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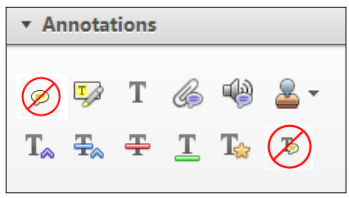

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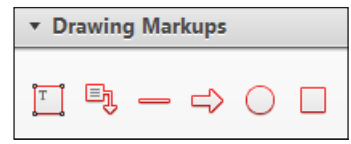

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LAW, CULTURE AND THE HUMANITIES

Article

Sociological Aesthetics of Law

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Abstract
Aesthetic theory has the potential to develop a sensorium for the rational and arational forces of law. But the aesthetic knowledge of law is underdeveloped. That is why this article proposes a self-reflective sociological aesthetics of law that is capable of acknowledging human and social forces. The article unfolds its argument in three steps: first, it outlines the main approaches in the field of "law and aesthetics"; second, it connects these approaches in legal aesthetics with sociological and philosophical discussions on aesthetics; and, third, it suggests what distinctive contributions such a connection could make to jurisprudence and legal practice.

Keywords
aesthetics of law, aesthetic knowledge, deconstruction, systems theory, rationality, arationality, force (of law)

The enactment and application of law produce texts by recourse to texts. It is hardly surprising, then, that jurisprudence is also mainly thought of as a text-based discipline. Law, according to conventional legal theory as "theory of legal knowledge,"[1] is linked to visual and auditory communication channels: it observes its environment visually, with the ear playing at best an ancillary role.[2] But as Niklas Luhmann pointed out early on, it

1. See the critique of unreflective theories of knowledge of law in Alexander Somek, *Rechtliches Wissen* (Frankfurt am Main: Suhrkamp, 2005), p.7 – associated with the observation "that an appropriate theory of law must be formulated as a theory of legal knowledge."
2. Thomas Vesting, "Zuhören ist Lesen mit dem Ohr," in Karl-Heinz Ladeur and Ino Augsberg (eds), *Talmudische Tradition und moderne Rechtstheorie: Kontexte und Perspektiven einer Begegnung* (Tübingen: Mohr Siebeck, 2013), pp. 181ff.; but see also Jacques Derrida, "Différance," in Derrida, *Margins of Philosophy,* trans. Alan Bass (Chicago, IL: University of Chicago Press, 1982), pp. 1ff.

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is a fundamental misconception to think that the reproduction of existing knowledge with an increase in novelty is tied to the (visual or auditory) "churning of masses of texts."[3] Knowledge is neither text nor image, neither mere words nor empty images. It does not represent something objective, but is instead an attitude that finds expression in communication. Knowledge is "an expectation stylized as cognitive experience."[4] "Legal knowledge," therefore, is not many things it appears to be: it is not objective, nor is it a matter of rationality realized in intersubjective discourses of knowledge. Rather, legal knowledge under social conditions of uncertainty is volatile, fragmented, and polycontextualized – a result of temporal dislocations and inaccessibilities between communication and consciousness, between consciousness and the unconscious, and "between brains and the outside world, which only acquires form in the brain."[5]

Therefore, reflection on legal knowledge cannot build on a meta-rule for legitimizing knowledge in a uniform way[6] but must be based on a theory of difference: knowledge of law arises only in the difference between law and non-law. Thus a theory of legal knowledge takes *this* basic epistemic difference as its analytical starting point and not the distinction between *rational* legal rationality and *arational* external world.[7] The central question from the difference-theoretical perspective, therefore, is whether legal rationality makes adequate reference back to the non-legal – in other words, whether law, in differentiating between law and non-law, develops a sufficiently complex picture of this relationship. The resulting requirement to develop a sensorium also for phenomena that are not an expression of rational, but instead of arational forces aims to develop an *aesthetic knowledge of law*[8] that does not drive its concepts and dogmatic systematizations to more and more dizzying heights of legal abstraction in self-sufficient isolation from its social contexts but, on

3. Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1990), p. 159.
4. Op. cit., p. 143.
5. Op. cit., p. 164. See also Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, trans. Gareth Norbury (Oxford: Oxford University Press, 2012), pp. 62f., who sees in the difference and the coupling of communicative processes with consciousness and corporeality the emergence of a form of "social energy" that must be captured by social theory. See also Dirk Baecker, *Neurosoziologie* (Berlin: Suhrkamp, 2014), pp. 171ff., on the "tragic relationship" between organism, environment, and relational observation.
6. Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge*, trans. Geoff Bennington and Brian Massumi (Minneapolis, MN: University of Minnesota Press, 1984).
7. Max Weber (*Economy and Society: An Outline of Interpretive Sociology*, ed. and trans. Guenther Roth and Claus Wittich [Berkeley, CA, University of California Press, 1978], vol. 2, p. 657) argues "that whatever cannot be 'constructed' rationally in legal terms is also legally irrelevant."
8. On the parallel questions in the field of economic aesthetics, see Steven Taylor and Hans Hansen, "Finding Form: Looking at the Field of Organizational Aesthetics," *Journal of Management Studies* 42 (2005), 1211ff.; Samantha Warren and Alf Rehn, "Oppression, Art and Aesthetics," *Consumption, Markets & Culture* 9 (2006), 81ff.; also Brigitte Biehl-Missal, *Wirtschaftsästhetik* (Wiesbaden: Gabler, 2011), and the contributions in Stephen Lindstead and Heather Höpfl (eds), *The Aesthetics of Organization* (London: Sage, 2000).

the contrary, is responsive to social and human forces. Law is law only in its difference from its non-legal environment in which arational and rational forces alike unfold. *Only through law's self-reflection on this difference between law and non-law* – this is the thesis that I want to develop – *can a form of low arise "that knows this about itself."*[9]

What is called for, therefore, is a "modesty of nescience" that puts an end to the self-promotion of "those who know the true law."[10] The autonomy of the law is not guaranteed by an expertocratic accumulation of knowledge, but only insofar as the law of world society opposes to trends toward mercantilist, statist, militarist, of scientific colonizations of legal form[11] something proper to law itself which upholds the idea of human and social emancipation and lends it effectiveness in an alliance with the forces of civil society.[12]

The prerequisite for this is that legal rationality faces up to the heights and abysses of human and social existence, while resisting the temptation to "harness the problem that arises here to the distinction between rational and irrational."[13] The rationalization of law is not a matter of replacing the "irrationality in the primitive legal procedure" by a purely rational legal system.[14] On the contrary, legal rationality – that is, law as a social system of communication that has become differentiated, like economics, politics, and art – is an organized form (also) of arationality.[15] Rational and arational – and also, as part of the latter, negative anti-rational/irrational – forces are effective in law. We cannot develop a complete picture of law by placing a taboo on what lacks rational form, but only through reflection on its rational and the arational moments, on its semantic moments and its moments of force, on its meaningful and sensuous moments:[16] legal knowledge is

9. Christoph Menke, *Recht und Gewalt* (Berlin: August, 2011), p. 102.
10. Bernd Rüthers, "Das Ungerechte an der Gerechtigkeit," *Juristenzeitung* (2009), 969ff., 975.
11. When Foucault observes that "normalizing procedures are increasingly colonizing the procedures of law" and hence that "there is a greater and greater need for a kind of arbitrating discourse, for a sort of power and knowledge that has been rendered neutral because its scientificity has become sacred" (*"Society Must be Defended": Lectures at the Collège de France 1975–1976*, trans. David Macey, [New York: Picador, 2003], pp. 38–9), he underestimates the drama of polycentric colonization through which law is confronted with conflicting processes of normalization.
12. This is also the basic motif of Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (London: Bloomsbury, 2014).
13. Luhmann, *Wissenschaft der Gesellschaft*, p. 160.
14. Contrary to Weber's argument in *Economy and Society*, p. 882: "[T]he formal qualities of the law emerge as follows: arising in primitive legal procedure from a combination of magically conditioned formalism and irrationality conditioned by revelation, they proceed to increasingly specialized juridical and logical rationality and systematization …"
15. See also Thomas Raiser's critique of Weber's concept of rationality: "Hence we must acknowledge the facticity of irrational moments and also understand them as a positive contribution to individual and social life" ("Max Weber und die Rationalität des Rechts," *Juristenzeitung* 63 (2008), 853ff., 858).
16. See already Ernst Cassirer, who insists on the non-dualistic intrication of meaning and the sensuous (*The Philosophy of Symbolic Forms, vol. 3: The Phenomenology of Knowledge* [1929], trans. Ralph Manheim [New Haven, CT: Yale University Press, 1957], pp. 281ff.); for a historical reconstruction, see Klaus Holzkamp, *Sinnliche Erkenntnis: Historischer Ursprung und gesellschaftliche Funktion der Wahrnehmung* (Bodenheim: Athenaeum, 1989).

knowledge of the law both about its rational and its arational dimensions, consequences, and contingencies – and about the tasteless aspects of law, its callousness and its tactlessness toward the concerns of social and human emancipation.

The *end* of such a theory of legal knowledge is a law that is mindful of the dangers of infiltration and therefore reflects on both the difference between law and non-law and on the interwovenness of rationality and arationality. The *means* for realizing this end of legal theory is aesthetics.[17] Aesthetics is the discipline that thematizes relationships and contrasts, harmony and correspondence, counterpositions or analogies[18] in a way that avoids an artificial split between the rational and the arational. Precisely such an approach seems to be particularly fruitful when it comes to developing a theory of legal knowledge. To concretize my thesis, I will first outline some of the main approaches in the field of "law and aesthetics" (section I). In a second step I will combine these approaches in legal aesthetics with sociological and philosophical discussions on aesthetics (section II). Finally, in a third step, I will suggest what distinctive contributions such a connection could make to jurisprudence and legal practice (section III).

I. Approaches in the Aesthetics of Law

The idea of reflecting on law in aesthetic terms has long since ceased to be "a test of academic courage."[19] Legal aesthetics can be traced back in the history of ideas to Plato. In the *Republic*, Plato connected the theory of the state with music in the notion of the organization of harmony.[20] Both in the state as well as in music, he argued, things must be harmonious in an aesthetic sense. In Friedrich Schiller we also find a combination of aesthetics and theory of the state that takes the Greek idea of paideia as its starting point[21] and stresses the importance of the aesthetic dimension of paideia for the political system.[22] Already in the

17. See also Martti Koskenniemi, "Law's (Negative) Aesthetic: Will it save us?," *Philosophy and Social Criticism* 41/10 (2015), 1039ff.
18. Wolfgang Welsch, "Aestheticization Processes: Phenomena, Distinctions and Prospects," *Theory Culture Society* 13 (1996), 1–24.
19. Christian Klein, "Ästhetik des Spiels als Ästhetik des Rechts," in Andreas von Arnauld (ed.), *Recht und Spielregeln* (Tübingen: Mohr Siebeck, 2003), pp. 273ff., p. 273; see also Heather Hughes, "Aesthetics of Commercial Law: Domestic and International Implications," *Louisiana Law Review* 67 (2007), 689ff., and Katrin van Marle, "Liminal Landscape," in Katrin van Marle and Stewart Motha (eds), *Genres of Critique: Law, Aesthetics and Liminality* (Stellenbosch: Sun Press, 2013), pp. 109ff., p. 112; also, finally, the prognosis by Dieter Simon: "The resistance of lawyers to equating legal art with rhetoric will collapse. They will accept that their techniques of argumentation are rhetoric and once again pay homage to form, style, and aesthetics" (Recht als Rhetorik – Rhetorik als Recht, Recht im Kontext. Working Paper 5/2012, p. 4); see now also the contributions in 1/2015 of the journal *Rechtsphilosophie* and already Anna Schimke, "Tagungsbericht Ästhetik und Recht," *Juristenzeitung* (2012), 567f.
20. Plato, *Republic*, trans. G.M.A. Grube (Indianapolis, IN: Hackett, 1974) Book III, pp. 68ff., pp. 398b–399c, and pp.78ff., pp. 410b–412e.
21. On paideia, see the classical account in Werner Jaeger, *Paideia: The Ideals of Greek Culture, Vols. 1–3*, trans. Gilbert Highet (Oxford: Oxford University Press, 1945).
22. Friedrich Schiller, *On the Aesthetic Education of Man in a Series of Letters*, trans. M. Wilkinson and L.A. Willoughby (Oxford: Clarendon Press, 1967); see on this already

1920s Gustav Radbruch called upon jurisprudence, in spite of the "autonomy of the domains of culture" that had developed in the meantime, not to neglect the connection that these early writings made between law and art. Thus, Radbruch advocated an "aesthetics of law" that should reflect specifically on "the peculiar mixture of coldness and passion," the coexistence of the "poverty of a lapidary style" and a "combative sense of justice," in law.[23] In so arguing, he adopted a double perspective that is also characteristic of later works in legal aesthetics[24] such as Heinrich Triepel's treatise "Vom Stil des Rechts"[25] in that it, on the one hand, analyzes the forms of artistic expression in law and, on the other, simultaneously focuses on the law as the subject matter of art.[26]

Legal aesthetics is pursued in this tradition in the first instance as literary aesthetics of law.[27] In his text "Von der Poesie im Recht," Jacob Grimm already pointed out that "law and poetry arose from the same bed."[28] As Hans Fehr put it in the 1930s in his trilogy "Art and Law,"[29] law, like literature, wants to affect its addressees not only at the rational but also at the emotional level; it wants to "reach them in the inner recesses of the soul."[30] Studies on law and poetry that go beyond a mythopoetics of law[31] take this as their starting point.[32]

Hermann Blaese, "Schillers Staats- und Rechtsdenken," in Franz Beyerle and Karl Bader (eds), *Kunst und Recht. Festgabe für Hans Fehr* (Karlsruhe: Müller, 1948), pp. 48ff.; from the recent literature, see Klaus Lüderssen, *"... daß nicht der Nutzen des Staats Euch als Gerechtigkeit erscheine": Schiller und das Recht* (Frankfurt am Main: Insel, 2005).

23. Gustav Radbruch, *Rechtsphilosophie*, reprint of 3rd ed. (1932) (Heidelberg: C.F. Müller, 1999), pp. 104ff. (106).
24. For a good overview, see Thilo Tetzlaff, "Der Sound des Rechts. Rechtsästhetik und Rechtsakustik," *Archiv für Rechts- und Sozialphilosophie Beiheft* 99 (2004), 85ff.
25. Heinrich Triepel, *Vom Stil des Rechts: Beiträge zu einer Ästhetik des Rechts* (1947) (Berlin: BWV, 2007).
26. On the perspective of the "law and literature" movement, see Robert Weisberg, "The Law-Literature Enterprise," *Yale Journal of Law & the Humanities* 1 (1988), 1ff.; Klaus Lüderssen, *Produktive Spiegelungen, Vol. 1, Recht und Kriminalistik in der Literatur* (Frankfurt am Main: Suhrkamp, 1998); Lüderssen, *Produktive Spiegelungen, Vol. 2, Recht in Literatur, Theater und Film* (Berlin: BWV, 2007).
27. See Andreas von Arnauld and Wolfgang Durner, "Heinrich Triepel und die Ästhetik des Rechts," in Triepel, *Vom Stil des Rechts*, p. XI.
28. Jacob Grimm, "Von der Poesie im Recht," *Zeitschrift für die geschichtliche Rechtswissenschaft* 2(1) (1816), 25ff.
29. Hans Fehr, *Das Recht im Bilde* (Zurich: Erlenbach, 1923); Fehr, *Das Recht in der Dichtung* (Bern: Francke, 1931); and Fehr, *Die Dichtung im Recht* (Bern: Francke, 1936).
30. Fehr, *Die Dichtung im Recht*, pp. 293ff.
31. On this, see Fehr, op. cit., pp. 240; on poetry in law, see also Klaus Schuhmacher, "Paradies – Wüste und zurück? Zur Mythopoetik des Rechts," in Michael Kilian (ed.), *Dichter, Denker und der Staat* (Tübingen: Attempto, 1993), pp. 263ff., and the contributions in Heinrich Scholler and Silvia Tellenbach (eds), *Rechtssprichwort und Erzählgut* (Berlin: Duncker und Humblot, 2002); on legal knowledge stored in spoken language, see also Thomas Vesting, *Die Medien des Rechts: Sprache* (Weilerswist: Velbrück, 2011), p. 101.
32. Josef Kohler, *Shakespeare vor dem Forum der Jurisprudenz, 2nd ed.* (Berlin: Rotschild, 1919); on this, see Rainer Maria Kiesow, "Josef Kohlers Poesie," in Kiesow et al. (eds),

The classical works in legal aesthetics[33] – like the law and literature movement[34] – engage in legal criticism of law.[35] Law, legal methodology, and legal decision-making practices make use of the forms of rhetoric, art, architecture, and theater.[36] A legal aesthetics that starts from here aims to use the aesthetic as a leading metaphor for the law – in particular for methodology and decision theory.[37] Above all, these approaches reject the assumptions that conventional theories make about the rational basis of decisions.[38] Normative decisions are supposed to be rationally justified *lege artis* with reference to legal norms. But that does not mean that normative decisions are in fact made on a rational basis.[39] On the contrary, the production, justification, and also the consequences of legal decisions have arational as well as rational dimensions.[40] The conventional understanding of law, which is generally criticized in works in legal aesthetics, truncates the legal process to its objectifiable and rational moment and hence takes account of only one segment of the law.[41]

Reflections on law based on the theory of language also adopt this perspective.[42] They point to the difficulties in generating binding legal force through language and explore

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Summa: Dieter Simon zum 70. Geburtstag (Frankfurt am Main: Klostermann, 2005), pp. 297ff.; Sebastian Donat et al., "Zu Geschichte, Formen und Inhalten poetischer Gerechtigkeit," in Donat (ed.), *Poetische Gerechtigkeit* (Düsseldorf: dup, 2012), pp. 9ff.; Susanne Kaul, *Poetik der Gerechtigkeit* (Munich: Fink, 2008).

33. From the German literature, the following merit special mention: Erik Wolf, *Vom Wesen des Rechts in deutscher Dichtung* (Frankfurt am Main: Klostermann, 1946); Eugen Wohlhaupter, *Dichterjuristen Vols. 1 to 3* (Tübingen: Mohr Siebeck, 1953–1957); Erich Fechner, *Recht und Politik in Adalbert Stifters Witiko* (Tübingen: Laupp, 1952); Peter Schneider, *"... ein einzig Volk von Brüdern": Recht und Staat in der Literatur* (Frankfurt am Main: Athenaeum, 1987); on the latter and for a survey of the field of law and literature, Peter Häberle, "Begegnungen von Staatsrechtslehre und Literatur," *Archiv des öffentlichen Rechts* 115 (1990), 83ff., 83.
34. See, for example, the contributions in Michael Freeman und Andrew Lewis (eds), *Law and Literature* (Oxford: Oxford University Press, 1999); Ian Ward, *Law and Literature, Possibilities and Perspectives* (Cambridge: Cambridge University Press, 1995).
35. On international law, see Peter Goodrich, "On the Relational Aesthetics of International Law," *Journal of the History of International Law* 10 (2008), 321ff.; Ed Morgan, *The Aesthetics of International Law* (Toronto: University of Toronto Press, 2007), pp. 116ff.
36. See, for example, Kieran Dolin, *A Critical Introduction to Law and Literature* (Cambridge: Cambridge University Press, 2007).
37. See James B. White, "What can a Lawyer learn from Literature?" *Harvard Law Review* 102 (1989), 2014ff.
38. Niklas Luhmann, *Theory of Society*, 2 vols., trans. Rhodes Barrett (Stanford, CA: Stanford University Press, 2012), pp. 141ff.
39. See already the critique in Rüdiger Lautmann, *Justiz: Die stille Gewalt* (Frankfurt am Main: Fischer, 1972).
40. On this position, see also Alessandra Asteriti, "Ugly, Dirty and Bad: Working Class Aesthetics Reconsidered," *Law & Literature* 26 (2014), 191ff., 201; "There is an overlap here between the aesthetics of suffering and the aesthetics of legal judgement."
41. Arnauld, "Heinrich Triepel und die Ästhetik des Rechts," in Triepel, *Vom Stil des Rechts*, pp. XXXVIIIf.
42. From the diverse literature, see Kent Lerch, *Lesarten des Rechts: Sprache und Medien der Jurisprudenz* (Berlin: Avinus-Verlag, 2008); Thomas Seibert, "Der aktuelle Stil der juristischen différance," in Heinrich Plett (ed.), *Die Aktualität der Rhetorik* (Munich:

the narrativity of law in its different variants.[43] This approach addresses, on the one hand, the internal operativity of law but also, on the other, the limitations of language itself: translating social conflicts into the language of law, according to this tradition in legal aesthetics, estranges these very conflicts.[44]

Aside from texts from the ambit of literature and law, there are numerous other currents that deal with aspects of legal aesthetics – mainly as criticism of the performative aspects of law and of the associated obfuscation of techniques of power and domination. For example, studies from the field of music and law not only revive Plato's doctrine of harmony[45] but also make comparisons between legal and musical forms of interpretation.[46] Studies

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Fink, 1996), pp. 120ff.; Seibert, "Goethe in der Tradition juristischer Rhetorik," in Klaus Lüderssen (ed.), *Die wahre Liberalität ist Anerkennung: Goethe und die Jurisprudenz* (Baden-Baden: Nomos, 1999), pp. 319ff.

43. On this, see the contributions in Peter Brooks and Paul Gerwitz (eds), *Law's Stories: Narrative and Rhetoric in Law* (New Haven, CT: Yale University Press), 1996; Gerald Wetlaufer, "Rhetoric and Its Denial in Legal Discourse," *Virginia Law Review* 76 (1990), 1545ff.; Katharina Gräfin von Schlieffen, "Rhetorik und rechtsmethodologische Aufklärung," *Rechtstheorie* 32 (2001), 175ff.; Theodor Viehweg, *Topik und Jurisprudenz: Ein Beitrag zur rechtswissenschaftlichen Grundlagenforschung* (Munich: C.H. Beck, 1954); Thomas Seibert, *Zeichen. Prozesse: Grenzgänge zur Semiotik des Rechts* (Berlin: Duncker & Humblot, 1996); see also already the contributions in Friedrich Müller (ed.), *Untersuchungen zur Rechtslinguistik: Interdisziplinäre Studien zu praktischer Semantik und Strukturierender Rechtslehre in Grundfragen der juristischen Methodik* (Berlin: Duncker & Humblot, 1989).
44. James Boyd White, *Justice as Translation* (Chicago, IL: University of Chicago Press, 1990).
45. Cornelia Vismann, *Das Schöne am Recht* (Berlin: Merve, 2012), pp. 7ff.; Marie Theres Fögen, *Das Lied vom Gesetz* (Munich: Carl Friedrich von Siemens Stiftung, 2006); Jerome Frank, "Words and Music: Some Remarks on Statutory Interpretation," *Columbia Law Review* 47 (1947), 1259ff.; Sanford Levinson and Jack Balkin, "Law, Music, and Other Performing Arts," *University of Pennsylvania Law Review* 139 (1991), 1597ff.; Ulrich Haltern, "Musik (und Recht) heute: eine rhapsodische Collage," in Volker Epping (ed.), *Brücken bauen und begehen: FS für Knut Ipsen zum 65. Geburtstag* (Munich: C.H. Beck, 2000), pp. 651ff.; Peter Gabel and Duncan Kennedy, "Roll over Beethoven," *Stanford Law Review* 36 (1984), 1ff.; Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (London: Routledge, 2013); Desmond Manderson, *Songs without Music: Aesthetic dimensions of Law and Justice* (Berkeley, CA: University of California Press, 2000); James Parker, "The Musicology of Justice," in M.J. Grant and Férdia J. Stone-Davis (eds), *The Soundtrack of Conflict* (Hildesheim: Georg Olms; 2013), pp. 211ff.; M.J. Grant and Férdia J. Stone-Davis, "The Soundscape of Justice," *Griffith Law Review* 20 (2011), 962ff.; see also the contributions to the symposium, "The Modes of Law: Music and Legal Theory – An Interdisciplinary Workshop," Cardozo Law Review 20 (1999), 1325ff.; Bernhard Weck, '"Euch werde Lohn in bessern Welten!' – Ludwig van Beethoven und die Entwicklung moderner Menschenrechts- und Verfassungsutopien," in Hermann Weber (ed.), *Literatur, Recht und Musik* (Berlin: BWV, 2007), pp. 48ff.
46. See James Parker, "Towards an Acoustic Jurisprudence: Law and the Long Range Acoustic Device," *Law, Culture and the Humanities* (2015); Günter Hirsch, "Der Richter wird's schon richten," *Zeitschrift für Rechtspolitik* (2006), 161, and Christoph Möllers, "Mehr oder weniger virtuos – Der Mann am Klavier: Was spielt BGH-Präsident Hirsch?," *Frankfurter Allgemeine Zeitung* October 26, 2006, p. 37; on this, see also Bernd Rüthers, "Deckel zu! Richter sind keine Pianisten," *Frankfurter Allgemeine Zeitung* December 27, 2006, p. 31.

that go beyond this stress the relations between law and dance.[47] Situationist analyses address law as a spectacle[48] and the relationship between law and theater.[49] Contributions from the field of law and image[50] uncover the visual strategies of legal discourse[51] and forensic practice.[52] Other studies shed light on the connection between law and the visual arts,[53] law and architecture,[54] law and film,[55] law and new media,[56] and on law and play.[57]

47. Susanne Baer, "Getanzte Konstitutionalisierung: Human Writes und in Menschenrechten inbegriffene Ausschlüsse," *Kritische Justiz* (2010), 470ff.
48. Gary Watt, "Law Suits: Clothing as the Image of Law," in Leif Dahlberg (ed.), *Visualizing Law and Authority: Essays on Legal Aesthetics* (Berlin: de Gruyter, 2012), pp. 23ff.; Angus McDonald, "The New Beauty of a Sum of Possibilities," *Law and Critique* 8 (1997), 141ff.; Christo Stanley, *Urban Excess and the Law* (London: Routledge-Cavendish, 1996); Peter Winn, "Legal Ritual," in Roberta Kevelson (ed.), *Law and Aesthetics* (New York: Peter Lang, 1992), pp. 401ff.
49. Cornelia Vismann, "Vor ihren Richtern nackt," in Friedrich Kittler and Cornelia Vismann, *Internationaler Merve-Diskurs Nr. 240: Vom Griechenland* (Berlin: Merve, 2001), pp. 39ff.
50. See the contributions in Leif Dahlberg (ed.), *Visualizing Law and Authority: Essays on Legal Aesthetics* (Berlin: de Gruyter, 2012); Costas Douzinas and Lynda Nead (eds), *Law and the Image: The authority of Art and the Aesthetics of Law* (London and Chicago, IL: University of Chicago Press, 1999); Linda Merrill, *A Pot of Paint: Aesthetics on Trial in Whistler v. Ruskin* (Washington, DC: Smithsonian, 1993); Les Moran, "Transcript and Truth: Writing the Trials of Oscar Wilde," in Joseph Bristow (ed.), Oscar Wilde and Modern Culture: The Making of a Legend (Athens, OH: Ohio University Press, 2008), pp. 234ff.; Günter Frankenberg, "Der normative Blick: Recht, Ethik und Ästhetik der Bilderverbote," in Günter Frankenberg and Peter Niesen (eds), *Bilderverbot: Zu Recht, Ethik und Ästhetik der öffentlichen Darstellung* (Münster: LIT, 2004), pp. 1ff.
51. Horst Bredekamp, *Thomas Hobbes visuelle Strategien: Der Leviathan: Das Urbild des modernen Staates und seine Gegenbilder* (Berlin: Akademie, 1999), pp. 56ff.; for a classical account, see Zenon Bankowski and Geoff Maugham, *Images of Law* (London: Routledge, 1976).
52. Thomas Keenan and Eyal Weizman, *Mengele's Skull: The Advent of a Forensic Aesthetics* (Berlin: Sternberg, 2012).
53. George Karavokyris, "The Art of Law," *Law & Critique* 25 (2014), 67ff.; Igor Stramignoni, "Seizing Truths: Art, Politics, Law," in Oren Ben-Dor (ed.), *Law and Art: Justice, Ethics and Aesthetics* (New York: Routledge, 2011), pp. 73ff.
54. Piyel Haldar, "Acoustic Justice," in Lionel Bently and Leo Flynn (eds), *Law and the Senses: Sensational Justice* (London: Pluto Press, 1996), pp. 123ff.; Haldar, "The Function of Ornament in Quintillian, Alberti and Court Architecture," in Douzinas and Nead, *Law and the Image*, pp. 117ff.; Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (London: Routledge, 2011); see also the contributions in Jonathan Simon, Nicholas Temple, and Renée Tobe (eds), *Architecture and Justice: Judicial Meanings in the Public Realm* (Farnham: Ashgate, 2013).
55. Steve Greenfield, Guy Osborn, and Peter Robson, *Film and the Law: The Cinema of Justice* (Oxford: Hart Publishing, 2010); Austin Sarat et al., *Law on the Screen* (Stanford, CA: Stanford University Press, 2005); Desmond Manderson, *Kangaroo Courts and the Rule of Law* (London: Routledge, 2012).
56. Richard Sherwin, *Visualizing Law in the Age of Digital Neo-Baroque* (London: Routledge, 2011).
57. Andreas von Arnauld, "Recht – Spiel – Magie," in idem (ed.), *Recht und Spielregeln* (Tübingen: Mohr Siebeck, 2003), pp. 101ff. (102f.). For further references, see ibid.

The prevalent basic tenor of these studies is that law is influenced by arational forces[58] which can lend passions[59] and the subconscious[60] force in the law.[61] This is precisely what studies on the sense of justice and emotionalism in law have always claimed.[62] The suspicion that there is an unconscious force at work in law that "has the ability to take the intellect's place in the making of a judgement"[63] can be found in many different versions in legal methodology:[64] Carl Schmitt's decisionism *ex nihilo* takes this as its starting point, Josef Esser's notion of preunderstanding,[65] sociological studies of lawyers – all of these approaches seek to uncover and explain in methodological terms the share of the non-rational in legal decisions.[66] Current studies on multisensory law[67] and on the haptic

58. Jack M. Balkin, "Transcendental Deconstruction, Transcendent Justice," *Michigan Law Review* 92 (1994), 1131ff.
59. From the perspective of Critical Legal Studies: Roberto Unger, *Passion* (New York: Free Press, 1984).
60. See the contributions in Peter Goodrich (ed.), *Law and the Unconscious: A Legendre Reader* (London: Palgrave Macmillan, 1999).
61. Law, as described by Richard Sherwin, consists of "powerful impersonal forces, strange forms of reason, and unfamiliar ritual practices" (*When Law goes Pop: The Vanishing Line between Law and Popular Culture* [Chicago, IL: University of Chicago Press, 2000], p. 191).
62. To cite just one, representative example, Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (1931), trans. Walter Lewis Moll (New Brunswick, NJ: Transaction Publishers, 2009), pp. 486ff.
63. Christoph Menke, *Force: A Fundamental Concept of Aesthetic Anthropology*, trans. Gerrit Jackson (New York: Fordham University Press, 2013), p. 8.
64. Allen Mendenhall, "Dissent as Site of Aesthetic Adaptation in the Work of Oliver Wendell Holmes Jr.," *British Journal of American Legal Studies* 1 (2012), 517ff.; on law as an "anti-rational, almost mystical concept," see Daniel J. Boorstin, *The Mysterious Science of the Law: Essays on Blackstone's Commentaries* (Chicago, IL: University of Chicago Press, 1996), p. 99.
65. See Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, 2nd ed. (Frankfurt am Main: Athenäum-Fischer, 1972).
66. See also Carol Sanger, "Legislating with Affect: Emotions and Legislative Law Making," in James E. Fleming (ed.), *Passions and Emotions: Nomos LIII* (New York: NYU Press, 2013), pp. 38ff.; Malte Gruber, "Normen der Empathie: Zur Einfühlung," in Malte Grube and Stefan Häußler (eds), *Normen der Empathie* (Berlin: trafo Wissenschaftsverlag, 2012), pp. 9ff.; András Sajó, *Constitutional Sentiments* (New Haven, CT: Yale University Press, 2011); on the emergence of the 1848 "Declaration of Rights and Sentiments" that should be mentioned in this context, see Lisa Tetraut, *The Myth of Seneca Falls: Memory of the Women's Suffrage Movement* (Chapel Hill, NC: The University of North Carolina Press, 2014).
67. Colette Brunschwig, "Multisensory Law and Legal Informatics – A Comparison of How These Legal Disciplines Relate to Visual Law," in Anton Geistet et al. (eds), *Strukturierung der Juristischen Semantik – Structuring Legal Semantics, Festschrift für Erich Schweighofer* (Bern: Editions Weblaw, 2011), pp. 573ff.; for a critical position, see Klaus Röhl, "Zur Rede vom multisensorischen Recht," *Zeitschrift für Rechtssoziologie* 33 (2013), 51ff. That "the legally relevant characteristics are of a tangible nature" was already emphasized by Max Weber: "The adherence to external characteristics of the facts, for instance, the utterance of certain words, the execution of a signature, or the performance of a certain symbolic act with a fixed meaning, represents the most rigorous type of legal formalism" (Weber, *Economy and Society*, p. 657).

dimension of legal aesthetics[68] take up this point: they argue that law-making and legal decision-making, aside from their rational dimension, also have a non-rational moment.

The identification of these kinds of basic aesthetic processes is a shared feature of such diverse concepts as Kant's "transcendental aesthetic,"[69] Nietzsche's aesthetic philosophy ("the drive to truth," the "sense of truth"),[70] and Niklas Luhmann's decision theory.[71] Luhmann's appeal to "sound judgment in relation to legal taste"[72] insists that normative decision-making as a general rule is neither a purely cognitive process of recognizing correct law[73] nor a matter of retrospectively concealing the exercise of institutional power with reasons:[74] "Only angels or fanatics can get by without distinctions – that is, with intuition."[75]

Rational and non-rational drives come together in normative decision-making.[76] Kant already anticipated the combination of rational and arational forces[77] when he

68. Alison Young, "Arrested by the Image," *New York Law School Law Review* (2012), 77ff.
69. Immanuel Kant, *The Critique of Pure Reason*, ed. and trans. Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 1998), p. 156 (A 21 B 36); a classical "aesthetic" reading of Kant can be found in Gilles Deleuze, *Kant's Critical Philosophy: the Doctrine of the Faculties*, trans. Hugh Tomlinson and Barbara Habberjam (Minneapolis, MN: University of Minnesota Press, 1984).
70. Friedrich Nietzsche, "On Truth and Lie in an Extra-Moral Sense," in Walter Kaufmann (ed.), *The Portable Nietzsche* (New York: Viking, 1954), pp. 42ff.
71. Niklas Luhmann, "Das Paradox der Menschenrechte und drei Formen seiner Entfaltung," in Luhmann, *Soziologische Aufklärung*, 3rd ed. (Wiesbaden: VS, 2008), pp. 229ff., p. 234; Luhmann, *Wissenschaft der Gesellschaft*.
72. Niklas Luhmann, *Law as a Social System*, trans. Klaus Ziegert (Oxford: Oxford University Press, 2004), p. 484.
73. See the contributions in Friedrich Müller and Rainer Wimmer (eds), *Neue Studien zur Rechtslinguistik* (Berlin: Duncker & Humblot, 2001); also Friedrich Müller, Ralph Christensen, and Michael Sokolowski, *Rechtstext und Textarbeit* (Berlin: Duncker & Humblot, 1997); Sabine Müller-Mall, *Performative Rechtserzeugung: Eine theoretische Annäherung* (Weilerswist: Velbrück, 2012).
74. But for such an argument, see Joseph Hutcheson, "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," *Cornell Law Quarterly* 14 (1929), 274ff.; Julia Hänni, *Vom Gefühl am Grund der Rechtsfindung* (Berlin: Duncker & Humblot, 2011), p. 168; Albert Ehrenzweig, *Psychoanalytic Jurisprudence: On Ethics, Aesthetics, and "Law"* (Leiden: Oceana Publications, 1971), p. 153.
75. Niklas Luhmann, "Weltkunst," in Jürgen Gerhards (ed.), *Soziologie der Kunst* (Opladen: VS, 1997), pp. 55ff., p.70; see also Luhmann, *Die Wirtschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1988), p. 122, n. 56: "Intuition had been always a faculty of higher beings – formerly of angels, today of elites." On implicit knowledge, see also Gerd Gigerenzer, *Gut Feelings: The Intelligence of the Unconscious* (New York: Viking Penguin, 2007).
76. See, in this sense, also Jacques Derrida, "Force and Significance," in Derrida, *Writing and Difference*, trans. Alan Bass (Chicago, IL: University of Chicago Press, 1978), pp. 1ff.
77. However, he ultimately subordinated imagination to the faculty of logic (Immanuel Kant, *Critique of the Power of Judgement*, trans. Paul Guyer and Eric Matthews [Cambridge: Cambridge University Press, 2000], §35, p. 167; Ak. 5: 287).

conceived of the aesthetic judgment of taste as "the agreement of two powers of representation: namely, the imagination … and the understanding."[78] It is this non-hierarchical unity in difference between the faculty and the power of judgment that is characteristic of aesthetic, and hence also of legal differentiation.[79] On the one hand, rational reflection is receptive to aesthetic-sensuous perception; on the other hand, rationally reflecting judgment becomes an object of aesthetic-instantaneous expression.[80]

II. Sociological Aesthetics of Law

However, the distinctive contribution of the traditional approaches to "law and aesthetics" to our understanding of law is sometimes rather limited.[81] Granted, they often managed to expose the rationality assumptions of law as mythologizations and to reveal the implications for a theory of power concealed by these performances. However, much of this work remains at the level of such external criticism of law and does not draw any conclusions for legal practice. The parallel references back to legal practice often end in a contribution to methodology and the general theory of legislation that calls for taking account of aesthetic criteria – such as coherence and choice of language – in the legislative process.[82] If we want to broaden the perspective of these studies, then we must find ways to inscribe aesthetic reflection into law. Such reflection must thematize the relation between the autonomous domain of law and its other, non-law, from within law itself.[83] If we want to criticize instrumental or functionalist rationality, then this is possible only in the medium of this rationality, through its own self-reflection.

78. So also Ino Augsberg, '"Das moralische Gefühl in mir': Zu Kants Konzeption menschlicher Freiheit und Würde als Auto-Heteronomie," *Juristenzeitung* 68 (2013), 533ff.; see also Rudolf Makkreel, "Relating Kant's Theory of Reflective Judgment to the Law," *Washington University Jurisprudence Review* 6 (2013), 147ff.; Douglas Edlin, "Kant and the Common Law: Intersubjectivity in Aesthetic and Legal Judgment," *Canadian Journal of Law and Jurisprudence* 23 (2010), 429ff.
79. George Karavokyris, "The Art of Law," *Law & Critique* 25 (2014), 67ff.; Todd Kesselman, "The Critique of Judgement: An interest in the Impossible," *Washington University Jurisprudence Review* 6 (2013), 59ff.
80. Christoph Menke, *Die Kraft der Kunst* (Berlin: Suhrkamp, 2013), p. 70.
81. For a critique of various forms of arbitrariness, see also Benjamin Kram, "Rumpelstilzchen," *Rechtsgeschichte* (2008), 237ff., 237, "… until one has reached the combination 'Law and Rumpelstilzchen'." See also already Dieter Simon, "Knäule," *Rechtsgeschichte* (2006), 213ff., 216f.; also the critique in Richard Posner, *Law and Literature. A misunderstood Relation* (Cambridge, MA: Harvard University Press, 1988), p. 79.
82. For an early account: Karl N. Llewellyn, "On the Good, the True, the Beautiful in Law," *University of Chicago Law Review* 9 (1942), pp. 224ff.; from the literature in German, Peter Lerche, "Stil, Methode, Ansicht: Polemische Bemerkungen zum Methodenproblem," *Deutsches Verwaltungsblatt* (1961), 690ff.; Paul Kirchhof, "Sprachstil und System als Geltungsbedingung des Gesetzes," *Neue Juristische Wochenschrift* (2002), 2760ff.
83. See also Menke, *Recht und Gewalt*, p. 40, who locates the force of law in this difference.

1 Sociological aesthetics

The aesthetic perspective focuses on the reflexivity of the aesthetic. Ontological approaches take the aesthetic object – in other words, art, nature, or the sublime – as a basis for developing aesthetics. Since Baumgarten they have been based on a theory of the sense faculties of the subject who is attentive to the aesthetic aspects of these objects.[84] Recent approaches, by contrast, proceed in the opposite direction: according to them, aesthetics as a theory of the aesthetic first gives rise to the object as something "aesthetic."[85] At the center of the aesthetic search process, therefore, is not the aesthetics of elements but the aesthetics of relations.

Sociological theories of aesthetics do not adopt an ontological perspective either. Their aim is not to heighten the aesthetic in social structures[86] but instead to uncover the duality of processes of social rationalization and to describe the relationship between the differentiated spheres of rationality, on the one hand, and society and human beings, on the other. This motif is especially prominent in Theodor W. Adorno's sociology of music where Adorno refers to Max Weber's rationalization thesis, but corrects it by insisting that rationality can develop "only by reflection on the social totality that finds expression in the special mental fields as well as in all areas separated from each other by a division of labor."[87] By aesthetics Adorno understands schematic reflection on the relationship between the individual domains of social rationality and the totality of society, together with the associated attentiveness also to the non-rational.[88] His material morphology

84. Alexander Gottlieb Baumgarten, *Aesthetica* (1750) (Hildesheim: G. Olms, 1961); German translation: *Ästhetik*, trans. and ed. Dagmar Mirbach, 2 vols. (Hamburg: Meiner, 2007).
85. Menke, *Force*, p. ix; Norbert Schneider, *Geschichte der Ästhetik von der Aufklärung bis zur Postmoderne*, 5th ed. (Stuttgart: Reclaim, 2010), pp. 251ff.
86. See the critique in Rainer Maria Kiesow, "Ach ist das Recht schön! Ach…," *myops* 21 (2014), 60ff.
87. Theodor W. Adorno, *Introduction to the Sociology of Music*, trans. E. B. Ashton (New York: Continuum, 1988), p. 207. This provides the starting point for Jürgen Habermas, who criticizes Horkheimer and Adorno on the grounds that their analysis of "aesthetic modernity" drawing on Nietzsche has led to "uninhibited scepticism regarding reason" ("The Entwinement of Myth and Enlightenment: Horkheimer and Adorno," in Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, trans. Frederick G. Lawrence [Cambridge, MA: MIT Press, 1990], pp. 106ff., p. 129). This fails to recognize the dialectical strain in Adorno's aesthetic sociology, which does not play arationality and rationality off against each other, but instead combines them. Adorno's critique of Georg Lukács (*The Destruction of Reason* [Atlantic Highlands, NJ: Humanities Press, 1981]) should also be understood in this sense ("Extorted Reconciliation," in Adorno, *Notes to Literature*, Vol. 1, trans. Shierry Weber Nicholsen [New York: Columbia University Press, 1991], pp. 216ff., pp. 217f.; see also Terry Eagleton, *The Ideology of the Aesthetic* [Oxford: Blackwell, 1990], pp. 341ff.).
88. Theodor W. Adorno, "Some Ideas on the Sociology of Music," in Adorno, *Sound Figures*, trans. Rodney Livingstone (Stanford, CA: Stanford University Press, 1999), pp. 1ff., p. 5. "But rationalization represents … only one of the social features of music, just as rationality itself, Enlightenment, is no more than one aspect of the history of a society."

traces the arational in the rationalized world taking music as its guide. Adorno uses musical relationships to illustrate how society can be organized in an emancipatory way.[89]

From this perspective, aesthetics and social spheres such as law do not constitute mutually exclusive domains that could be connected through an arbitrary combination of "law and aesthetics." On the contrary, the analysis of the aesthetic dimensions of law leads to the question of the relationship between law and society and human beings and of how the relation between the material and the form of law[90] is configured.[91] Sociological legal aesthetics enriches the existing perspectives on this relationship through the inclusion of sensuousness. Social systems, on this conception, consist not only of meaning but also of the sensuous.[92] Sociological aesthetics since Georg Simmel is geared to the fact that, notwithstanding the imposition of rational form, "life remains instinctive, emotional, and irrational."[93] Without reducing the symmetry between the rational and the arational to either of its two components, the aim of sociological aesthetics is to explore how affective processes and structures are integral parts of social systems and how these systems in turn exert effects back on affective processes.[94]

Here an analysis in legal aesthetics can connect up with the discussion on emotionalism in law[95] and on legal taste.[96] Aesthetic reflection on law can contribute to

89. Tia DeNora, *After Adorno: Rethinking Music Sociology* (Cambridge: Cambridge University Press, 2003), p. 13; see also Susanne Kogler, "Adornos Musikphilosophie in Frankreich," *Musik und Ästhetik* 64 (2012), 88ff., 95.
90. On this relation, see Christoph Menke, *Kritik der Rechte* (Berlin: Suhrkamp, 2015), pp. 122ff.
91. Thus, for Jean Marie Guyau the aesthetic character of sense impressions has less to do with their essential content than with their *form.* (Jean Marie Guyau, *L'art au point de vue sociologique* (1889) [Paris: Fayard, 2001]; cf. Kurt Blaukopf, *Musik im Wandel der Gesellschaft* [Munich: DTV, 1984], pp. 296ff.).
92. See already Parsons, who at first conceived of sociology at the science of the nonrational (as opposed to rational action), though in his later work he stressed the equal importance and interwovenness of rational and nonrational constitutive moments; see Talcott Parsons and Gerald Platt, *The American University* (Cambridge, MA: Harvard University Press, 1973), p. 93, and the instructive account in Rudolf Stichweh, "Rationalität bei Parsons," *Zeitschrift für Soziologie* 9 (1980), 54ff., 60 and 73.
93. Georg Simmel, "Soziologische Ästhetik" (1896), in Simmel, *Soziologische Ästhetik* (Bodenheim: Philo, 1998), pp. 77ff., p. 81.
94. Andreas Reckwitz, "Praktiken und ihre Affekte," *Mittelweg* 36 (2015), 27ff.; Helmut Staubmann, *Die Kommunikation von Gefühlen: Ein Beitrag zur Soziologie der Ästhetik* (Berlin: Duncker & Humblot, 1995).
95. See Andreas Philippopoulos-Mihalopoulos, "Atmospheres of Law: Senses, Affects, Lawscapes," *Emotion, Space and Society* 7 (2013), 35ff.; Terry A. Maroney, "Law and Emotion," *Law Hum Behav* 30 (2006), 119ff.
96. See Julia Chryssostalis et al. (eds), "Introduction: Law and Taste," Non Liquet: The Westminster Online Working Papers Series, Law and the Senses Series, The Taste Issue 2013, pp. 3ff.; see also the contributions in Lionel Bently and Leo Flynn (eds), *Law and the Senses: Sensational Jurisprudence* (London: Pluto, 1996); Bernard J. Hibbitts, '"Coming To Our Senses': Communication and Legal Expression in Performance Cultures," *Emory Law Journal* 41 (1992), 873ff.; Emily Grabham, "Shaking Mr Jones: Law and Touch," *International Journal of Law in Context* 5 (2009), 343ff.; Davina Cooper, "Reading the State as a Multi-Identity Formation: The Touch and Feel of Equality Governance," *Feminist Legal Studies* 19 (2011), 3ff.

refining legal awareness of emotions, feelings, and unconscious forces[97] at work in the social systems.[98]

2 The aesthetic constitution of law

Whereas a wide range of metaphysical, ethical, and logical theories of justification have been developed for law,[99] to date no attempt has been made to evolve a comparable theory that would provide a systematic analysis of the aesthetic constitution of law.[100]

Jurisprudence, at least as regards its dogmatic aspects, has been reluctant to open itself up to legal aesthetics.[101] For a long time the dominant reflex was to reject aesthetic analyses as extra-juridical and to insist that "aesthetics describes an essential aspect of the content of literature, whereas normativity is the decisive dimension of the content of legal texts."[102] It would indeed be inappropriate to equate aesthetic and judicial

97. Helmut Staubmann, *Ästhetik – Aisthetik – Emotionen: Soziologische Essays* (Konstanz: UVK, 2008), p. 21; on force, see Menke, *Force*, pp. 316ff.; on the sociology of emotions, see Ben Highmore, "Bitter after Taste, Affect, Food, and Social Aesthetics," in Melissa Gregg et al. (ed.), *The Affect Theory Reader* (London: Duke University Press, 2010), pp. 118ff.; Brian Massumi, *Parables for the Virtual: Movement, Affect, Sensation* (London: Duke University Press, 2002); Massumi, "Fear (The Spectrum Said)," *positions* 13(1) (2005), 31ff.; Sven Opitz, "Zur Soziologie der Affekte: Resonanzen epidemischer Angst," in Joachim Fischer et al. (eds), *Kultursoziologie im 21. Jahrhundert* (Wiesbaden: Springer VS, 2014), pp. 267ff.

98. From a systematic perspective, see Veith Selk and Karsten Malowitz, "Angst in Bielefeld: Über ein ausgeschlossenes Gefühl in der Systemtheorie," *Mittelweg* 36 (2015), 92ff.; Luc Ciompi, "Ein blinder Fleck bei Niklas Luhmann? Soziale Wirkungen von Emotionen aus Sicht der fraktalen Affektlogik," *Soziale Systeme* 10 (2004), 21ff.; see also Fritz Simon, "Zur Systemtheorie der Emotionen," *Soziale Systeme* 10 (2004), 111ff.; Michael Urban, "Systemtheoretische Annäherungen an das Konzept der Emotionen," in Annette Schnabel et al. (eds), *Emotionen, Sozialstruktur und Moderne* (Wiesbaden: VS, 2012), pp. 93ff.

99. Whereas not only the Scottish moral philosophy insists on the correlation of moral sentiments and law, but also contemporary approaches: see e.g. Richard Rorty, "Human Rights, Rationality and Sentimentality," in Stephen Shute et al. (eds), *On Human Rights* (New York: Basic Books, 1994), pp. 115ff.; José Manuel Barreto, "Ethics of Emotions as Ethics of Human Rights. A Jurisprudence of Sympathy in Adorno, Horkheimer and Rorty," *Law and Critique* 17 (2006), 73ff.; for the Scottish moral philosophy, though this takes the moral subject as its point of departure: Adam Smith, *The Theory of Moral Sentiments* (1759) (New York: Garland, 1971); on this Ulli Rühl, *Moralischer Sinn und Sympathie: Der Denkweg der schottischen Aufklärung in der Moral- und Rechtsphilosophie* (Paderborn: mentis, 2005).

100. See already the finding in Richard F. Wolfson, "Aesthetics in and about the Law," *Kentucky Law Journal* 33 (1944–45), 33ff.

101. Cf. Christoph Möllers, *Die Möglichkeit der Normen* (Berlin: Suhrkamp, 2015), pp. 238ff.

102. Susanne Bleich, "Die literarische und die juristische Hermeneutik: Ein Vergleich," *Neue Juristische Wochenschrift* 42 (1989), 3197ff. (3199); see also Heinz Wagner, "Interpretation in Literatur- und Rechtswissenschaft," *Archiv für die civilistische Praxis* 165 (1965), 520ff., 551: "Aesthetics is not a legal concept; aesthetic categories do not provide standards for evaluating law."

communication directly, because a sociological aesthetics of law cannot claim to develop standards for law from the outside which law would nevertheless have to internalize. However, through a reflective movement from within legal form itself, sociological aesthetics of law can cast new light on the other of the rationality of the law, on its repressed and often unthematized sides.[103] Its instruments enable reflection on how rational and non-rational forces – hence the aesthetic dimensions of the constitution of reality – operate in law. Approaches along these lines have indeed been developed, especially in works that explore the connections between ethics and aesthetics.[104] The result concerns a structural coupling of sociological aesthetics as a science with the legal system – in other words, an aesthetic elucidation of the law which has the potential to refine the modes of perception and the decision-making programs of the law.[105]

Here studies in legal aesthetics as a general rule pursue a negativistic approach.[106] In an attempt to unmask and deconstruct the mystical foundations of authority,[107] they demystify legal juggling with dogmatics and concepts: "*Disenchantment of the legal world*, twilight of the gods and of the idols, demythologizing, for the sake of the human being and hence also of the law."[108] They oppose the "gigantic, radiant empty formulas," decode "fake but seductive justifications"[109] of law, and focus instead on possible signs

103. Helge Dedek, "The Splendour of Form: Scholastic Jurisprudence and 'Irrational Formality'," *Land and Humanities* 5 (2011), 349ff., 382: "The pervasive depiction of Western history as the triumph of Reason, this self-portrayal of the enlightened man as the pinnacle of 'rationality', has led to the tendency to minimise the role of the irrational in modernity. Such a cult of Reason is, of course, nothing but mythical, irrational itself – an argument most notably made by Adorno and Horkheimer in their 'Dialectics of the Enlightenment'."
104. See, for example, Wolfgang Welsch, *Undoing Aesthetics*, trans. Andrew Inkpin (London: Sage Publications), pp. 78ff.; Carrol Clarkson, *Drawing the Line: Toward an Aesthetics of Transitional Justice* (New York: Fordham University Press, 2014), pp. 88ff.; Costas Douzinas and Ronnie Warrington (eds), *Justice Miscarried: Ethics, Aesthetics and the Law* (New York and London: Harvester Wheatsheaf, 1994); Herbert Grabes, "Ethics, Aesthetics, and Alterity," in Gerhard Hoffmann and Alfred Hornung (eds), *Ethics and Aesthetics: The Moral Turn of Postmodernism* (Heidelberg: C. Winter, 1996), pp. 13ff.; Melanie Williams, "Euthanasia and the Ethics of Trees: Law and Ethics through Aesthetics," *The Australian Feminist Law Journal* 10 (1998), 109ff.; Lon Fuller, *The Morality of Law*, 2nd revised ed. (New Haven, CT: Yale University Press, 1969), pp. 14f.
105. See Luhmann, *Law as a Social System*, pp. 458ff., who proposes a structural coupling of sociology and law.
106. From the copious literature, see Adam Geary, *Law and Aesthetics* (Oxford: Hart Publishing, 2011); Robin West, "Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory," *New York University Law Review* 60 (1985), 145ff.; Isabell Hensel, "Klangpotentiale: Eine Annäherung an das Rauschen im Recht," in Christian Joerges and Peer Zumbansen (eds), *Politische Rechtstheorie Revisited: Rudolf Wiethölter als Lehrer, Anstifter, Freund* (Bremen: ZERP, 2013), pp. 73ff.
107. Jacques Derrida, "Force of Law: The 'Mystical Foundations of Authority'," *Cardozo Law Review* 11(5) (1990), 920ff.
108. Rudolf Wiethölter, *Rechtswissenschaft* (Frankfurt am Main: Fischer, 1968), p. 26 (emphasis in the original).
109. Op. cit., p. 17.

of tastelessness in the law.[110] Thus, Heinrich Triepel, for example, read the Radbruch formula[111] against the moral grain in an aesthetic sense and, with reference to the Nuremberg racial laws, disputed the external effectiveness of ugly law filled with disgust and revulsion.[112] Similarly, Martti Koskenniemi has advocated applying the distinction between art and kitsch to the law in order to expose kitschy and false forms of law. The latter, according to Koskenniemi, are at work, for example, when law is invoked "to defend the easy truth, the nostalgic feel for an abstract mankind, and to curtain off death."[113] Niklas Luhmann also has the aesthetics of the law in mind when, with reference to blatant violations of law, he criticizes it as "tasteless" in the face of atrocities "to consult texts or to inspect the local legal system to determine whether such practices are permitted."[114]

A sociological aesthetics of the law that proceeds in this manner is not reduced to demonstrating which aesthetic expressions the law chooses, how theatrical it is, or how closely legal interpretation tracks musical interpretation. Rather, it unfolds its legal and social critical potential by facilitating a relationship conceived by Adorno as the relationship between critical subjectivity and systemic violence, by Habermas as the interdependence of lifeworld and system, and by Menke as the difference between the human being and the social subject.[115] The point is to establish what possibilities exist for organizing social relations in humane ways – while eschewing the insufficiently complex approaches of natural law or rational law, which developed the normative a priori of social order from supposedly essential features of human nature or human reason. What is needed is instead a further stage of complexity: only if we recognize the ineluctability of the difference between human being and society will it become possible to relate them to each other in anything approaching an adequate way. The call for a humane law, therefore, is not a call to resolve the existing contradictions and disharmonies, but to give them free play in law.

Here Adorno's aesthetic theory, in particular, which takes up Durkheim's idea of the *fait social*, offers the key insight that a "corrective correlate" must be introduced into the differentiated social formations[116] in order to break open the paradigm of rationality and

110. Ludger Schwarte, *Vom Urteilen: Gesetzlosigkeit, Geschmack, Gerechtigkeit* (Berlin: Merve, 2012).
111. Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht," *Süddeutsche Juristenzeitung* (1946), 105ff.
112. Triepel, *Vom Stil des Rechts*, pp. 150ff.
113. Martti Koskenniemi, "International Law in Europe, Between Tradition and Renewal," *European Journal of International Law* 16 (2005), 113ff. (122).
114. Luhmann, "Das Paradox der Menschenrechte und drei Formen seiner Entfaltung," pp. 229ff., p. 234.
115. Cf. Hauke Brunkhorst, "Ästhetik als Gesellschaftskritik," *Widerspruch* 41 (2003), 12ff., 16; Lucia Sziborsky, *Rettung des Hoffnungslosen: Untersuchungen zur Ästhetik und Musikphilosophie Theodor W. Adornos* (Frankfurt am Main: Suhrkamp, 1994), pp. 94ff.; Christoph Menke, *Die Gegenwart der Tragödie: Versuch über Urteil und Spiel* (Frankfurt am Main: Suhrkamp, 2005), pp. 203ff.
116. Josef Früchtl, *Mimesis – Konstellation eines Zentralbegriffs bei Adorno* (Würzburg: Königshausen & Neumann, 1986), p. 35.

to subject the social spheres to the requirement of humaneness.[117] Adorno expressed this idea in the concept of mimesis.[118] Thus in a study on Alban Berg he calls for restoring "human dignity to a banished, heretical yearning."[119] Such a form of mimesis is anti-essentialist. It will not resolve the incommensurabilities but will call for a form of interrelating that reflects on its relation to the human being as an "ensemble of the social relations"[120] without dissolving the non-identities in identities.

III. Legal Practice

A mimetic responsiveness of law to its environment will not lead to the dissolution of the difference between law and non-law. The differentiation of law is irreversible. Therefore, mimesis of law does not aim to level down differences in a harmonistic way, but instead to reflect what is external to the law in the law in sophisticated ways. It aims at a form of law that is aware that law is receptive to and affirms rational and arational forces. It is also affected by these forces.[121]

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117. See also Adorno's Kranichsteiner lectures published in Theodor W. Adorno, *Kranichsteiner Vorlesungen* (Berlin: Suhrkamp, 2014) – specifically the 1961 lecture, "Vers une musique informelle" (pp. 381ff.). English translation: "Vers une musique informelle," in Adorno, *Quasi Una Fantasia: Essays on Modern Music*, trans. Rodney Livingstone (London: Verso, 1998), pp. 269ff.
118. For a detailed discussion, see Martin Jay, "Mimesis and Mimetology: Adorno and Lacoue-Labarthe," in Tom Huhn and Lambert Zuidervaart (eds), *The Semblance of Subjectivity: Adorno's Aesthetic Theory* (Cambridge, MA: MIT Press, 1995), pp. 29ff., p. 30. See also the concept of mimesis in René Girard, *Violence and Sacred*, trans. Patrick Gregory (Baltimore, MD: The Johns Hopkins University Press, 1992), though Girard's concept is non-dialectical and hence fails to recognize the tension between the Dionysian and the Apollonian; on this tension, see also Horst Hansen, *Die kopernikanische Wende in die Ästhetik: Ernst Bloch und der Geist seiner Zeit* (Würzburg: Königshausen and Neumann, 1998), p. 206.
119. Theodor W. Adorno, *Alban Berg: Master of the Smallest Link*, trans. Juliane Brand and Christopher Hailey (Cambridge: Cambridge University Press, 1991), p. 7. And on Arnold Schoenberg's melodrama "A Survivor from Warsaw," in which the threat of anti-Semitism is made palpable by the musical form, Adorno writes: "The genuinely revolutionary element in his music is the transformation of the function of expression. Passions are no longer faked; on the contrary, corporeal impulses of the unconscious, shocks, traumas are registered undisguised in the medium of music. They attack the taboos of the form because these taboos submit the impulses to their censorship and rationalize them … Real suffering has left them [the bloodstains] behind in the artwork as a sign that it no longer recognizes the latter's autonomy." (Theodor W. Adorno, *The Philosophy of New Music*, trans. Robert Hullot-Kentor [Minneapolis, MN and London: University of Minnesota Press, 2006], p. 35) (translation amended).
120. Karl Marx, "Concerning Feuerbach," in Marx, *Early Writings*, trans. Rodney Livingstone (Harmondsworth: Penguin, 1975), pp. 421ff., Thesis VI, p. 423.
121. Andreas Fischer-Lescano, *Rechtskraft* (Berlin: August, 2013); on the interdependence of social and human forces, see also Gilles Deleuze, "To Have Done with Judgement," in *Essays. Critical and Clinical*, trans. D.W. Smith (Minneapolis, MN: University of Minnesota Press, 1997), pp. 126ff.

The corresponding science of law is a science of force. We must also avoid misinterpreting this in essentialistic terms. It is not about developing an ontology of legal force in order to derive specific legal contents from the existence of social and human forces.[122] Rather, the point is, on the one hand, to understand how emotions and forces as potentialities suspend the everyday routines of the law; on the other hand, the challenge is to develop a sense for the effects that law exerts on these affects and forces.[123]

This is what Adorno is referring to when he attributes to "those driving forces that erupt and rebel against the horrific – such as the suffering of others" the power to create a form of social existence fit for human beings[124] and when he stresses that a humane societal order can be established "only when the drives of people are no longer repressed, but fulfilled and released."[125] In other words, reflection on the dialectic of rational and arational forces enables us to thematize the legal violence of a law "without feeling" through its confrontation with a legal force that opposes this violence and liberates human and social forces.

The point of this sociological aesthetics is that aesthetic reflection on social processes can, on the one hand, throw light on the dialectical processes of law as an arational system of rationality. But, on the other hand, it also makes it possible to conceive of law in a new transsubjective form.[126] The point of reference of aesthetics is not the moral, political, or legal subject, but the human being. Humanity is not exhausted in being a subject.

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122. But see Lorenz von Stein, *Gegenwart und Zukunft der Rechts- und Staatswissenschaft Deutschlands* (Stuttgart: Cotta, 1876), p. VII: "The science of law is not jurisprudence but the science of the forces that generate law; it is … the consequence of these forces, which operate in subjects, the personality, and in the object, the nature of things. Therefore, I should not study what is or is taken to be law; I can leave that to memory and learn paragraphs only to forget them. But if I want to acquire knowledge of law I must examine what generates law."
123. This is also at the core of the sociology of emotions developed by Deleuze; see Gilles Deleuze and Félix Guatari, *A Thousand Plateaus: Capitalism and Schizophrenia*, trans. Brian Massumi (New York: Continuum, 1987); cf. Robert Seyfert, *Das Leben der Institutionen: Zu einer Allgemeinen Theorie der Institutionalisierung* (Weilerswist: Velbrück, 2011).
124. See Mirko Wischke, "Eine negativ gewendete Ethik des richtigen Lebens?," in Schweppenhäuser et al. (eds), *Impuls und Negativität* (Hamburg: Argument, 1995), pp. 29ff., pp. 34f.
125. Theodor W. Adorno, "Education after Auschwitz," in Adorno, *Critical Models: Interventions and Catchwords*, trans. Henry W. Pickford (New York: Columbia University Press, 1998), p. 202; see also Günter Figal, "Absolut modern: Zu Adornos Verständnis von Freiheit und Kunst," in Richard Klein et al. (eds), *Mit den Ohren denken: Adornos Philosophie der Musik* (Frankfurt am Main: Suhrkamp, 1998), pp. 21ff.
126. "Transsubjective" here has not only an institutional, but also a humane meaning (see the contributions in Thomas Vesting et al. (eds), *Grundrechte als Phänomene kollektiver Ordnung* [Tübingen: Mohr Siebeck, 2014]). For this conception, see already Ludwig Raiser, "Der Stand der Lehre vom subjektiven Recht im Deutschen Zivilrecht," *Juristenzeitung* 16 (1961), 465ff., 472: "The possibility to develop one's own powers and the opportunity to obtain economic benefits thereby should not be understood as subjective rights vis-à-vis competitors and customers."

Human freedom is not the same thing as the freedom of the liberal subject. An aesthetics of law along these lines tries to answer the central question of how law as the "primal phenomenon of irrational rationality" can be subjected to the ideal of human freedom.[127]

The aesthetic enlightenment[128] of law starts from social structures.[129] Different creative mechanisms have taken shape in the sectors of science, religion, and art[130] that regulate the development of human and social forces and affects and make room for the "aesthetics of existence."[131] Law reproduces these mechanisms and is affected by them in turn: justice is "sought,"[132] courts are required to investigate the *Begehr* ("desire") of the claimant see §88 of the German Code of Administrative Court Procedure (VwGO).[133]

Law and the non-rational are interwoven in the various processes in which law and different social spheres co-evolve. It would be mistaken to take this intrication as a reason to raise an idealized affective tone into a normative yardstick that applies across

127. Theodor W. Adorno, *Negative Dialectics*, trans. E.B. Ashton (New York: Continuum, 1973), p. 249; on the "Irrationality of Rationality," see also George Ritzer, *The McDonaldization of Society* (Los Angeles, CA: Pine Forge, 2011), pp. 143ff.
128. Jürgen Peper, *Ästhetisierung als Zweite Aufklärung: Eine literaturästhetisch abgeleitete Kulturtheorie*, 2nd ed. (Berlin: Aisthesis, 2012), pp. 281ff.
129. As such they represent an "aesthetics from below"; on this, see Richard Klein, "Überschreitungen, immanente und transzendente Kritik," in Adolf Nowak et al. (eds), *Musikalische Analyse und Kritische Theorie: Zu Adornos Philosophie der Musik* (Tutzing: Hans Schneider, 2007), pp. 276ff., p. 277.
130. Andreas Reckwitz, *Die Erfindung der Kreativität: Zum Prozess gesellschaftlicher Ästhetisierung* (Berlin: Suhrkamp, 2012); see also Michael Hutter, "Cultural Conditions of Creation," in Hubert Knoblauch et al. (eds), *Culture, Communication, and Creativity* (Frankfurt am Main: Peter Lang, 2014), pp. 35ff.
131. See Michel Foucault, who contrasts this aesthetics of existence with an ethics of existence (*Ästhetik der Existenz*, Frankfurt am Main, 2007, pp. 280ff.); see also Rahel Jaeggi, *Kritik von Lebensformen* (Berlin: Suhrkamp, 2014), p. 57, and Bruno Latour, *An Inquiry into Modes of Existence: An Anthropology of the Moderns*, trans. Catherine Porter (Cambridge, MA: Harvard University Press, 2013), pp. 1ff.
132. Paul Stenner speaks in terms of "rights filled out with affective content, or as affect shaped into the patterns of rights" ("Is Autopoietic Systems Theory Alexithymic? Luhmann and the Socio-Psychology of Emotions," *Soziale Systeme* 10 (2004), 159ff., 175); see also Hans Joas, *The Sacredness of the Person: A New Genealogy of Human Rights*, trans. Alex Skinner (Washington, DC: Georgetown University Press), p. 171: "the sense of self evidence and affective intensity."
133. On the connection between factual and legal desire, see already Georg Simmel, "Conflict," in Simmel, *Conflict and The Web of Group Affiliations*, trans. Kurt H. Wolff and Reinhard Bendix (New York: Free Press, 1955), pp. 11ff. (p. 53): "In fact, the double meaning of 'claim' – simple desire and legally grounded desire – alludes to the fact that the will likes to increase the right of its strength by the strength of its right." On the sociology of desire, see also Gabriel Tarde, The *Laws of Imitation*, trans. Elsie Clews Parson (New York: H. Holt and Company, 1903); and Jean-Philippe Antoine, "Tardes Ästhetik," in Christian Borch et al. (eds), *Soziologie der Nachahmung und des Begehrens* (Frankfurt am Main: Suhrkamp, 2009), pp. 164ff.

systems.[134] One can gain a more adequate picture of the connections with the non-rational only if one instead traces the legal points of contact with arationality in the different social relations of co-evolution. Here legal aesthetics leads to the question of whether the legal instruments can be designed in such a way that they exhibit more refinement, more tact, and more sensitivity to the emotionally conditioned character of social structures. There is no shortage of occasions for posing this question of appropriateness. To sketch some examples:

(1) *Business/Law*: When it comes to the relationship between law and the economic sphere, the rational choice paradigm was superseded long ago by theories which treat the non-rational as part of economic rationality.[135] Profit seeking,[136] greed, and the psychologically conditioned character of trade are not the exclusive preserve of behavioral economics.[137] Law is not very receptive to these arational phenomena.[138] Financial market regulation is a prime example of the interconnection between the arational and the rational – an interconnection to which the Federal Constitutional Court (BVerfGE) also appealed in its decision on *Outright Monetary Transactions* (OMT) when it examined the argument of the European Central Bank that OMTs would combat irrational effects on the money market. The Federal Constitutional Court rejected this justification on the grounds that "the rational/irrational distinction is meaningless in this context and in any case cannot be operationalized."[139] However, law will be able to address the epidemiological dynamics on the financial markets effectively[140] only when it develops a more precise understanding of the interactions between arational and rational forces in economics.

134. Just as it would be in the case of the love relationship between couples, which provides the basic model of social recognition in Axel Honneth (*Freedom's Right: The Social Foundations of Democratic Life*, trans. Joseph Ganahl [New York: Columbia University Press, 2013]).
135. Jocelyn Pixley, "Emotions and Economics," in Jack Barbalet (ed.), *Emotions and Sociology* (Oxford: Wiley-Blackwell, 2002), pp. 69ff.
136. Talcott Parsons, "The Motivation of Economic Activities," in Parsons, *Essays in Sociological Theory* (New York: Free Press, 1954), pp. 50ff.; Dirk Baecker, "Volkszählung," in Baecker (ed.), *Kapitalismus als Religion* (Berlin: Kulturverlag Kadmos, 2003), pp. 265ff., p. 278.
137. Matthew Rabin, "Psychology and Economics," in *J. Econ. Lit.* 36 (1998), 11ff.; James Heyman et al., "Auction Fever," *Journal of Interactive Marketing* 18 (2004), 4ff.; Dan Ariely, *Predictably Irrational: The Hidden Forces that Shape our Decisions* (New York: Harper, 2008); on other greedy social institutions, see Lewis A. Coser, *Gierige Institutionen: Soziologische Studien über totales Engagement* (Berlin: Suhrkamp, 2015), pp. 11ff.
138. But see already Werner Gephart, "Von der 'Unternehmensethik' zur 'Unternehmensästhetik': Einige Konsequenzen der kunstsoziologischen Fragestellung Max Webers," *Zeitschrift für Betriebswirtschaft. Ergänzungsheft* 1 (1992), 51ff.
139. BVerfG, 2 BvR 2728/13 of January 14, 2014, paragraph 98; now see also ECJ, decision of 16 June 2015, C-62/14.
140. Urs Staeheli, "Political Epidemiology and the Financial Crisis," in Poul Kjaer et al. (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Oxford: Hart Publishing, 2011), pp. 113ff.

(2) Religion/Law: Law is also confronted with the arational in the religious domain.[141] The law often comes into contact with religiously connoted issues. This can be seen, for example, in how criminal law deals with so-called "honor killings." In the discussion over whether "honor killing" satisfies the murder criterion referred to in §211 para. 2 of the German Criminal Code as "base motives," a religious contextualization is often made in an attempt to distinguish "honor killings" from "separation killings out of separation anxiety," in which the murder criterion is not considered to be satisfied.[142] Court judgments that reject a sweeping demonization of honor killings[143] are publicly criticized for granting a supposed "Islam allowance."[144] The ways of dealing with the arational in the law that originates in (supposedly) religious contexts must be subjected to critical examination.

(3) Politics/Law: There is nothing new about the claim that the arational is present in politics. On the contrary, this is the underlying thesis of political theology and its sovereigntist exaggeration of the political instinct as a seismograph for the political – the friend-and-enemy distinction.[145] Contemporary aestheticizations of the political also emphasize the connections between politics and the arational,[146] connect them with emotionality[147] and stress their representation in music. Hymns and freedom songs are in this concept expressions of "soul forces."[148] One of the central questions of legal aesthetics at this point is how human forces

141. On the mystical dimension of the religious, see also Jürgen Habermas, "Versprachlichung des Sakralen," in Habermas, *Nachmetaphysisches Denken*, Vol. 2 (Berlin: Suhrkamp, 2012), pp. 7ff.; see already Emile Durkheim (*The Elementary Forms of Religious Life* [1912], trans. Karen E. Fields [New York: Free Press, 1995]), who emphasizes the role that emotional ties play in securing social stability.
142. Federal Court of Justice October 29, 2008 – 2 StR 349/08.
143. See e.g. State Court Wiesbaden judgment of March 24, 2014 – Az. 2 Ks – 2234 Js 1018/13.
144. References in Lena Foljanty and Ulrike Lembke, "Die Konstruktion des Anderen in der 'Ehrenmord'-Rechtsprechung," *Kritische Justiz* (2014), 298ff. (298).
145. The classical account is Carl Schmitt, *The Concept of the Political*, trans. G. Schwab (Chicago, IL: University of Chicago Press, 1996), p. 34; for the current discussion, Ulrich Haltern, "Recht als Tabu? Was Juristen nicht wissen wollen sollten," in Otto Depenheuer (ed.), *Recht und Tabu* (Opladen: VS, 2003), pp. 141ff. (141): the state as an "erotic amorous project"; see also, in connection with the legal philosophy of Giorgio Agamben, Peg Birmingham, "Law's Violent Judgement," *The New Centennial Review* 14 (2014), 99ff.
146. Jacques Rancière, *The Politics of Aesthetics* (London: Bloomsbury, 2004); see also the critique of the self-staging of politics in the contributions in Oliver Lepsius and Reinhart Meyer-Kalkus (eds), *Inszenierung als Beruf: Der Fall Guttenberg* (Berlin: Suhrkamp, 2011).
147. Martha Nussbaum, *Political Emotions: Why Love Matters for Justice* (Cambridge, MA: Harvard University Press, 2013).
148. Nancy S. Love, *Musical Democracy* (Albany, NY: State University of New York Press, 2006), pp. 87ff.

can be organized in order to render the idea of democracy socially effective.[149] Ultimately it is a matter of activating self-healing forces against collective anxieties,[150] forces that encourage "dissent, protest, opposition, and civic courage against the paralyzing atmosphere of … hierarchies and against pressures to conform."[151] The practice of whistleblowing is a prime example of the difficulties that law faces when it comes to dealing with people as "truth animals."[152] Here the case law of the European Court of Human Rights (ECtHR) in particular operates with categories of the arational that are in need of critical examination. Thus the ECtHR denies legal protection to whistleblowing motivated by revenge or the craving for personal recognition, for example, but seeks to protect whistleblowing motivated by instincts of truth and justice, but without offering a more detailed explanation of these very different emanations of arational forces.[153]

(4) *Media/Law*: As a general rule, the processes in which public opinion is formed and expressed are charged with emotion. In this sense, Luhmann draws on Durkheim's concept of *colère publique* to describe scandalization processes and manifestations of collective exuberance in the field of human rights.[154] The example of freedom of the press demonstrates the difficulties faced by law in dealing with arationality in the media. The decisions of the ECtHR, for example, generally conclude that freedom of the press should outweigh the protection of private life and the protection of one's "good name" in reporting when there is a public interest in the content of the report.[155] Protection of the freedom of the press does not apply, according to the court, when reporting only serves to satisfy public

149. In this sense, Kant's theory of democracy already insisted that procedures must be created that would civilize even a "nation of devils." This involves enabling human beings to organize their natural drives "in opposition to one other in such a way that one checks the destructive effect of the other" ("Toward Perpetual Peace: A Philosophical Project," in Kant, *Practical Philosophy*, ed. and trans. Mary Gregor [Cambridge: Cambridge University Press, 1996], pp. 317ff., p. 335 [Ak. 8:366]). See also Albert O. Hirschman, *The Passions and the Interests* (Princeton, NJ: Princeton University Press, 1977), pp. 22ff., for whom political institutions must be established so that passions can neutralize each other, which in turn presupposes that the interests, as moderate passions, can be opposed to the excessive and destructive passions as "tamers."

150. On fear in politics, see Franz L. Neumann, "Angst in der Politik," in Neumann, *Wirtschaft, Staat, Demokratie* (Frankfurt am Main: Suhrkamp, 1978), pp. 424ff.

151. Gunther Teubner, "Whistleblowing gegen den Herdentrieb?," in Dirk Becker et al. (eds), *Ökonomie der Werte* (Marburg: Metropolis, 2013), pp. 39ff., p. 39.

152. Frieder Vogelmann, "Kraft, Widerständigkeit, Historizität," *Deutsche Zeitschrift für Philosophie* 62 (2014), 1062ff., 1069.

153. ECtHR, *Heinisch v. Germany*, judgment of July 21, 2011, application no. 28274/08, para.64ff.

154. Luhmann, "Das Paradox der Menschenrechte und drei Formen seiner Entfaltung," in Luhmann, *Soziologische Aufklärung*, pp. 229ff.; see also Judith Butler, *Frames of War: When is Life Grievable?* (Brooklyn, NY: Verso, 2009), pp. 38ff.

155. ECtHR, judgment of February 7, 2012, application no. 39954/08 (*Axel Springer AG v. Germany*), para. 83.

curiosity[156] – a distinction that the ECtHR has difficulty in upholding. This becomes apparent, for example, in its decision that a prince's treatment of his illegitimate son was a matter of public interest, on the grounds that character traits of the prince could be inferred from this treatment, which in turn were also important for his performance of his public office.[157] Here the formation of a sensibility for arational processes in the public arena should help to develop appropriate solutions for such cases that can contribute to stability at the dogmatic level.

(5) *Family/Law*: In the sphere of the family, it is obvious that the willingness to make sacrifices for the family, love, and also – especially in the case of failure, though not only (*odi et amo*) – countervailing passions like hatred[158] constitute a formative component.[159] Here, too, the law all too often exhibits a deficient sensibility for the arational, as is also shown specifically and especially by the example of family guarantees. The legal foil for deciding cases involving such guarantees take its orientation as a general rule from asymmetries of knowledge and power.[160] But the law does not accord sufficient weight to the fact that such guarantees are also a matter of protecting the family system, and its pattern of loyalty based on emotional ties, from economic corruption.[161]

(6) *Art/Law*: When it comes to the relationship between law and art, law is not adequately attuned to the arational dimensions of the sphere of art either. The so-called "Pussy Riot" trials are prime examples of the arbitrariness of the way law deals with forms of musical expression. While the Moscow lower court attested that the members of the band had acted out of "religious hatred against a social group,"[162]

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156. ECtHR, judgment of February 7, 2012, applications nos. 40660/08 and 60641/08 (*Hannover v. German No. 2*).
157. ECtHR, judgment of June 12, 2014, application no. 40454/07 (*Couderc et Hachette Filipacchi Associés v. France*): "insight into his personality."
158. One of the central challenges for family law is to channel these guarantees and the resulting disputes over maintenance, custody, and access. "In practice, however," writes, for example, Kurt Schellhammer, "the pious wish of the law is all too often thwarted by the implacable hatred of the parents" (see Schellhammer, *Familienrecht nach Anspruchsgrundlagen*, 4th ed. [Heidelberg: Müller, 2006], marginal no. 1170). On emotions of hatred in general, see Jens-Christian Rabe, "Agieren, reagieren, abreagieren: Hass als populäre Kunst," *Mittelweg* 36 (2015), 211ff.; on the role of legal proceedings in "wearing down the parties" and thus subduing the conflict, see already Niklas Luhmann, *Legitimation durch Verfahren* (Frankfurt am Main: Suhrkamp, 1983), p. 4.
159. Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, ed. A. Wood, trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1991), § 158: "The family … has as its determination the spirit's *feeling* of its own unity, which is *love*."
160. BVerfGE 89, pp. 214ff.
161. See the critique in Gunther Teubner, "Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken," *Kritische Vierteljahreszeitschrift* (2000), 388ff., 395ff.
162. See the reconstruction of the judgment in Caroline von Gall, "Vorerst gescheitert: 'Pussy Riot' und der Rechtsstaat in Russland," Bundeszentrale für politische Bildung of November 6, 2012; on the emotionality of criminal violence, see the treatment of the underlying issues in Randall Collins, "Entering and leaving the tunnel of violence," *Current Sociology* 6 (2012), 132ff. (139).

the court of appeal relativized this accusation.[163] An individual application against these Russian decisions is pending with the ECtHR.[164] Here the decisive question will be whether the domain of artistic freedom granted protection in Art. 10 of the European Convention on Human Rights (ECHR) also extends to aesthetic criticism by punk music, specifically when this music lends social protest an "emotional *timber*."[165]

IV. Conclusion

All of the fields mentioned clearly exhibit an entanglement of rationality and arationality. If one wants to promote the subtlety of the associated legal emotional and perceptual culture,[166] then one must first chart the relationship between law and the arational. Building on this, it then becomes a matter, normatively speaking, of sharpening the legal sense of appropriateness[167] also with regard to the arational.[168]

Thus this movement involves two steps. The *first (descriptive) step* is to gain an understanding of how the arational becomes inscribed in the social domains of rationality, in this case the law,[169] in order to bring law closer to human beings and society. When "human freedom" is described as a central concern of "aesthetics,"[170] this points to the

163. See Darya Kozhanova, "Something is Wrong with Pussy Riot's Sentence According to the Supreme Court," *The Interpreter*, December 12, 2013.
164. Alec Luhn, "Pussy Riot Members Take Kremlin to European Court of Human Rights," *The Guardian*, July 28, 2014.
165. See Desmond Manderson's plea ("Making a Point and Making a Noise: A Punk Prayer," *Law, Culture and the Humanities* (2013), 1ff., 12f.), though he does not thematize the combination of various artistic media with each other – for an instructive account of this combination, see Albrecht Wellmer, "On Music and Language," in Jonathan Cross et al. (eds), *Identity and Difference: Essays on Music, Language, and Time* (Leuven: Leuven University Press, 2004), pp. 71ff.
166. Peter Fuchs, "Wer hat wozu und wieso überhaupt Gefühle?," *Soziale Systeme* 10 (2004), 89ff., 103: "As they evolve, social systems can develop more and more subtle expressions for feelings; they can develop their 'affective cultures'."
167. Klaus Günther, *The Sense of Appropriateness: Application Discourses in Morality and Law*, trans. John Farrell (Albany, NY: SUNY Press, 1993).
168. See also along these lines Hilge Landweer, "Der Sinn für Angemessenheit als Quelle von Normativität in Ethik und Ästhetik," in Kerstin Andermann and Undine Eberlein (eds), *Gefühle als Atmosphären: Neue Phänomenologie und philosophische Emotionstheorie, Deutsche Zeitschrift für Philosophie* – special issue 29, Berlin (2011), pp. 57ff.; see also Edmond Cahn, *The Sense of Injustice: An Anthropocentric View of Law* (New York: New York University Press, 1949), p. 15: "One does not become outraged and furious merely because some decision has violated a dialectic pattern. The true reason must go considerably deeper, below the threshold of feeling."
169. See the perspective in Peter Fuchs, "Die Materialität der Sinnsysteme," in Pascal Goeke et al. (eds), *Konstruktion und Kontrolle: Zur Raumordnung sozialer Systeme* (Wiesbaden: Springer VS, 2015), pp. 205ff., pp. 212f.
170. Menke, *Force*, p. 98.

potential of a sociological aesthetics for law, namely for assessing the legal presuppositions for shaping this freedom.[171] This question is not answered by reconstructing a supposed human nature. Rather, it is a matter of legal reflection on the tension that pervades human life in the guise of the difference between human being and social subject.[172] In this sense, an aesthetics of law can link up with aesthetic theories that conceptualize the aesthetic question in terms of the "idea of aesthetic autonomy."[173] The challenge for legal theory is to look for ways to realize this very human freedom, which is not identical with the freedom of the subject.[174]

Then, the *second (normative) step* is to use reflection on the aesthetic constitution of the law to make legal practice itself more complex, that is, more adequate to human beings and society.[175] In particular, the aesthetics of law makes possible a new approach to the justification of law. Whereas discourse-theoretical approaches situate the outcome of normativity in rational intersubjectivity, approaches in legal ethics generally externalize the normativity of law in morality, legal positivist interpretations treat the "basic norm" as the end point of reflection, political theories of law externalize the basis of validity in politics, and economic analyses of law elevate economic utility into the supreme measure of law,[176] the aesthetics of law proposed here adopts a different approach. The basic normative reference of the law is not tied to a fixed point in the environment of law. Therefore, the law does not rest on a stable ground. Neither human nature, nor the consensus of subjects, nor the functional requirements of a social subsystem such as the economy, politics, or science constituted the outcome of normativity. The specific character of normativity resides instead in the relationship between autonomous law as a differentiated social sphere, on the one hand, and the rest of society and human beings, on the other. Aesthetic reflection on law enables us not only to thematize the relation between the domain of legal autonomy and its other, non-law, from within law, but also to develop legal safeguards for the social and human spaces of freedom.

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171. See also Kolja Möller, "Rechtskritik und Systemtheorie," in Albert Scherr (ed.), *Systemtheorie und Differenzierungstheorie als Kritik: Perspektiven im Anschluss an Niklas Luhmann* (Weinheim, Basel: Beltz Juventa, 2015), pp. 186ff.; from a postcolonial perspective, Ratne Kapur, "In the Aftermath of Critique," *Law & Critique* 25 (2014), 25ff.
172. Juliane Rebentisch, *Die Kunst der Freiheit: Zur Dialektik demokratischer Existenz* (Berlin: Suhrkamp, 2012), pp. 20f.
173. Theodor W. Adorno, *Aesthetic Theory*, trans. Robert Hullot-Kentor (London: Bloomsbury, 1997), p. 8.
174. See Michael Cahn, "Subversive Mimesis: Theodor W. Adorno and the modern Impasse of Critique," in Mihai Spariosu (ed.), *Mimesis in Contemporary Theory* (Philadelphia, PA: John Benjamins, 1984), pp. 27ff.
175. The responsiveness of law to feelings increases the internal complexity of law – unlike the emotions themselves, which according to Jan Philipp Reemtsma, drawing on Jean-Paul Sartre (*The Emotions: Outline of a Theory*, trans. Bernard Frechtman [New York, Philosophical Library, 1948]), lead to a "reduction in complexity" (Jan Philipp Reemtsma, "Warum Affekte?," *Mittelweg* 36 (2015), 15ff. (24)).
176. See the survey in Luhmann, *Law as a Social System*, pp. 125ff.

In all of this, an interdisciplinary analysis that aspires to throw light on the potential of an aesthetic perspective for the law itself must do justice to the normativity proper to law: aesthetic standards cannot be developed for law from the "outside" as it were.[177] A non-violent force of law can arise only in a self-reflective manner,[178] specifically by law becoming more responsive to human and social forces.[179] Only when the law does justice to the rational and the arational alike will a different law "beyond legal violence" become possible.[180]

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177. Gunther Teubner, "Rechtswissenschaft und -praxis im Kontext der Sozialtheorie," in Stefan Grundmann and Jan Thiessen (eds), *Recht und Sozialtheorie: Interdisziplinäres Denken in Rechtswissenschaft und -praxis* (Tübingen: Mohr Siebeck, 2015), pp. 141ff.
178. This is also what Derrida announces; see Derrida, *Force of Law*, p. 927; on this, see Andreas Fischer-Lescano, "A 'Just and Non-violent Force'? Critique of Law in World Society," *Law & Critique* 26 (2015), 267ff.
179. See the call in Karl Marx, "On the Jewish Question" (1843) in R.C. Tucker (ed.), *The Marx-Engels Reader*, 2nd ed. (New York: W.W. Norton, 1978), pp. 26–52, p. 46: "Human emancipation will only be complete when the real, individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life, in his work, and in his relationships, he has become a *species-being*; and when he has recognized and organized his own powers (*forces propres*) as social powers so that he no longer separates this social power from himself as political power." The translation uses "powers" where Marx used the German term "*Kraft*," which is more adequately translated with "force" (a term Marx uses himself when he alludes to the French term "*forces propres*").
180. Cornelia Vismann, "Das Gesetz 'DER Dekonstruktion'," *Rechtshistorisches Journal* 11 (1992), 250ff. (259f. and 261); also along these lines Manderson, "Making a Point and Making a Noise," *Law, Culture and the Humanities*, ibid., 12f.