 'procedural context' or 'frame' on the one hand, and legal modes of arriving at the 'material truth' on the other. 'Observing procedure' is a practice of *enacting* procedure; 'acquiring the facts' is similarly a practice of folding statements and utterances into legal space-time. It is important to note that this mode of making facts is different from how we may understand the making of facts within scientific practices. Highlighting, furthermore, precisely the *connections* between 'doing time' and 'doing truth', this chapter has refused to treat one as a context for the other. The case file, transporting and transforming evidence, is a crucial object doing both legal and truth-telling work.

Temporal Interferences

In emphasizing the making of multiple temporalities this chapter has paid specific attention to phenomena we can now start to recognize as moments of *temporal interference*: that is, the moments in which the time of procedure, the time of the file's production, and chronological time cannot be neatly kept apart but rather *interfere with each other* to produce barriers to truth-making. In each of the cases drawn on in this chapter, the time of procedure, the time of the production of the file, and the time of the offense are evoked and 'brought to life' simultaneously, producing a situation both propitious (for the defendant and lawyer) and challenging (to prosecutor). These moments of temporal interference demonstrate that, even though while great care is taken to set the procedural stage for truth-making - to make procedure into a *context* - such efforts do not necessarily succeed. 'Procedure', as well as the times and places of the case file's production, can be evoked to bar access to the truth. To speak with Barad (2003), processes of mattering - of something becoming material to and

consequential for, of making differences that make a difference - have, then, both spatial and temporal dimensions. Or rather, spatiality and temporality are *themselves* the product of

> ongoing open process of mattering through which "mattering" itself acquires meaning and form in the realization of different agential possibilities (Barad 2003: 817).

Both 'temporality and spatiality emerge in this processual historicity' (id.: 817-818). The case file's multiple temporalities play a crucial role in these practices of translating between the there-and-then of the offense and the here-and-now of the court session. By folding, ordering, and sorting different temporalities, the case file is both what allows procedure and facts to be 'kept apart' as much as it presents the possibility of such temporal interferences, and with these, the undoing or unmaking of a case. Indeed, M'charek (2014) locates politics not necessarily in what is 'contained in' objects - a presupposed substance - but rather in the ways they are folded: how they make certain histories immediately present, and how histories linger on in obscurity. Building upon this recognition, this piece has also suggested that this temporality is also key to understanding not just power, but also its *subversion*. As it is possible to make these histories present again, it is possible to turn the tables on this object, to act in the face of an accusation, to keep, in other words, a human body in movement. Recognizing that objects are political things, recognizing, too, that part of their politics resides in their temporal fold, is hence key to understanding how they can be unfolded and refolded.

Process/Event Distinctions

In highlighting practices of temporal sorting, this account has similarly bracketed distinctions regularly drawn between the *process of inquiry* and the *event of the court session*. Such distinctions are not necessarily made explicitly. Conversation analytical

approaches to legal practices, for instance, tend to emphasize courtroom interaction, glossing over inquiry into the practices that chronologically 'precede' and structure these interactions, e.g. file-work - a tendency commented upon in Chapter 5. In working with a very narrow conception of 'context' as utterances produced in court, such approaches gloss not only over the fact that these in-court interactions are 'bound' in crucial ways to previous utterances and statements (see Scheffer 2010), but also the way these accounts are bound to written accounts. In other words, the past of these case 'reaches out into the present' (Scheffer 2010: 53): court parties not only have to 'tell their story', present evidence, or produce lines of attack and defence, all in relation to the case file's written and unwritten histories. Similarly, accounts that focus exclusively on the in-court production of narrative or discourse (e.g. Conley and O'Barr 1990) are similarly presentist. While they may work with a broader sense of societal or discursive context, histories of frequent and local relevance to in-court actors are glossed over. This analytical presentism risks underestimating the extent to which the dramaturgical unity of space, time, and act so central to court proceedings is itself made possible and plausible *only* by virtue of active and partial ways of accounting for and erasing of histories. It also shows that the 'process' that precedes, in chronological time, the 'event' of the court is itself always already *oriented towards* that event: process and event, past and present, are difficult to tease apart a priori. Indeed, it is only through the spatial and temporal enactment of a 'cut' (Barad 2003, 2007) that process and event are separated: only then it makes sense not to speak of an unfolding process but an event with a before and after; only then can both 'procedure' and 'investigatory process' appear as 'context' to the event in question (Scheffer 2010: 186-188). The challenge, then, is to inquire into how, where and when such cuts are made; how, in other words, events are processually enacted.

6 Visionary and Forensic Approaches to Documents: Or, What to Learn From Lawyers

There is another lesson, here, and it is one that pertains to documents and to our modes of treating them. That is, while I warned, in the preceding chapter, against both our 'phonocentric' reflex and a 'politics of immediation' (Mazzarella 2006) - the tendency to treat organizational documents as self-evident representations of (social or organizational) realities at the cost of understanding documents as physical, material objects - I aim now to add a further note to these praxiographic concerns with documents in practices. I want to warn against a third habit of thought in relation to the documents we encounter in fieldwork settings: the tendency to treat these not as unproblematic representations of the world, but rather as documents that can be read *hermeneutically* - in search of authorial intent - or else interpreted as signifying dominant world-views, (sub)cultures, discourses, or mentalities (Hull 2012; Prior 2008). Of course, both approaches are useful to some extent. From pre-sentencing reports we may, for instance, aim to distil not just information with regards to the defendant but also try to read them as the product of the author's intentions. Did this or that parole officer really think this defendants is willing to change, or is he or she subtly letting the judge know rehabilitation is not to be expected? Indeed, this 'hermeneutic' reading of pre-sentencing reports is in fact a local mode of approaching pre-sentencing reports, both in the site studied here as elsewhere (see Tata et al. 2008). For instance, it is not uncommon for the judges studied here to treat standard, routine, and very short pre-sentencing reports as an expression of the individual parole service worker's lack of confidence in a specific defendant. Secondly, elucidating as well is the mode of reading that treats documents as signs of wider societal or cultural logics, discourses, or world-views. Take pre-sentencing reports again: we might wonder how pre-sentencing

reports reflect wider societal shifts in conceiving of and dealing with crime, deviance, and risk (see e.g. Maurutto and Hannah-Moffat 2006; Hannah-Moffat and Maurutto 2010). These two ways of approaching documents, however, contrast sharply with the kind of understanding of documentation developed in this chapter. Indeed, both these approaches treat the document as a sign of something *else*, e.g. the author's intentions or socio-cultural or discursive realities. In a way, its treatment of documents is almost *visionary*: the gesture places *behind* the document an intentional subject or a world of which the document is mere testimony.

In contrast, I would like to develop here an understanding of documents in a different key; an understanding for which we do not need a visionary, but rather, a *forensic* sensibility. It is concerned not with the 'meaning' of documents, nor with their 'truth'; instead it seeks to understand their operation, their effects, their moments of mobilization, production and use. And if (but it is a big 'if') such operations include 'meaning' or 'truth', both can be analysed not as something given or exterior to the document, but as operations of the document itself. A forensic sensibility with regards to documents is interested less in treating them as *signs of*, but rather as *clues to* (Cf. Valverde 2008: 13). It treats them, at first sight, superficially, 'dermatologically' (Deleuze 1990: 120). Tracing their moments of production, mobilization and use, this mode of inquiry is concerned with finding a trajectory through different practices. It is a kind of approach quite close to what lawyers, with their skilled forensic eye, do when they aim to mobilize documents' histories of production. Leading us from different 'heres' to 'theres', from presents to pasts and to potential futures, this forensic approach treats the document as a trajectory. Keep following it - as lawyers may do - and we may end, not in the generalities of 'procedure' or 'truth', but rather in local, concrete modes of doing both.

7 Onwards: Productive Fictions for the Description of the Law

Highlighting the doing of truth and the making of multiple times, this chapter has suggested, crucially, that these legal practices are characterized by sophisticated practices of making and sorting time. As such this chapter contrasts sharply with a conception of Law that places it outside history and time; a conception within which the Law, Derrida writes, must always be 'intolerant to its own history' (Derrida 1992: 112). Instead, this chapter has concentrated on different operations of sorting and making multiple times.

Looking back and pushing forwards, the following chapter will aim to relate my travelling so far to the question that has been plaguing us ever since the beginning of this book: that is, in essence, a question about the relationship between capitalized abstractions of Science and Law on the one hand, and the practical and concrete robustness of both scientific and legal practices. What is it these ambulations, these different ways of collaborating with and within concrete legal practices, have taught me? What can we learn, both about 'the Law' itself and about our methods, approaches, and descriptions? What abstractions will help us 'hop, skip and jump' some more? In the following chapter, I argue that we need productive fictions that set us in inquisitive motion, that ground our trajectories, that alert us to specificity and concreteness, that defer generalizing abstraction itself. The notion of the hyper-object (Morton 2013) does exactly that. Onwards, then, once more.

NOTES

1 Parts of this chapter, as well as parts of its arguments, have been published as two venues, the first being Oorschot, I. van (2014b) "Vouw - en Ontvouwpraktijken in Juridische Waarheidsvinding" in Sociologie 10(3):

301-318, and the second, Oorschot, I. van (forthcoming) "Doing Times, Doing Truths". In: Grabham, E. and Beynon Jones, S. (eds.) *Regulating Time*. Routledge Social Justice Series.

2 Arguing that legal practices are partially 'epistemic' is crucially not meant to imply that truth in such settings is sought at any cost, nor that these truth-making practices are adequately understood as the grasping, through purely mental and creative labor, of the final truth of the matter. Indeed, the judge in criminal justice practices 'inquires mostly paper testimony and technical reports' (Otte 2015: 102) and practices, in the court room, a kind of legal 'verification':

> There is hardly any gathering of new evidence, but rather the gauging of the value of the already gathered evidence. […] if witnesses are heard at all, those tend to be witnesses who, throughout the earlier investigation, have been heard before. Their [in-court] statements allow that which has been stated before to be checked. (van Veen 1985: 3-4 cited in Otte 2015: 103-104).

Such practices may not meet the stringent, epistemological demands placed on 'truth-finding' within a purely positivist register, but within a pragmatic register these do, in fact, amount to 'epistemic practices' (Lynch 1993). Making this troubling presence of the 'truth' productive - as I aim to do here - is assisted by taking these practices quite seriously.

3 Throughout my fieldwork I encountered one case within which videotaped materials - not stills - played a role in court. This was a case involving a young man accused of physically assaulting another customer at a bar at night. The incident was caught on the bar's security camera. After some difficulties getting the digitized videotape to play on one of the court's computers, both prosecutor, judge and defendant took place at the prosecutor's desk to witness the events unfold. In exercises reminiscent of Goodwin's (1994) description of the use of videotaped material in the Rodney King trial, the prosecutor used his finger to point out, within the videotaped episode, 'aggressive' and 'provocative' behaviour on the part of the defendant, suggesting that he 'is like a devil in a box' attacking an innocent, if somewhat grating, victim. The judge quickly silenced him: 'I have to see for myself, have I not?' was her icy comment. In this case, the mediations introduced by the videotape were very much on everyone's minds, specifically the manner in which its perspective and frame rendered invisible certain acts outside the camera's, and by extension the judges', line of sight.

4 The difference between Latour's account and mine is arguably rooted in the *specificity* of the two sites studied: while the 'material truth' is very much a local concern in 'my' lower court criminal justice practices, Latour's Counsel

of State - the highest administrative appellate court - is arguably a setting emphasizing legal qualification over the making of (legally relevant) facts. All the more reason, I would argue, to not generalize too hastily.

7 Productive Fictions for the Study of the Law: From Hyper-Explanation to Hyper-Object

1 An End to Journeying

Jurists write arrêts (Latour 2010): statements that want to bring discussion to a close, to bring us to *halt*. Scientists, in contrast, write 'please-go-ons' (id.) efforts that call upon others to try for yet another approach, make yet another leap. In this sense, a scientific case is always a *cause* hoping to mobilize, in that it 'obliges those who belong to this [scientific] field, forces them to think, to act, to invent, to object' (Stengers 2015: 91). Whether this characterization of the status of legal and social-scientific writing can be elevated to a defining or typical characteristic of both practices *in toto* I dare not say anymore - for that, I am much too weary of sociological purification and totalization. But as a reflection on the different purposes of much legal and scientific writings, it is quite apt. Beholden, as I am, to description, the final thing to do for me here is to allow inquiry to go on.

The following chapter, then, looks back as much as it aims to push inquiry onwards and outwards. Emphasizing the multiple ways 'the Law' has been enacted throughout this book as well as the categorical troubles evident within both scientific and legal practices, I will suggest we choose to understand legal practices through the prism of a fiction that effectively *bars* us from having the final word, a fiction that stops us stopping. If we are truly interested in description, I think we must refuse conceptual

confinement. Instead, we must insist on our capacity to engage in *real conceptual movement* (Cf. Deleuze and Guattari 1986: 45). Because the demand that we write 'please-go-ons' is not assisted particularly well by our own tendencies to generalize, totalize, and purify. The notion of the hyper-object, in contrast, promises to stop us from stopping. As a fiction to think with, the notion of the hyper-object suggests we are never quite 'in' or 'out' 'the Law'; instead, it asks that we find concrete passages, paths and burrows. It does not prioritize contemplation but calls us to find, like Joseph K., yet another entrance, and behind that entrance, yet another door, yet another office. Deferring totalization and finalization, the hyper-object keeps us in inquisitive motion.

2 Looking Back

Let's first, however, briefly revisit the three central questions that have guided this inquiry. The first pertained to sociological accounts of the Law and the work they do, inquiring into the performative dimensions of sociological knowledges about the Law. The second question concentrated not on sociological 'case-making', but rather focused on the legal case-making practices I encountered in 'the field', and aimed to pay particular attention to the role of the legal case file in mediating epistemic access to the events and persons in question. The third question required me to introduce accountability into my own account and focused on tracing the performativity of my own methodological collaborations with these legal practices.

All three questions were born out of the observation that theorization regarding the relationship between sociological description and legal practices itself is largely unhelpful when confronted with the vagaries of both scientific description and legal practices. On the one hand, there is always more to legal practices than the application of norms or rules: legal practices *need* knowledge of and reference to events and persons for them

to proceed to become anything else than self-referential. On the other hand, while an emphasis on accurate representation of the world 'out there' may sound like a worthy scientific goal, it nevertheless fails to address the performative dimensions of scientific practices themselves. When taken to its logical extreme, the norm-fact distinction underlying these two mandates gives rise to paradigmatic conundrums.

In *Chapter 1: Contemplating the Law* I presented these conundrums and emphasized the theoretical dilemmas that accompany thinking about the Law in abstracted terms. Not only does it concentrate on the by now well-known contrasts between sociological and legal-positivist understandings of the Law - the first tends to treat the Law as a surface effect of deeper social processes or structures, while the second instead understands the Law as a being suspending itself miraculously above the mire of social, political, and cultural concerns - but it also emphasizes precisely their common disregard for concrete representational and legal practices. Even Latour's sociology of Law, grounded in robust, fine-grained ethnographic fieldwork falls prey to the purification inherent in any effort to isolate Law's proper, true being. Perspectivist thought regarding the Law has not been shown to be quite helpful either in this specific instance: Bourdieu's account because his sociology of Law presumes an impossible 'view from nowhere' upon legal practices, Hart's because his internal viewpoint is in effect no epistemic viewpoint at all. Again, the choice seems to be one between either an understanding of the Law's true being, or a description - but not both. And because the Law is identified with norms or rules and Science with the accurate representation of reality, it becomes increasingly difficult to account for the impurities and troubles represented, first, by performative dimensions of knowledge practices - the fact that accounts of the world do things in and with worlds - and second, by epistemic practices within legal settings - the fact that judges need a sense of what they are talking

about when they are judging. While it may be the case that the Law has at its purpose the provision of legally sound judgments, and while Science may have at its *telos* the provision of truths (I find nothing objectionable in either standpoint), neither of the two practices is adequately grasped in these binary terms. For within these practices dwell impurities and troubles: performativities attending to scientific efforts at representation, epistemic practices necessary for legal practices of judgment. Of these troubles, the Leiden study is but one exemplar, but - as I hope to have shown throughout this book - in this case a worthy exemplar to think with.

In contrast to purified conceptions of the Law or a problematic, unmediated perspectivism with regards to the Law, I aimed to develop a more pragmatic and concrete appreciation of both scientific and legal practices in *Chapter 2: A Guide for the Perplexed.* There, I argued that lacking from the theorizations of the Law presented in Chapter 1 was, in the case of Kelsen, Hart, Bourdieu, Black and Marx, an appreciation of the Law as first and foremost a *practice,* in this case a practice of shuffling documents, of translating events into judgment-compatible language, of comparing statements, of quiet file-work and of fraught interactions in Court. In other words, in their overt abstraction, these accounts failed to understand 'the Law' as a concrete being. This is not to gloss over important differences between these strands of thought: after all, lines of reasoning contrast sharply. On the one hand, there is a tendency within legal positivism to understand that abstraction Law in reference to a foundational Norm or taken-for-granted, structuring Rule. On the other, sociologists are more apt to treat the Law as a sign of something more real, particularly as a surface manifestation of deeper 'social' processes or structures. And while Latour does attend to these concrete legal practices, he nevertheless falls prey to that both juristic and scientific tendency of purification: separating the properly legal beings from other kinds of beings (or modes of

existence), his sociology of Law delegated to other fields of inquiry the question of, within legal practices, truths and facts are made. A similar problematic characterizes the implicit understanding of scientific (or 'positive') description in these accounts. Kelsen and Black are perhaps most explicit about the demands they place on description: it must be 'pure', separate contingencies, concreteness, and 'mess' from what is purest to this phenomenon the Law. But Bourdieu's mode of description, if more implicitly, similarly asks of description that it occupies the impossible, Archimedean point of view. And while Hart pays some attention to the internal or external situatedness of viewpoints, his conception of these viewpoints treats them nevertheless as unproblematic positions instead of concrete accomplishments. Indeed both authors treat such viewpoints as simply preceding actual practices of inquiry and investigation. In other words: description itself is also conceived of abstractly, and not as a concrete practice of jostling, collaborating, transforming, intervening in, and running op against the solidity of concrete realities. As such, the question as to how, concretely, description is achieved and how, concretely, epistemic 'standpoints' are made is glossed over. In Chapter 2, then, I aimed to make concrete both 'the Law' and 'description', pragmatically respecifying the question 'What is the Law' into a version that attend to how, where, and when the abstraction 'the Law' is concretely done. I also paid attention to how, where and when 'description' occurs and is made possible. Characterizing this pragmatic respecification is further an attendance to the agency of objects in these legal and scientific practices: in the first case, I introduced case files as crucial to an understanding of concrete legal practices; in the second case, I pointed to concrete practices of measurement, of 'gathering' data, of sorting, ordering, and hence *making* realities.

This pragmatic respecification offered me the tools to start my journeying. Starting with the categorically troubling Leiden study, *Chapter 3: Dealing with Difference* is an attempt at both diplomacy

and accountability. It seeks to create not harmony, but some understanding between practising jurists and social-scientific observers. It does so by providing an account of the specific realities enacted in statistical research of legal practices. It has aimed to demonstrate to jurists precisely what kind of reality statistically-inclined social scientists tend to enact and speak about when they engage in statistical modelling of sentencing practices. It shows that criminal justice, in and through such statistical modelling, is enacted as a distribution machine taking as its object of knowledge a population internally stratified along several axes of difference. In this case, the meaningful differences made pertain to both 'legal' and 'extra-legal', that is social, 'factors', most notably in this instance defendants' phenotype and administrative category as a Dutch citizen. In so doing, Chapter 3 cautions us against making two assumptions about criminal justice practices and the role played by the individual judge. First, it suggests that the legal promise to 'treat equal cases alike' is not a promise made based on sociological equivalences between population groups. Such an epistemology of legal practices not only introduces equivalences and differences where legal actors make *different differences* - e.g. in terms of individual defendants' remorsefulness, as I show in Chapter 4 - but also risks expecting criminal law to combat institutional and structural racisms. Second, placing that burden not only on criminal law, but on the individual judge and his or her (un)conscious thinking may be an unhelpful, even harmful, gesture, precisely because it treats racism itself as something that structures only 'outcomes', and not people's 'starting positions' in highly unequal structures of inequality more generally.

Chapter 4: Situating Remorse is the result of a different kind of entry into the practices of the judges I studied. Empirically, it is an effort to stay with judicial conceptions of practice as an intuitive, partially moral and evaluative kind of work, including a concern with the legal category of the 'person of the defendant'.

At the same time it has zoomed in on a friction between these judicial, casuistic self-descriptions and the three recurring typified whole-case narratives, suggesting that these typified whole-case narratives are instances of cases not existing as a singular whole but rather as an exemplar or kind of a narrative kind. Relying on conversations with judges and the observation and transcription of in-court interactions, this chapter has tried to connect two separate bodies of research: on the one hand, research into narrative in legal settings; on the other, research on the role and production of remorse in such settings. Both audiences may find things of value in my account of these practices: those concerned with 'signs of remorse' (Tombs and Jagger 2006) may come to appreciate the interactional and narrative complexities of 'doing remorse' in courtroom contexts; those concentrating on the in-court production of stories and facts may appreciate the centrality not only of legal modes of story-telling, but their relationship with *moral* modes of interrogation (see e.g. Jackson 1988, 1990).

Taken together, these two chapters demonstrate and contrast the performativities of statistical modelling of sentencing practices (Chapter 3) and those accompanying a more verbally mediated emphasis on account-giving and narrative (Chapter 4). However, these two modes of collaborating with these legal realities do not exhaust our possibilities; indeed, once I ventured 'backstage' and delved into files and started to trace 'file-work', a phonocentric emphasis on the spoken word made way for an appreciation of largely silent and protracted instances of 'file-work'. *Chapter 5: Visualizing Cases* is rooted in yet another mode of collaboration with the practices at hand. Grounded in observations of backstage file-work, this chapter has called attention to the material texture and social distribution of judicial work practices and the implication of the case file in coordinating and distributing clerical and judicial visualizations. In that sense this chapter is also a meditation on the role played by objects, and the strange and shifty part they play in our relationship with the

world. Objects, Heidegger (1962) suggests, have a tendency to withdraw from us when they are implied in ongoing action; that is, when they are ready-to-hand [*Zuhanden*]. Moments of such naturally occurring 'infrastructural inversions' (Bowker 1994; see also Star 1999) do not rarely represent ruptures in every-day work practices. They are moments when the tools of one's trade become not an object implied in action, but objects of contemplation: not only did judges reflect on the affordances of the paper versus the digital file viewer, however; implied in that reflection was also a recognition of their dependency on clerk's brief and to-the-point summaries. This chapter has also demonstrated the conceptual limitations of both cognitivist and 'perspectivist' understandings of judicial work practices, as both judicial 'thinking' and 'seeing the case clearly' are by no means wholly individual nor purely mental practices. Visualization of the case, I have shown, is a distributed and materially mediated practice involving the affordances and limitations of both paper and digital files. The 'internal point of view', in so far as one wishes to speak about it, is better grasped not as *one* point, nor does it involve an unmediated *view* but rather distributed, networked, and mediated practices of visualization.

Chapter 6: Folding Time, Doing Truths took up the case file not as a material, but as a temporal, 'folded object' (M'charek 2014). It has paid attention not to 'Law's' supposed timeless being, but rather to the vernacular and multiple ways times are enacted as a matter of legal practice. The event of the offense, the time of procedure, the time and space of future-oriented production of evidence, the retroactive reading of documents to retrieve, from them, a sense of these times and places lost, all this taking place, again, within the pacing introduced by statutes of limitations and the fallibilities of human memory: these are the temporal ingredients of making a decision in the here-and-now about the there-and-then. The timelessness of abstracted 'Law' - in which Law is only 'found', never 'made' (Latour 2010) - contrasts with

these multiple ways of sorting, ordering, and folding time: in fact, it may be predicated upon it. After all, there can be no event - no cut, no rupture between past and future - without these many ways of doing process/procedure. In a way, this is also a way of speaking about the relation between the legal archive - precedent, rules, and case-specific communications - and the decision. The archive, Derrida (1995) suggests, can be thought of as a site of the command and of the commencement, or in more familiar terms: of a rule and a beginning. As such they are flexible, moving horizons (Scheffer 2010: 45) to everyday judicial practices. Folding an event, as the beginnings of a 'case', into the circuitry of legal practices is an archival practice, much like the decision is itself a mode of making a relation between the case and legal rule. This chapter has zoomed in especially on the doing - enacting - of procedure and its crucial role in the doing of 'the Law'.

Looking back, it is evident that my journeying has yielded distinct chapters. Staying on the move, moving from different epistemic positions vis-à-vis legal practices, has meant that these different chapters all make contributions to different bodies of research, and are grounded in different modes of collaboration and methods with sociological and legal realities. The first is an account of the performativities of a survey-format; the second concentrated on the morally dense interactions in Court; and the following two chapters concentrated on the material and temporal recalcitrances of legal case files. These chapters place different interventions in different bodies of literature: in examinations of the performativities of social-scientific measurement (Chapter 3), in elaborations of the role of narrative and remorse in legal settings (Chapter 4), in accounts of the materiality of legal work specifically, and work practices more generally (Chapter 5), and theorizing regarding truth-telling, time and procedure in legal settings (Chapter 6). These different chapters are in turn rooted in specific and varying kinds of

collaborations with realities, e.g. reading peer-reviewed articles, in correspondence, in gathering newspaper clippings, in talking with judges, in transcribing courtroom proceedings, in observations of backstage file-work, and in struggles with the case files themselves. Methodologically, each chapter similarly makes a contribution to our understanding of both sociological and judicial ways of case-making. *Chapter 3: Dealing with Difference* enquires into the making of an 'external point of view' upon the Law, and pays specific attention to both affordances and limitations of such a statistically mediated perspective. *Chapter 4: Situating Remorse* is suggestive of what a concentration on verbal interactions in court and a method of pre- and post-trial informal conversation helps to render visible - and what it fails to address. *Chapter 5: Visualizing Cases* is as much a reflection on backstage practices of case-making as it is a demonstration of how 'access' to these backstage practices significantly rearticulates just how we collaborate with legal practice. It also draws attention to that mundane object of legal work: the case file. *Chapter 6: Folding Times, Doing Truths* offers a methodological discussion of the fraught collaborations with case files and is suggestive of challenges facing researchers in bureaucracies more generally. Drawing on judges', prosecutors' and lawyers' selective mobilization of the case file's histories of production, it develops a *forensic* sensibility with regards to organizational documents: an approach that focuses not on what documents mean or signify, but rather on their trajectories through bureaucratic networks and their moments of production and mobilization.

Letting go of the demand that description be pure, letting go of a perspectivism blind to mediation, this book has sought to stay with the troubling presence of both social-scientific *enactments* of reality and of *epistemic* work in legal practices. Such an effort has required methodological agility and has emphasized the finding of paths over the stability of established and rather static 'points of view'. Indeed, in contrast with approaches that

emphasize stable and static epistemic situations - one method, one theory, one well-defined object of study - I have sought to expunge from my account neither the fact of journeying itself nor the multiplicities my concrete collaborations with legal practices have yielded. As such the chapters also speak to different audiences and may generate different kinds of publics. Of course, I am not in control of either my readership's reactions, or of this book's travels and implication in the formation of publics. Yet I do want to venture a series of speculations grounded in the specific contributions of each individual empirical chapters.

3 Speculating upon Multiple Publics: Taking up the Separate Chapters

Taking up Difference

Chapter 3: Dealing with Difference has been an attempt at both diplomacy and accountability. It seeks to create not harmony, but some understanding between practising jurists and social-scientific observers - and it does so by providing an account of the specific realities enacted in statistical research of legal practices. It has zoomed in on the question of discrimination and its measurement, warning specifically against the expectation that criminal law can and should combat institutional and structural racisms. As it furthermore treats the 'head of the judge' as the locus of discriminatory stereotypes - conscious or unconscious - this kind of approach may yield counterproductive results when, as is often suggested, judges are made to be aware of these unconscious biases. For instance, it has been pointed out that efforts to train people to reflect on their unconscious biases, it seems, not infrequently have the precisely opposite effect of *validating* bias (Duguid and Thomas-Hunt 2015). Sentencing guidelines introduced in most notably the United States, similarly introduced to combat the hold of unconscious bias upon judicial discretion, similarly have had mixed results. It seems minimum

sentences in particular have the tendency to drive *up* disparities in outcomes (Fischman and Schanzenbach 2012). In the Dutch context, then, the recently introduced rule barring judges from deciding on community service for offenders with similar recidivism in the past five years is perhaps a more immediate target for those concerned with inequalities in sentencing outcomes. Furthermore, taking away discretion at the level of the judiciary may also shift that use of discretion to 'lower' levels in the criminal justice chain - where decisions and actions are not necessarily object of explicit review procedures as are in place within the judiciary (i.e. appellate courts) (Heaney 1991). In the Dutch context, I am thinking here specifically of the fact that increasing amounts of cases are diverted to public prosecutors, who are able to offer defendants a 'transaction' - hence cutting the costs of having these defendants appear in court. In essence, this is a kind of plea-bargaining; and plea-bargaining, may *mitigate* ethnic inequalities in sentencing duration or severity (because defendants are offered typically lower 'transactions' than the punishment they risk in court) - however, as these transactions are included in people's criminal records, these are also included in routine background checks employers may run on prospective employees. As such the question remains whether such a developments may not inadvertently and cumulatively harm those with the least (legal) resources at their disposal. Similarly, proposals to cut publicly funded legal assistance might endanger precisely the socially and economically vulnerable. It seems to me that, *without* a concern for the relations between practices of crime control and the problematization of certain individuals and populations; *without* attention paid to the intersections between social, economic, political, and legal forms of marginalization; *without* considerations of individuals' differential levels of access and differential resources, an approach that locates the problem of the social reproduction of inequalities in judges' unconscious biases represents a significant and, in my view, unacceptable

narrowing down of the both epistemological and political problems surrounding equal treatment.

In any case, both legal practices and the victims of racism deserve more sustained attention to how and where differences start to make a difference. Such a recognition opens up inquiry not only - as I have shown - into concrete legal practices of case-making, but also into the very different sites and settings where racial differences are made and how these achieve plausibility and salience (see in particular M'charek 2013). In such examinations of 'race-making' the role of 'science', even that of the social sciences, cannot be glossed over. Sociological research routinely works with the fact-fiction of the 'population group'. Precisely to what extent sociologists are happy to perpetuate - even if only 'instrumentally', even if only to measure different 'outcomes' - this conception of a population quite naturally falling apart in groups (sharing blood, soil, or culture) is a question that needs to be addressed sooner rather than later (van Reekum 2016). Key to sociology's public relevance, I argue, is the willingness to critically interrogate its own fact-fictions. The notion of the population group and the work it does in reifying and solidifying cultural or ethnic differences would, I think, be a necessary step in that attempt. Can and should we do perhaps without? Yet how can we continue to address issues of unequal treatment while simultaneously avoiding the pitfalls of reification?

Remorse and Rehabilitation

Chapter 4: Situating Remorse again raises a set of important questions about the desirability of judging remorse by placing different evaluations of 'remorse' within the fraught context of the courtroom and within three typified whole-case narratives. That is, if certain people may have difficulties negotiating the interactional dilemma's accompanying the court's both legal and moral purposes, is it desirable to make such distinctions at all? Some have argued that the evaluation of defendants'

remorsefulness is a questionable business fraught with the potential of miscommunication (Ward 2006; de Haan and Hielkema 2005). With regards to specific typification practices, we could wonder whether the differential evaluations of remorsefulness in cases of public assault and domestic violence may end up doing disproportionate harm to not only the victim of domestic violence, but also to those typically present in the domestic sphere as well, i.e. children. In other words: while the (often) female victim may not, in the words of one judge 'be an angel herself', we might start to address the question whether it is desirable that the demonstrations of remorse on the part of the (often male) perpetrators of domestic violence are deemed somewhat less necessary than in other (kinds of) cases. A similar gesture is possible in the case of drug-addicted defendants, whose remorsefulness is sidelined as empty promises and posturing: we may wonder how the pathologization of drug-addiction remains bound up with moral discourses about selfhood and responsibility, and whether this entanglement is politically desirable.

The intricacies of demonstrating, perceiving, and evaluating remorse in legal settings remains a fruitful site for future research - especially, I should add, against a background of rivalling modes of responsibilization. Relying on the capacity of people to relate themselves morally to themselves, the emphasis on remorse highlighted here may be understood as a specific mode of responsibilization: of asking of individuals to negotiate a morally self-aware and self-reflexive relationship with themselves. Yet there are other ways to 'responsibilize' individuals, and fields like psychiatry and neuro-criminology seem to rearticulate just what it means to 'take responsibility'. Dehue (2014) for instance shows how advances in the diagnosis and treatment of ADHD tend to be cast in a language of responsibilization. ADHD is not, in other words, something to be passively accepted about oneself, but something to be actively managed (through medication, for

instance). With recent advances in neuro-criminology, a similar move may be made when it is suggested, for instance, that criminal behaviour may be steered by the brain (or genes), so that the individual defendant is asked to take responsibility for their own brain or genes. Precisely how and where neurological and moral modes of 'taking responsibility' play out in legal settings remains to be seen; indeed, the frequent use of cognitive behavioural therapy presented as a way to manage stress, anger, and anxiety for certain types of offenders suggests that the two are folded into each other already. How the 'soul' (Foucault 1977) as a locus of intent and intervention is rearticulated against the background of these emerging expert knowledges, then, is an important avenue to explore.

Decentring the Judge, Introducing Other Actors in the Process

Chapter 5: Visualizing Cases demonstrated how judicial 'thinking' is a materially mediated and socially distributed accomplishment. In a way, judges' dependency on clerical assistants contrasts sharply with juristic understandings of the autonomous and neutral judge. At the level of visualization - of the ordering of information, in the extraction of a case - judges are in a real sense dependent on clerks' preparations, and they may not be entirely comfortable with that: hence the emphasis some of them place on 'reading everything myself'. The tension between the demand of legal accountability, asking that the judge is responsible for the verdict reached, and actual work practice, in which the judge relies on files and clerks, is one that should be explored further. I am thinking here in particular about the careful negotiation of both legal demand and practical reality as they affect other practices of advising and informing the legal decision-making process. Important efforts here are those by Holvast (2014), who studies the role played by clerical assistants in legal practices. However, important efforts have also zoomed in on the role of scientific expertise and forensic evidence in legal settings (see especially

Jasanoff 1995; Lynch et al. 2008). Especially salient, in these encounters between scientific and legal modes of making knowledge, is the way legal actors deal with the fact that scientific knowledges or experts typically do not guarantee truth, but merely speak of probabilities. Where scientific experts are typically quite comfortable with a margin of error and with statistical uncertainties, judges typically need more than a high probability to sentence accordingly - after all, the evidence needs to be deemed both lawful and convincing [*wettig en overtuigend*]. At the same time, it seems that the judiciary is not always equipped to interpret scientific or statistical forms of evidence (Derksen 2006). Against the background of this problematic, a recent pilot project involving clerks trained in forensic technique and measurement experimented with the introduction of clerks that would help judges understand forensic evidence (de Rechtspraak 2014). Interestingly, the pilot had to draw not only a distinction between these 'forensic employees' and the category of the 'expert-witness', but also between the clerks' 'own interpretation' and practices of 'assisting in understanding forensic evidence' (de Rechtspraak 2014: 5). These distinctions represent, of course, boundary-work in action (Gieryn 1983) - and as such offer not only an opportunity to study what can concretely be done to equip judges in their dealing with the information 'input' of other actors. They also represent a moment in which conceptual and social distinctions are reproduced or challenged, e.g. the distinctions between the probabilities offered by science and the legal demand for certainty beyond reasonable doubt, the distinction between 'mere fact' and 'interpretation', the distinction between judge and expert. Precisely how and where boundaries between legal and scientific facts, expertise, and jurisdictions are drawn are fruitful sites of further research in line with this chapter's attempt to 'decentre the judge'.

Im/materialities of Work

I also think Chapter 5 in particular offers judges a vocabulary with which to begin talking about their work-practices in terms not governed by a conception of 'knowledge work' as a cognitive, mental effort only. The importance of the humble materials of one's trade may pale in comparison with the abstractions one serves - Justice, the Law - yet are not, for that reason, inconsequential or irrelevant. Recognizing the centrality of the paper case file in their practices may not only help judges to articulate opposition; it may also help to put into words just what they need a digital file viewer to do in order for them to do their work well. In addition, my emphasis on the affordances of paper files may also help the judiciary in anticipating troubles and challenges when other technologies of witnessing are increasingly included in judicial practices - particularly video-materials (see e.g. Lanzara 2009).

Other publics, however, could be just as interested: if we accept the premise that knowledge work takes place within specific material infrastructures and have in that sense become more or less medium-specific, we may similarly find a language within which to negotiate a robust critique of organizational efforts that intervene in the media of everyday work practices. I am thinking of digitization projects more generally, but also a recent push towards open office plans - evident within some courts and the public sector more generally (including, too, universities). Framed as allowing a transparent atmosphere of collegial camaraderie and collaboration (or else as a measure to cut costs), these open office plans, researchers have suggested, tend to also increase stress- and distraction levels in ways that may significantly affect not only workers' productivity, but their health and well-being in general (Baldry and Barnes 2012; Danielsson and Bodin 2008). Additionally, the fact that disruptions in the media and infrastructures of work are often intimately bound up with budgetary concerns suggests, too, that it

might be necessary to start to connect this discussion of materiality to the word's Marxist history. To put it rather provocatively, speculatively: working within a public sector modelling itself after the competitive demands of private industry, within office buildings that function less as sites for intellectual work than as instruments of rent-seeking, within offices that emphasize flow, transparency and immediation (Mazzarella 2006), we might want to start drawing connections once again between the two intellectual histories of the concept of materiality. Woolf, after all, had it quite right when she suggested that if women are to write - and let's include men here as well - they need both 'money and a room of one's own' (1929: 1). How and where 'money and rooms' shape what kind of material and immaterial laboring needs to be explored further.[1]

Studying Bureaucratic Action-at-a-Distance

Together with *Chapter 5: Visualizing Cases*, *Chapter 6: Folding Times, Doing Truths*, has taken up the challenge of studying the use, production, and circulation of documents in legal practices. Both Chapters 5 and 6 are also efforts to move away from three dominant understandings of documents: the informational-representational register (in which a document simply stands for the world it seeks to represent), the hermeneutic register (in which a document is primarily understood as a reflection of an author's intentions) or interpretative register (in which documents function as signs of broader world views or discourses). Both Chapters 5 and 6 are efforts to treat the representational, truth-telling value of documents as a both pre-trial and on-trial accomplishment and not a given. Both Chapters 5 and 6 have eye for the limitations of treating documents as containers of information: Chapter 5 emphasizes the case file's non-textual affordances, while Chapter 6 concentrates partially on its absently present histories and their mobilization in the court session. Neither Chapter 5 nor 6 read these documents primarily as

reflections of either authorial intent or as a sign of broader cultural, political, or social logics; instead, such concerns are only addressed if and when legal actors themselves evoke these. Think, for instance, of the evocation of 'how police officials write these things down', or the suggestion that the public prosecutor has failed to exercise 'due diligence': these moments represent, if you will, local hermeneutic moments. Yet such hermeneutic readings do not exhaust the case file's uses (and, of course, its recalcitrances).

It is in this sense that especially *Chapter 6: Folding Times, Doing Truths* represents an alternative mode of engaging with documents and their use in practices. I have referred to this mode of engagement as *forensic*. It treats the document not primarily as a *sign of* something else (worldviews, authorial intent, cultural logics, etc.) but rather as a *clue to* yet other practices, yet other sites, yet other offices. It is also a pragmatic and casuistic sensibility: it emphasises this particular case, this particular truth (Valverde 2008), and in that sense helps to defer unwarranted totalization, purification, and abstraction. It is a sensibility I learned to adopt in the field, as legal actors engage themselves with questions about the documents' trajectories and more or less immediately present histories. This forensic sensibility is especially helpful, I think, to those studying bureaucratic practices more generally. Bureaucracies, we know since Weber (1978 [1922]), are sites of distribution, fragmentation, even extensification: of cutting up tasks, of distributing accountability, of rendering replaceable human actors and of relying extensively on the non-human mediators of bureaucratic power: case files, archives, registration systems, etc. In other words, bureaucratic sites depend on the building of long and fragile chains so that action-at-a-distance may take place. As such they represent unique challenges to ethnographers (or praxiographers, for that matter), who tend to have to accept the boundaries of a self-defined 'field' - e.g. 'the Court' - and all too often lack the time and resources to follow all

these bureaucratic linkages, to speak to everyone engaged in case-making, to trace a case from event to decision. This problem, of course, is one researchers *share with judges*: for them, too, the local epistemic problem is that they 'were not there when it happened' and that they were not there for all the little steps in the investigatory procedure. That is, they are dependent on their files. Subjecting their files to forensic readings, judges, lawyers and prosecutors are able to reconstruct decisions and routines - in other words, to use the document as a *clue*. If we are interested in apprehending this bureaucratic action-at-a-distance, this forensic sensibility with regards to documents promises an understanding of the distributed, temporal, and unfolding character of the unit of all this bureaucratic action: the case itself.

4 Retaining Multiplicity, Deferring Totalization: Towards a Sociology of Hyper-Objects

Although the preceding chapters are all rooted in the same pragmatic respecification of both description and 'the Law', these disparate chapters yield multiple realities, demonstrating how 'the Law' is enacted as a distribution machine, a both legal and moral being, a file-bound and rule-oriented practice, and a practice of making times and doing truth. To get to this multiplicity, I have moved from one epistemic situation to the next and to the next again; mine has been an ambulatory approach that never forgets that it moves across a terrain rather than glides across a frictionless plane. Conceptually, I have moved away from a purified understanding of the Law and Science towards an appreciation of the impure, the troublesome, and the hybrid. I have moved away from a conception of description as unproblematic mirroring of the world towards a more performative and mediated understanding of knowledge making. I have also collaborated with the things designated as 'legal' in many different ways, and in so doing have produced 'the Law' in

many different ways. For instance, with a sociological, cross-sectional 'view' of the Law we lose all sense of legality at all, even though we may be happy to see many cases at once - or at least, the 'factors' of which they are composed and the outputs they yield. In the emphasis on the processes taking place in the quintessentially legal courtroom we encounter morals; the distinction between legal culpability and moral responsibility continually at stake. Judicial visualizations of the case prove reliant upon social and material infrastructures and bear witness to the entanglement of cognition and matter, minds and things. Last, with legal procedure, often branded so specifically legal, comes simultaneously the question of facts, truths, and the relationship between documentary as well as 'actual' realities. There are real multiplicities here, and facing that multiplicity it is tempting to ask just how they can be brought together once more.

Bringing together multiplicities, Mol (2002) shows, is often effectuated with reference to a singular reality. Different ways to measure or diagnose a disease can, for instance, be calibrated and compared against each other in reference to a real, biological reality. Many scientific efforts do precisely this: which measurement comes closest to what we assume is an underlying, singular real? In the study of the Law, we have seen such an effort before. We have encountered it in appeals to 'Law's truth', presumed to be hostile to description itself and only apprehensible in reference to a basic norm. Characterizing this mode of asking questions about multiplicity is that they presume the existence of an underlying, singular reality: in Mol's case, the assumption made is that all measurements of disease refer back to a singular disease (Mol 2002). In my case, it has been the assumption that accounts of legal practices all refer back to that one true thing: the Law. This desire for hierarchization and ordering, then, is a question that tends to erect, once again, a 'real' thing that precedes and transcends actual occasions of

collaboration and experimentation. Giving in to this tempting gesture, we might wonder how the four realities enacted in this book can be ordered. Which one is more accurate? Which one approaches the Law best? As such, singularization is also a gesture that desires both closure and totalization: when all is said and done, this or that is what the Law *actually* is. In that sense, it is a question that wants, again, a hyper-explanation (Dupret et al. 2015): something definite, essential, and final about the object of study.

In these last pages, I will not provide you with such a definite answer and produce a stop to these debates. After all, I am not in the business of writing arrêts. In fact, I will do the opposite. Instead of proposing an abstraction that captures something pure about the Law, I will hand you one that suspects totalization, defers finalization, and as such allows multiplicities to persist - in other words, a word that asks you to please go on. This is the notion of the hyper-object.

Sociologies of the Hyper-Object: From Climate Change …

Inspiration is found in unlikely places. I found mine in Morton's *Hyper-Objects: Philosophy and Ecology after the End of the World* (2013), in which he sets out to understand the unique problems the object of climate change poses to human observers. A brief discussion is necessary here, for it is in this example - global warming - that we can detect ways to do justice to 'the Law' without, crucially, suggesting that we can ever have the last word about it.

Global warming, Morton argues, is a thing so vast and complex that it challenges the way we tend to think about objects more generally: that is, the conception that objects are 'out there', that we can feasibly situate ourselves in an external position vis-à-vis their objective reality, and that they have a stable existence across and within space and time. Hyper-objects such as climate change, however, defy such habits of thought. There is a mystery

to them we fail to grasp, however hard we might try: 'The more data we have about hyper-objects the less we know about them - the more we realize we can *never* truly know them' (Morton 2013: 180). Global warming is so vast a thing that it encompasses us, making impossible a relation of (epistemic, political, ethical) exteriority: we are never quite outside of them. Hyper-objects like global warming, Morton argues, are also 'molten' and 'non-local'. They exist not 'in' time and space but 'emit' these: they recon, shape, direct and disrupt flows of time and shapes of space. These material and temporal forms of mattering, to adopt a phrase from Barad (2003), are multiscalar, 'phased' and non-local: it is as if hyper-objects occupy a wholly different plane of reality than us mere mortals. These high dimensional phases are, Morton (2013) suggests, not directly available to human perception. Its multiple forms of temporalization - of natural cycles, of the durée of change over millennia - contrast with modes of doing time more familiar to us (e.g. a human life, a calendar year, a day). Climate change is non-local in that there is always something *more* to it than local manifestations. A rise in average temperatures or a rise in sea levels do not begin to account for the full complexities of global warming. Climate change also messes with the categories of causality and scale we are used to: 'tiny' events may have 'large' consequences. And human beings may not always be able to make differences and to act successfully in the face of this hyper-object: yes, we play a role, but climate change is also an inter-objective process, shaped by relations between ice, sun, oceans, vegetation, etc. With the impossibility of taking up a relation of exteriority comes also the impossibility of ever seeing them 'in full' or directly; instead, all we ever arrive at are *glimpses of the traces it leaves:* e.g. a rise in sea levels or average temperatures. This is the mystery of the climate change, and with that, of hyper-objects: they defy the possibility of looking at them 'directly' and seeing them 'in full'. For that, we are far too limited and enveloped. Above all else, *hyper-objects resist*

hyper-explanation. There is no one 'theory' of climate change: climate change is itself far too distributed, multi-scalar, and phased to allow such singularization.

… *to the Law*

The kind of conception of legal practices I have been working towards will surely start to resonate with this conception of the hyper-object. Let's start with the issue of multiplicity. Like climate change, 'the Law' is not one thing upon which one may have different perspectives. It is multiple: depending on our collaborations with it, it does not so much shift in appearance as change entirely. From a distribution machine, to a morally dense narrative practice, to a practice of paper-shuffling, to folding multiple temporalities: these are but four of the 'beings' of the Law, and by no means the only ones. None of these can lay claim to capturing the Law in its totality, but none of these are entirely divorced from its machinations either. What we have encountered along the way are glimpses of the traces 'the Law' leaves on bodies ordered, on words spoken and written, on time folded and refolded. Situated glimpses, mediated glimpses, but also glimpses that deny us a view onto the totality of 'the Law'. Hyper-objects are also *non-local*: there is always something more than only the here-and-now of local enactments. Something escapes the here-and-now. This, too, is a dimension of 'the Law' in my account: every chapter created aporias, every chapter as such set the stage for another line of escape: there are always yet other offices, other doors to enter. That 'the Law' is both 'here' and 'elsewhere' is, for Deleuze and Guattari (1986), a sign not of the Law's fictional, perhaps even transcendent character, but rather of its *serial and contiguous* character. If 'the Law' only provides glimpses, if in other words it *hides*, Deleuze and Guattari write, that is only an effect of it always partially taking place 'in the office next door, or behind the door, on to infinity' (Deleuze and Guattari 1986: 45).

Like the hyper-object climate change, 'the Law' also shapes and reconfigures - 'emits' - time in many different ways. We have encountered not only the time of procedure, the time of events, the time of production and use of its artefacts, but there is also the image of a timeless Law that knows no beginning or end. The Law is a 'phasing' thing: time 'percolates' (Latour and Serres 1995) in legal practices. Procedure allows for periodization, times and spaces are rendered absently present, there-and-thens become available in the here-and-nows of the court session so that - once all is said and done - a lasting, impersonal judgment, as if out of nowhere, can strike the accused. How are these ways of making and taking time related? I would venture the suspicion, here, that both the 'Law' as a folder of times and the Law's placement outside of history are related: perhaps the image of ahistorical Law functions precisely as a way to 'align its gears and make them function together with "perfect synchronicity"' Latour and Serres 1995: 43). *Syn-chronicity*: the coming together in time - or *of* times? Indeed, if there is one way this book has made a contribution to situating Law's claim to transcendence - to tracing how an appeal to transcendence 'aligns gears and makes things function together' (Deleuze and Guattari 1986: 43) - it has been in its attention to the tension between the making and doing of multiple temporalities in legal practices, and Law's paradoxical placement *outside* of chronological time. This is my suggestion: it is that timeless, transcendent 'Law' is precisely an *effect* of the very different ways of folding, sorting and ordering times. These practices of phasing, of 'emitting' time, are not an *expression* of 'the Law'; timeless 'Law' is their *effect*.

The Law, finally, is both inter-subjective and inter-objective: it relies not solely on inter-subjective agreements between human actors (as a conception of the Law as a culture or institutions would have it) but on written reports, post-it notes, files, folders, staples, digital programs, law books, case files, desks, chairs, computers … These are the infrastructure of legal memory and of

legal action. The case file in particular is testament to the traces the hyper-object 'Law' leaves, its preferred trace being, of course, the *signature*. Referring back to its human authorizer and the mandate of impersonal (non-human) 'Law', the signature is the objective-subjective nexus around which the legal machinery turns.

Adopting the productive fiction of the hyper-object, we face a Law that is a many-scaled thing, parts of it too big to fully see, other parts immediately available, a thing that has no centre nor definite boundaries, a distributed and tentacular thing (ten Bos 2015). It is also too big, or rather too multi-scalar, to ever 'see in full': there is no 'outside' of the Law, just like it has no 'inside'. Instead, we can only hope to move through it and capture some of the traces it leaves. As such, the notion of the hyper-object makes hyper-explanation impossible, and does not hold out the promise of unmediated vision of totalities. It only asks us to consider opening yet another door, finding yet another burrow, another escape.

5 Joseph K.'s Murder: A Note on Life and Death

Nearing the end of this book I have but one (for now) last thread to follow up on. These concerns are related to the end of *The Trial*: the scene in which Joseph K is killed 'like a dog' at the hands of two shady representatives of the Law. While I have highlighted the differences between the 'man from the countryside', stuck in contemplation, and Joseph K.'s frantic travails, this ending of The Trial seems to collapse the distinction between the man from the countryside and Joseph K. After all, they both *die*.

These two deaths seem to call into doubt my suggestion that it matters how, where and when we collaborate with things qualified as legal. I have insisted that we cannot 'arrive at truth' without departing and travelling roads. And in making ourselves ambulatory, we arrive at different truths and enact different realities depending on the tools we use and the situations in

which we find ourselves. This ambulatory attitude contrasts with the man from the country side's contemplative approach. While static contemplation yields sterile abstractions, tautology, or reduction, Joseph K. teaches us that ambulatory action, by contrast, yields multiplicity, specificity, and concreteness. Different collaborations, in turn, yield multiple truths and realities. In other words: you must always travel roads - to pass *meta hodoi* - to make knowledge, and which roads you take will always matter to the realities produced.

Yet irrespective of whether they prefer to contemplate or investigate, both the man from the countryside and Joseph K. meet their deaths. Is this, then, perhaps the Law's final truth? That it does not matter what we do, for death awaits us in the end? In this interpretation, there is something *vampiric* about the Law: both deaths function as symptoms of Law's timelessness, its *immortality* perhaps: 'for in the exercise of violence over life and death more than in any other legal act', Benjamin writes, 'Law reaffirms itself' (1978 [1921]: 286). Is this, perhaps, Law's final and foundational capital-T Truth? Is its deathly grip on life itself, to speak with Benjamin (id.: 286), at its 'rotten' core?

In essence, this is an interpretation that highlights the relationship between the Law, life, and violence. Benjamin (1978 [1921]) especially zooms in on this aspect of the Law. The Law's violence, Benjamin writes, is mythical: it does not express a will, neither a command, nor a project or plan, but first of all existence of the Law itself (id.: 294). Agamben's elaboration on sovereignty and the Law displays a similar insistence on the relationship between violence and the Law: the sovereign, in a precise mirror image of 'bare life', stands both within and outside of the Law: within it, as ostensibly constrained by its imperatives, and outside it, as that body which is capable of suspending the Law itself in a state of exception (Agamben 1995). Investing bureaucracy with a similar violent capacity, Graeber (2015) suggests that those studying bureaucracy should not close their eyes for the fact that,

at the end of the day, bureaucracies rely on the legitimate mobilization of 'men with guns'. Command theories in legal scholarship similarly seek behind the force of Law a 'gunman': Austin (1995 [1832]) notoriously suggests that Law consists fundamentally in the command of the sovereign, backed up by sanctions. Indeed, my approach to legal practices has been largely silent about this crucial operation of the Law: an operation Deleuze and Guattari (1986) define as simply the capacity to keep you from going about your own business. *Rendering bodies in motion static*: this is what the Law does, and this is what it grasped at with recourse to an emphasis on violence and sovereignty. Is this, then, the final truth I have failed to capture? A truth of violence, death and confinement? A truth of violence against life as such?

I would argue, first, that to equal the Law with violence is a problematic gesture precisely because it is a way to purify our accounts once more: to distinguish between the mess and machinery of concrete practices and their guiding logos. In doing so we gloss over not only the concrete 'remainder of things' so crucial to this book - legal practices of truth-making, for instance - but may also end up mistaking the effects of 'the Law' for their foundational truth. Could the relation between 'the Law' and death not be drawn, however, in the other direction? Perhaps 'the Law's' power over life and death is only a transcendent-seeming *effect* of a *whole machinery of moving parts*. In the words of Deleuze and Guattari: 'the divisions of oppressor and oppressed, repressors and repressed, flow out of each state of the machine, and not vice versa' (Deleuze and Guattari 1986: 56-57). As death or confinement 'flow out of' this machine, they do not in and of themselves explain much about its machinations. Indeed, I think my sustained attention to the technicalities of 'the force of Law' - e.g. practices of police investigation, of producing, using, and circulating that which incriminates, of judgment and decision - speak precisely to the question as to how sovereignty and violence are *done*, drawing attention to 'the Law's' concrete,

perhaps even banal, being. And as we know, it is only with an emphasis on banality that we become able to truly understand the affective texture of this compromised, bureaucratized world we live in (Cf. Arendt 1963). With that, this emphasis on concrete, moving parts that go into producing the effect of abstract 'force' or 'power' is perhaps better suited to come to an appreciation of our responsibilities within these worlds.

Indeed, a second thing to consider in light of Benjamin's emphasis (1978 [1921]) on the inevitability of violence in Law-making and Law-positing is, crucially, what we want our accounts of this strange, seemingly interminable machinery of moving parts to be able to do. Even *if* death and violence are Law's most fundamental truths, may we not want to refuse to build abstractions in their names? The problem, I think, is related to the cynicism that is our dominant affective response to hyper-objects. Given their sheer size and scale (or multiple scales), hyper-objects not rarely inspire fatigue, complacence, or cynicism: after all, we are *far too small to make a difference*. Indeed, scaled-up analyses of the Law as an instrument of bourgeois, patriarchical, or neo-colonial powers not rarely inspire a similar kind of fatigue: for how might we hope to make a change for the better? For William James (1911: 226), this tired complacency is paradoxically also the precondition for us to be able to take a 'moral holiday'. In this case, this moral holiday would look like a few days off in which we learn not to worry about the Law, waiting perhaps for Benjaminian divine violence to bring the Law, violence, suffering, to an end (Benjamin 1978 [1921]). In the meantime, we might as well lean back and enjoy the view.

This attitude strikes me as wholly unsatisfactory. Only the most hardened cynic maintains that nothing matters for death awaits us all. Precisely *because* death gets us all in the end almost everything matters almost all of the time. Even *if* death and stasis are the keys to unlock Law's mystery, we nevertheless have concrete living to do, concrete paths to seek out, concrete hurdles

to take. And this is where I think our primary ethico-political imperative comes in as researchers, that is as those charged with making knowledge. This imperative, in my view, is the demand that the moves we make, the abstractions we fabricate, and the accounts we give, serve *the living* (Schinkel 2014).

While the Law's deathly, rotten core may (or may not) be one fact, then so are our lives. And this, again, is why the hyper-object is a productive fiction: it accepts grand-theoretical failure and precisely in doing so makes us cling on to real things, concrete things, *for dear life*. It does not expunge all mysticism from life - for there *is* a mystery to the Law, but not a mystery that is 'hidden by its transcendence', but one that exists simply because there is always something in 'the office next door, or behind the door, on to infinity' (Deleuze and Guattari 1986: 45). This political and affective sensibility, which I can only characterize as stubbornly optimistic, only asks where transcendence is done, how mysticism is sustained, how abstractions are made and mobilized, and then goes on to wonder how such abstractions sustain what kinds of living. A sociology of hyper-objects, in my view, is a sociology for the living: it finds its impetus, its jurisdiction, its *telos* not in the realm of purification, contemplation and finalization, but in the only task we really share: that of living-with. Living with what, whom, how and when? Now, that's a start. Please go on.

NOTE

1 I might add to both 'money and rooms' a third infrastructure of value-generation: the female body itself and the practices of caring for life so often delegated to the realm of the immaterial - mothering and caring practices that are ostensibly highly valued, of course, but remunerated badly. The relationship between material and immaterial labour in relation to both the physical environment and the virtuality of capital is too brief to explore here, yet it is worthwhile to point out that no Marxist understanding of production is adequate if it fails to include a concern with *re*production. See, for that last point, in particular Federici (2004).

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Summary

A Controversy

In March 2012, a study into sentencing disparities shocks the Dutch Judiciary. Three researchers of the University of Leiden have demonstrated that defendants' 'foreign' or Dutch 'appearance', as well as their capacity to speak Dutch, influence judges' sentencing decisions: defendants who both 'appear foreign' and who do not speak Dutch are more likely to be sentenced with a prison sentence that those who both 'appear' and speak Dutch (Wermink, de Keijser and Schuyt 2012a). Several actors in both politics and media seem to have made up their minds: the judiciary may promise to treat like cases alike, yet the data clearly suggest that the members of the judiciary are at least somewhat affected by discriminatory stereotypes. The three researchers suggest that the study's results may be explained with reference to unconscious biases on the part of these judges. Judges themselves, however, are rather piqued. Two judges reply to the study's findings in the Dutch Jurist's Magazine, where they wonder whether the researchers have 'any idea' as to how judges decide on actual cases. The judges who I am to meet later on in my fieldwork similarly feel misunderstood, and for them too it is clear the researchers seem to lack sufficient insight into their every-day work. For the judges, a lot is at stake: not simply their professional pride, but also an essentially different conception of their own practices. Can we, as social scientific observers, do justice to these different conceptions?

This controversy has been the start to a both theoretical and empirical journey. This journey was led by three central questions: What do these every-day practices of judging look like anyway?

How do judges deal with cases, that is: how do they evaluate evidence, construct or deconstruct different story-lines, how do they come to 'see' the case? And what do social scientific observers see and not see when they try to describe, understand and explain these practices, and how do their methodological choices and theoretical assumptions shape their conception of these practices? Third, what do I do when I try to research and describe these practices, that is: how do my own positionings, assumptions, and methodological choices affect the knowledge I produce? This book, then, is a reflexive study focused on different ways reality is apprehended in both the social sciences and criminal law. As such it focuses on different ways of case-making.

Conceptual Puzzles and a Pragmatic Respecification

Upon closer examination the controversy just described raises both theoretical and empirical questions. In *Chapter 1: Contemplating the Law* I focus on the theoretical dimensions of this controversy by tracing how science and the law are distinguished from each other. After all, it is precisely this demarcation that is at stake in the controversy: on the one hand, judges feel judged (while scientists should only speak the truth) and emphasize their own unique knowledge of their practice and the cases they deal with (while scientists are usually the ones is charge of making knowledge). In this chapter I show how the distinctions between norm and fact, judgment and truth, are mobilized in order to be able to differentiate between 'Law' and 'Science'. However, I also focus on the limitations of such exercises in demarcation. Because, although these demarcations may have some use, they do limit our capacity to do justice to the aforementioned controversy. After all, the limitations of these demarcation are evident in the controversy itself: on the one hand, social sciences speak of a reality judges do not recognize – they seem to do more than just provide the facts - and on the other, judges appeal to

their own knowledge of cases and practices of case-making - so that judges, too, are engaged in knowledge- and truth-making.

In *Chapter 2: A Guide for the Perplexed* I offer conceptual tools to understand these two dimensions of the controversy. I call my intervention a pragmatic respecification, which is characterized by an emphasis on concrete practices. As the association of the norm with the law and fact with science are the product of exercises in abstraction, we will need an approach capable of addressing concrete practices of case-making, both in science as in law. Only then can social scientists remain accountable to the way they, by virtue of our methods and research designs, actively shape and delineate the world, and only then might they remain sensitive to the ways the defendants and the case are made known within legal practices. In this chapter I also explain why it is crucial to take objects into account, for instance, the measurement instruments social scientists use (surveys, observations, interviews) but also the instruments in the hands of the judges, especially the legal case file. These objects, much like our assumptions and cognitive capacities, are inextricable parts of our practices of case-making, and are consequential not only to our every-day work practices but to the very cases we are able to make. Of course, this emphasis on methods requires a reflexive approach to the methods I myself use in my fieldwork.

Journeying

Equipped with a sensitivity to concrete practices of case-making and the role played, in these practices, by instruments and objects, I can commence my journeying. In *Chapter 3: Dealing with Difference: Doing Criminal Law and Social Order* I return to the Leiden study once again in order to analyse the realities produced in this study. Crucially, the researchers draw on numerical and categorical data, so that legal cases are being treated as products of these case characteristics. Another effects of the methods used is that criminal law itself appears as an input and output system

that distributed punishment over different populations of defendants. These populations of defendants, be it the defendants with a foreign or a 'native' look, are a third salient effect of the researchers' approach to these legal practices.

In *Chapter 4: Situating Remorse* I take my first inquisitive steps among the criminal judges of a Dutch court and show that the realities produced by the Leiden study are quite different from the way judges conceive of cases. Drawing on observations of court cases and conversations with judges I show that judges do not understand cases as a collection of case-factors, but rather that they treat cases as stories. Nor is the defendant a bundle of fixed and given factors, but is rather a narrating person. In contrast with the sociological reality produced by the Leiden study, these practices do not assume the existence of populations. However, judges do see similarities between cases. They distinguish especially between more or less typical case narratives, like a typical 'junkie' charged with petty theft, a typical 'angry young man' charged with physical assault (often in public), and typical 'explosive couples', involving a man who is accused of domestic violence. These typical cases are characterized by typical story-lines that connect motive, character of the defendant, the punishable offense, and the circumstances of the offense. The extent to which the defendants show remorse, furthermore, is weighed differently in each of these three typical narratives: in the case of drug-addicted defendants, remorse is often taken as an empty promise (their addiction presumably being stronger than their resolutions); however, angry young men are very much expected to show remorse (they have to understand the gravity of what they have done); while, last, in the case of 'explosive couples' the female partner's behaviour and character is weighed in the sentencing decision, and remorse on the part of the defendant is not always deemed necessary.

Now, it is tempting to use these observations in court and conversations with judges in order to argue that these legal

practices are mostly about the spoken word and about story-telling. While these practices certainly have a storied texture, we also know that methods have their consequences for the accounts we produce about practices. In *Chapter 5: Visualizing Cases* I show how observations of judicial practices 'backstage', in their offices, allow me to produce a rather different account or case. Backstage, it is rather quiet, and the defendant is absent. Only traces of other actors are present here, and they are present in the form of a legal case file. This chapter focuses on practices of file-work, and demonstrates how these work practices are instrumental in judges' pre-trial attempts to 'see the case clearly'. These file-work practices are shaped by and attuned to paper case files: both clerks and judges use paper, pen, pencil, stickers and post-its to order information and distinguish between signal and noise. No wonder, then, that the digitization of these case files over the summer of 2013 was cause for some consternation: all of a sudden, clerks and judges had to experiment with different ways to 'visualize the case'! Paying careful attention to the way clerks and judges adapt their work practices to these digital files I ask for an appreciation of the materiality of 'knowledge work' in general, and of these judicial practices in particular. I also show how the professional boundaries between clerks and judges needed to be rearticulated as a result of digitization. Considered in this light, digitization is neither an unequivocal blessing nor a simple way to cut costs, but considerably impacts everyday work practices.

In doing so I show how the case file is far from only a text; it is also a materially recalcitrant object: it resists and it affects the practices with it and around it. In *Chapter 6: Folding Times, Doing Truths* I emphasize another kind of recalcitrance of the case file, namely, its temporal recalcitrance. I start my inquiry here with making the assumption that time is not, or not only, a neutral container of action (so that it is possible to say that events happen 'in' time) but, in contrast, that there are different ways to

make different times. For instance, there is within legal practices the 'time' of procedure, but conversations with judges and observations also suggest that the case file is also instrumental in making two additional temporalities. First, the case file enacts the time of the event in question - when did what happen precisely? What is cause and effect? Who saw what, and when? - but the case file also renders certain dimensions of its history of production visible - for instance, when officers inadvertently draw attention to the context of the interrogation setting or their transcription practices. In this chapter, I show how these different temporalities are mobilized in the struggle over 'the facts' in court. Judicial practices, then, are neither only about stories, nor only a silent and file-bound practice, but also a practice of folding and refolding time.

Chapter 7: Productive Fictions for the Study of the Law: From Hyper-Explanation to Hyper-Object may be the last chapter in this book, but it is far from the last word on any of the subjects touched upon here. Here, I outline several theoretical and methodological lessons learned throughout my journeying, and want to emphasize the public relevance of these lessons. For instance, I point out that approaches that treat discrimination solely as an outcome of unconscious bias have serious limitations, and inquire whether we should not aim to develop more nuanced tools to understand the relationship between legal practices and the reproduction of social inequalities. I also emphasize the importance of understanding everyday legal practices: in order to truly engage with these legal practices, I argue, social scientists will have to pay attention to the way similarity and difference are enacted in legal settings themselves, and the role played there by more or less typical narratives. I also go on to wonder whether the fact that variable levels of importance are attached to defendants' demonstrations of remorse in these practices is politically desirable (for instance in domestic violence cases, in which the victim's character is implicated in appraisals of the

case). I stress, too, that digitization is a far-reaching and complex process, and that we hence cannot be led simply by a conception of legal practices as only taking place 'inside the actors' heads'. Knowledge work involves both 'eye' and 'hand'! For other knowledge workers - academics, medical professionals, other professionals in the public sector - the material infrastructures of work play an important role in their everyday practices, and there, too, digitization is sure to have lasting effects. I also ask social scientists who study legal practices to remain mindful of this humble and relatively understudied object: the case file. After all, there is no case without a case file! Last, I pay attention to the matter of time and procedure. While lay audiences tends to be quick to dismiss concerns with procedure as empty formalism, I nevertheless want to emphasize the crucial role it plays in shaping both everyday concerns with legality and justice.

These diverse lessons are drawn from diverse insights, which in their turn are based on different (combinations of) methods employed in different settings, e.g. conversations with judges, observations in court, observations of 'back-stage' work practices, and a detailed study of the unfolding of individual court cases. It is not easy, then, to say anything final about the practices studied here. After all, these legal practices make their appearance in many different ways. In Chapter 3, they appear as a distribution machine, while in Chapter 4, legal practices are first and foremost understood as narrative practices. In Chapter 5, however, these practices make themselves known as largely silent, file-bound activities, and in Chapter 6, these practices are characterized by an engagement with the multiple histories of the case file. Of course it is tempting to treat either one of these as a final, definitive truth. However, such a move would precisely be the same as the one towards purified abstractionism I identified in Chapter 1. Again, I would reduce the wildness and variety of these practices to one explanatory abstraction.

This solution is limiting, both to the social sciences and the law itself. Even if social scientists manage to agree, their efforts are better spent allowing different possible truths and different possible worlds to persist. The legal practices I studied, too, are not done justice when we aim to elect merely one explanatory abstraction: after all, what about the Law's concrete robustness, what about the many different ways the abstraction 'Law' is enacted in actual practices? In order to void making this doubly cardinal mistake, I suggest we approach the law as a hyper-object. The hyper-object is an object so large, so recalcitrant, so stretched out, that we can never locate ourselves 'outside' of it to apprehend it in full. Instead, the hyper-object gives us glimpses, and those glimpses are inextricably linked with the ways we journey through this hyper-object and the methods we use while journeying. Of course, the hyper-object has a certain mystery: however much we research or discuss it, we can never quite manage to have the last word about it. With this concept, we might be able to do justice to the multiplicity that is 'the Law', as well as be able to do justice to the scientific task of asking good questions, and, always carefully, humbly, trying to formulate tentative answers.

Samenvatting

Een Controverse

In Maart 2012 wordt de Nederlandse rechtspraak opgeschrikt door een studie naar verschillen in straftoemeting. Drie onderzoekers van de Universiteit Leiden hebben aangetoond dat rechters het uiterlijk en de taal van de verdachte mee laten wegen in hun beslissingen over straftoemeting: zo worden verdachten met een 'buitenlands uiterlijk' en geen Nederlandse taalvaardigheid vaker bestraft met een gevangenisstraf dan verdachten die wel Nederlands spreken en een 'Nederlands' uiterlijk hebben (Wermink, de Keijser en Schuyt 2012a). Voor verschillende actoren in de media en een aantal parlementsleden lijkt het een uitgemaakte zaak: de rechtspraak kan dan wel beloven dat ze gelijke gevallen gelijk behandelt, maar dit onderzoek impliceert dat dit toch niet het geval is. De drie onderzoekers zelf suggereren dat de resultaten van de studie verklaard kunnen worden aan de hand van vooroordelen die rechters, wellicht onbewust, laten meewegen in hun straftoemetingsbeslissingen. Rechters zelf lijken echter vooral gepikeerd. Zo schrijven twee rechters een reactie op de studie in het Nederlands Juristenblad, en vragen zich daar af of de onderzoekers 'enig idee' hebben hoe rechters beslissingen maken. Ook de rechters die ik later leer kennen in mijn veldwerk, voelen zich niet begrepen. Voor hen is het duidelijk dat de onderzoekers te weinig kennis hebben van de dagelijkse praktijk van het rechtspreken. Er staat hier veel op het spel voor de rechters: niet alleen hun beroepseer, maar ook een daadwerkelijk ander begrip van hun eigen praktijken. Kunnen we hier als sociologen recht aan doen?

Voor mij is deze controverse het begin geweest van een zowel theoretische als empirische reis geleid door de vragen: Hoe ziet die dagelijkse werkpraktijk van rechters er eigenlijk uit? Hoe evalueren ze bewijs, hoe construeren of deconstrueren ze verschillende verhaallijnen, hoe 'zien' ze de zaak? En wat doen sociologen eigenlijk als ze die juridische praktijken proberen te beschrijven, begrijpen, en verklaren, en hoe hebben hun methodische keuzes en theoretische aannames weer gevolgen voor het beeld dat wij krijgen van deze juridische praktijken? En wat doe ik als ik die dagelijkse praktijken ga bestuderen, dat wil zeggen: wat zijn de consequenties van mijn eigen methodologische keuzes voor de kennis die ik maak? Zo is dit boek een reflexieve studie naar de verschillende manieren waarop in de sociale wetenschappen en in het strafrecht zelf zaken worden gemaakt; hoe, met andere woorden, beide praktijken grip proberen te krijgen op de wereld.

Conceptuele Puzzels en een Pragmatische Respecificatie

Bij nadere bestudering blijkt deze controverse namelijk zowel theoretische als empirische vragen op te roepen. In *Hoofdstuk 1: Contemplating the Law* richt ik mij op de theoretische kant van deze controverse door te traceren hoe er precies demarcaties worden gemaakt tussen de wetenschap aan de ene kant, en het recht aan de andere kant. Het is immers deze demarcatie die op het spel komt te staan: rechters voelden zich door wetenschappers veroordeeld (terwijl rechters juist het veroordelende werk doen) en zij beroepen zich op de eigen kennis van de eigen praktijk en de inhoudelijke kennis van de zaak (terwijl wetenschappers het patent hebben op kennis). In Hoofdstuk 1 laat ik dan ook zien hoe het verschil tussen norm en feit, oordeel en waarheid, instrumenteel wordt gemaakt in het onderscheiden van 'het recht' en 'de wetenschap' - maar richt ik me ook op de grenzen van dergelijke oefeningen in demarcatie. Want hoewel deze demarcaties een zeker nut hebben, beperken ze wel onze

mogelijkheid recht te doen aan een aantal saillante onderdelen van deze controverse. De grenzen van dit denken worden namelijk belichaamd in de controverse zelf: aan de ene kant maken de sociale wetenschappers een realiteit waar de rechters zich niet in herkennen - wetenschappers doen meer dan alleen de waarheid spreken - en aan de andere kant beroepen rechters zich op hun eigen kennis van de specifieke zaak - ook rechters doen aan waarheidsvinding.

In *Hoofdstuk 2: A Guide for the Perplexed* reik ik conceptuele instrumenten aan om deze twee dimensies van de controverse te duiden. Ik noem mijn interventie een pragmatische respecificatie, welke wordt gekenmerkt door een nadruk op concrete praktijken. Als de vereenzelviging van norm en recht enerzijds, en waarheid en wetenschap anderzijds, het gevolg is van oefeningen in abstractie, hebben we juist een benadering nodig die zich kan verhouden tot concrete praktijken van 'zaken maken', zowel in het recht als in de wetenschap. Alleen dan kunnen we als sociale wetenschappers rekening houden met de manier waarop wij, in de keuze voor specifieke methodieken en onderzoeksdesigns, actief een specifieke wereld ordenen (en daarmee vormgeven), en alleen dan kunnen wij gevoelig blijven voor de manier waarop er binnen juridische praktijken grip wordt gekregen op de feiten en de verdachte. In dit hoofdstuk leg ik ook uit waarom het zo belangrijk is om rekening te houden met concrete objecten en instrumenten, zoals de meetinstrumenten die sociale wetenschappers gebruiken (surveys, observaties, interviews) als de instrumenten die ter beschikking staan van de rechter, en dan in het bijzonder het dossier. Niet alleen onze assumpties en cognitieve vermogens, maar ook deze instrumenten maken immers onlosmakelijk deel uit van concrete praktijken van zaken maken, en hebben daarmee grote gevolgen voor de alledaagse werkpraktijk en voor de 'zaak' die uiteindelijk kan worden gemaakt. Natuurlijk leidt deze nadruk op methoden ook tot een

reflexieve houding ten opzichte van de methoden die ik toepas in mijn eigen veldwerk.

Op Reis

Uitgerust met deze gevoeligheid voor concrete praktijken van zaken maken, en de rol die instrumenten hier in spelen, kan ik mijn reis echt beginnen. In *Hoofdstuk 3: Dealing with Difference: Doing Criminal Law and Social Order* neem ik de Leiden Studie nogmaals onder de loep om tot een analyse te komen van de realiteiten die de onderzoekers vormgeven. Cruciaal is om allereerst te erkennen dat de onderzoekers, in hun gebruik van numerieke en categorale data, juridische zaken gaan behandelen alsof ze optelsommen zijn van zaak- en persoonsfactoren. Een ander effect van de gebruikte methode is dat het strafrecht verschijnt als een in- en output systeem dat straf distribueert over verschillende populaties van verdachten. Want die populaties van verdachten, zoals daar zijn verdachten met een 'binnenlands' dan wel 'buitenlands' uiterlijk, zijn een derde effect van de gebruikte onderzoekstechniek. Op die manier vormen ze een werkelijkheid waarin rechters, zo zullen we zien, zichzelf en hun werkpraktijk maar slecht herkennen.

In *Hoofdstuk 4: Situating Remorse* waar ik mijn eerste stappen zet onder de strafrechters van een Nederlandse rechtbank, laat ik namelijk zien dat de realiteit waar rechters vanuit gaan een heel andere is. Uit observaties van rechtszittingen en gesprekken met rechters maak ik op dat ze de zaak niet zien als een bundel van factoren, maar eerder als een verhaal. De verdachte is evenmin een verzameling vaststaande gegevens, maar een vertellend en verhalend persoon. Anders dan de sociologische realiteit van de Leiden studie gaat de strafrechtelijke realiteit dus ook niet uit van populaties van individuen. Echter, dat wil niet zeggen dat rechters geen overeenkomsten tussen individuele zaken zien. Rechters maken onderscheid tussen meer of minder typische verhaallijnen, zoals de typische junk die wordt beschuldigd van kleine

diefstalletjes, de typische boze jongeman die openlijk geweld heeft gepleegd, en het typische explosieve stel, waarbinnen de man is beschuldigd van huiselijk geweld. Deze gevallen worden gekenmerkt door typische verhaallijnen, die motief, karakter van de verdachte, het strafbare feit en de omstandigheden van het feit met elkaar in verbinding brengen. Ook speelt de mate waarin de verdachte berouw toont een andere rol in de straftoemeting in deze drie typische verhalen: bij drugsverslaafde verdachten wordt berouw vaak gezien als een lege belofte (de verslaving is sterker dan de wil om het beter te doen); bij boze jongemannen is berouw van groot belang in de straftoemeting (ze moeten inzien wat ze hebben gedaan); en bij 'explosieve koppels' wordt vaak de vrouwelijke partner en haar karakter betrokken in de straftoemeting (onder het motto: 'ze zal zelf ook geen lieverdje zijn') en kan het zijn dat berouw aan de kant van de verdachte minder noodzakelijk wordt geacht.

Nu is het gemakkelijk om op basis van deze observaties ter terechtzitting en gesprekken het idee te krijgen dat de rechtspraak vooral een talige en verhalende praktijk is. Nu is dat voor een groot gedeelte ook zo, maar we hebben al eerder gezien dat methoden gevolgen hebben voor de realiteit die we schetsen. In *Hoofdstuk 5: Visualizing Cases* laat ik dan ook zien dat observaties van de werkpraktijken van de rechters 'backstage', in hun kantoren, echter een heel ander beeld geven van juridisch werk. Hier is het stil, hier wordt weinig gesproken, en hier is de verdachte afwezig. Hier zijn alleen de sporen van het werk van de politie en de officier van Justitie aanwezig in de vorm van het dossier. Dit hoofdstuk laat zien dat deze werkpraktijken gericht zijn op het vormen van een 'beeld' van de zaak. Ze zijn gevormd door en afgestemd op het papieren dossier: griffiers en rechters gebruiken papier, pen, potlood, stickers en post-its om informatie te ordenen en om hoofd- en bijzaken te onderscheiden. Echter, toende dossiers in de betreffende rechtbank werden gedigitaliseerd leidde dit toch tot enige consternatie: ineens moesten griffiers en

rechters andere manieren bedenken om toch hun zaak te 'visualiseren'! Door aandachtig te observeren hoe en waar deze aanpassingen plaatsvinden vraag ik aandacht voor de materialiteit van 'kenniswerk' in het algemeen en juridisch werk in het bijzonder. Ook laat ik zien hoe de subtiele grenzen tussen griffier en rechter opnieuw bevochten moeten worden, en dat digitalisering, zo bezien, niet slechts een zegen of kostenbesparende maatregels is, maar ook ingrijpt op de dagelijkse werkpraktijk.

Al met al laat ik zien dat het dossier dus niet alleen een container van tekst is, maar ook een materieel recalcitrant object: het verzet zich, het kan zich laten gelden, en beïnvloedt praktijken om zich heen. In *Hoofdstuk 6: Folding Times, Doing Truths* zoom ik in op een andere vorm van recalcitrantie, namelijk de recalcitrantie van het dossier in de temporele zin. Ik vertrek hier vanuit de assumptie dat tijd niet een neutrale container is van handelen (zodat je kan zeggen dat gebeurtenissen 'in' de tijd plaatsvinden) maar dat er verschillende manieren zijn om 'tijd' te maken. Zo is er natuurlijk, in het juridische veld, de 'tijd' van procedure (denk bijvoorbeeld aan juridische termijnen) maar observaties ter terechtzitting en gesprekken met rechters maken me ook duidelijk dat het dossier nog twee saillante tijden maakt. Ten eerste geeft het dossier toegang tot de geschiedenis van het feit – wanneer gebeurde er wat precies? Wat zijn oorzaak en gevolg? Wie heeft wat wanneer gezien of gedaan? - maar maakt het ook verschillende aspecten aan de geschiedenis van haar productie zichtbaar - bijvoorbeeld als agenten onverhoopt de aandacht trekken naar de context van de verhoorkamer of praktijken van het transcriberen van verbale communicatie. In dit hoofdstuk laat ik dan ook zien hoe de strijd over de feiten ter terechtzitting er een is waarbinnen deze verschillende geschiedenissen worden ingezet om de feiten dan wel te bewijzen, dan wel te ontkrachten. Zo is de juridische praktijk er niet alleen een van verhalen vertellen, noch alleen een van 'stil' dossierwerk

met fysieke of digitale objecten, maar ook een zorgvuldig ordenen en vouwen van tijden.

Laatste Woorden?

In *Hoofdstuk 7: Productive Fictions for the Study of the Law: From Hyper-Explanation to Hyper-object* wil ik zowel terugkijken als vooruitkijken. Het is het laatste hoofdstuk, maar wil eigenlijk geen laatste oordeel zijn - dat is immers meer iets voor de rechter, niet de wetenschapper! Met dat in mijn achterhoofd laat ik de zowel theoretische als methodologische lessen nog eens kort de revue passeren, en wil ik ook de publieke relevantie van deze lessen benadrukken. Zo zet ik vraagtekens bij een vertoog over discriminatie dat discriminatie primair als een onbewust fenomeen ziet, en vraag me af of het niet noodzakelijk is om op een genuanceerdere manier tot inzichten te komen over de rol van het strafrecht in het reproduceren van etnische verschillen. Ook stel ik de noodzaak tot begrip van de alledaagse werkpraktijk van rechters centraal in deze discussie: om daadwerkelijk tot een uitwisseling van relevante inzichten te komen met juridische actoren, zullen wetenschappers oog moeten blijven hebben voor de manier waarop verschillen en overeenkomsten tussen zaken vormgegeven worden in het strafrecht, en de rol die 'typische' verhaallijnen spelen in deze praktijken. Ook vraag ik me af of het wenselijk is dat berouw in sommige typen zaken meer of minder belangrijk wordt geacht (bijvoorbeeld in de huiselijk geweld zaken, waar het slachtoffer wordt betrokken in een oordeel over de verdachte). Daarnaast benadruk ik dat digitalisering een zeer ingrijpend proces is, en dat we ons niet zomaar kunnen laten leiden door een idee van kenniswerk als alleen maar mentaal werk dat plaatsvindt 'in het hoofd'. We denken ook met onze handen! Ook voor andere kenniswerkers - denk academici, denk medische professionals, denk andere mensen werkzaam in de publieke sector - speelt de fysieke infrastructuur een grote rol in het vormgeven van het werk, en kan digitalisering grote praktische

gevolgen hebben. Ook vraag ik sociale wetenschappers oog te houden voor dat cruciale, maar toch minder bestudeerd object in juridische praktijken: het dossier (immers: zonder dossier geen zaak!). Als laatste vraag ik waardering voor de kwestie van tijd en procedure. Hoewel men vaak de juridische zorg om procedure laakt (zeker als het gaat om 'vormfouten') is procedure desalniettemin een voorwaarde voor het afbakenen van de feiten en daarmee een voorwaarde voor rechtmatigheid en soms zelfs rechtvaardigheid.

Deze diverse lessen zijn elk gegrond in steeds andere inzichten, die op hun beurt gebaseerd zijn op net weer andere (combinaties van) methoden in verschillende settings: zo zijn er gesprekken en observaties ter terechtzitting, observaties en conversaties achter de schermen, en een gedetailleerde studie van een flink aantal individuele zaken en hun afwikkeling. Op basis van deze beweeglijke aanpak is het niet gemakkelijk om een laatste woord over deze praktijken uit te spreken. Immers, deze praktijken verschijnen steeds op een ander manier: dan weer als een distributiemachine (Hoofdstuk 3), dan als een morele en narratief gemedieerde praktijk (Hoofdstuk 4), dan weer als een stille dossier-gebonden praktijk (Hoofdstuk 5), en dan als een praktijk waarbinnen verschillende tijden worden gemaakt en gemobiliseerd (Hoofdstuk 6). Het is natuurlijk verleidelijk om een van deze verschillende versies als meer 'echt', als meer 'waar' te bestempelen. Echter, ik zou dan dezelfde beweging maken die ik in Hoofdstuk 1 problematiseerde: ook dan zou ik uit de weelde aan concrete praktijken slechts één abstractie kiezen en die verheffen tot de meest fundamentele waarheid over het recht.

Deze oplossing doet echter zowel de wetenschap als het recht te kort. Zelfs als wetenschappers het met elkaar eens kunnen worden, dan nog zou de wetenschap zich moeten bezighouden met het laten voortbestaan van verschillende mogelijke waarheden en verschillende mogelijke werelden. Ook de juridische praktijken die ik heb bestudeerd worden zo

tekortgedaan: waarom zouden we het recht slechts één abstract bestaan toekennen? Dat kan toch geen recht doen aan haar concrete robuustheid, aan de veelheid van manieren waarop de abstractie 'recht' concreet wordt gepraktiseerd? Om dit probleem te omzeilen suggereer ik het recht te zien als een hyper-object. Een hyper-object is een object zo groot, zo recalcitrant, zo uitgestrekt, dat we er nooit 'buiten' kunnen staan om het in zijn geheel in ons op te nemen. In plaats daarvan geeft het hyper-object ons alleen glimpen, en die glimpen zijn weer onlosmakelijk verbonden met de manier waarop we ons door dit hyper-object heen bewegen en de methoden die we gebruiken in onze ontdekkingsreizen. Het hyper-object heeft ook iets mysterieus: hoeveel we er ook over praten of hoeveel onderzoek we ook doen, we kunnen er niet het laatste woord over hebben. Met dit concept kunnen we tegemoet komen aan zowel de veelheid die het recht is - het recht is niet te reduceren tot slechts één verklarend abstractie! - als aan onze eigen belangrijke en bescheiden taak als wetenschappers: het stellen van goede vragen, en het voorzichtig, tentatief, altijd voorlopig, formuleren van antwoorden.

About the Author

Irene van Oorschot (1986) attained a BA in Liberal Arts and Sciences at University College Utrecht in 2007 (Cum Laude). In 2010, she finished a research master in the Social Sciences at the University of Amsterdam (Cum Laude). While researching young women's qat consumption in Sana'a, Yemen, in the context of this master's degree, she developed a keen interest in ethnography; an interest she was to develop further during her ethnographically inspired inquiry among the human and non-human members of the Dutch judiciary central to her PhD project. As of September 2016, she has been working as a postdoc on the ERC-funded Race Face ID research project (principal investigator: prof. A. M'charek), where she concentrates on the legal mobilization and contestation of forensic technologies of making sameness and difference. In 2014, she was the main applicant on a three-year postdoc proposal 'Good Sex: How Young People Perceive and Practice Good Sex', which was funded by the Dutch Fund for Scientific Sexuality Research (FWOS). She has previously worked as a guest editor for the Dutch peer-reviewed journal Sociologie, where she co-edited a collection of papers on actor network-theory. Currently, she is a member of the editorial board of Krisis: Journal for Contemporary Philosophy. Her interests lie in the fields of ethnography, material-semiotics, social and legal theory, the study of gender, sexuality, and race, and pragmatist philosophy.