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**Law as Practice
On Law's Susceptibility and Resistance Vis-à-Vis Security Matters**

LAW AS PRACTICE
ON LAW'S SUSCEPTIBILITY AND RESISTANCE
VIS-À-VIS SECURITY MATTERS

By Susanne Krasmann[*]

Abstract

Contrary to the prevailing debate on the governance of security with its focus on emergency and exception, a perspective on law as practice enables us to capture how law transforms in a rather gradual and unnoticed manner. As a practice, law appears to be notoriously susceptible vis-à-vis security matters. This will be illustrated by analysing the rationality of pre-emptive action that is facilitated by automated surveillance technologies. Taking a recent torture debate as an extreme example elucidates that a conception of law as practice also serves as a tool of critique and articulating dissent.

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1. Introduction: containing security government

Our political world today cannot be imagined without law. Law authorizes and regulates governmental action, in particular the resort to force. With the rule of law and a considerable range of citizens' and human rights the civilized world prides itself on having established a regime of stability and a framework for claiming one's rights. Remarkably, across different models of either rather centralised or pluralist environments of democratic authority, political crises, particularly in the face of terrorist threats since the 1970s, have been managed preferably within the normal statutory process, rather than by proclaiming a state of emergency (see Ferejohn and Pasquino 2004: 215; Poole 2008: 5-9). Nevertheless, social scientists and legal scholars articulate the concern that security is seizing more and more political space. Criminologists even see their subject field increasingly mirrored by Steven Spielberg's movie version of Phillip K. Dick's *Minority Report*. The movie depicts a dystopia of prospective offenders being incapacitated pre-emptively far in advance of the offenders' own anticipation of their future crimes. A 'pre-crime logic', as designated by the British criminologist Lucia Zedner (2007: 262), aims at 'forestalling risks' and seems to compete with, if not take precedence over, the traditional modes of policing and prosecution 'responding to wrongs done.' What is at stake here then is a qualitative shift as regards the threshold of intervention in the name of security. In terms of classical legal principles, the precondition for activating the security apparatus no longer seems to be the breach of a norm by an actual offence nor an imminent threat or a reasonable suspicion. Rather, security government is increasingly concerned with anticipating abstract risks and diffuse threats that are subsequently to be attributed to particular social groups or enemies. Pre-emption is one mode of dealing with threats that comes into play here. Originating in strategic military thinking (Freedman 2004), this rationality now seems to also assert itself in criminology's subject field. Pre-emption differs from well-established forms of prevention in penal law and criminology in the

dynamic it unfolds of actions to be taken. Being focused on abstract and presumably imminent threats, this rationale is interventionist and inventive.[1]

In the face of these developments, a new debate on how to contain governmental interference in the name of security has emerged. What is remarkable about this debate is that, on the one hand, it aims at establishing more civil and human rights and attendant procedural safeguards that allow for systematically calling into question the derogation of laws and the implementation of new laws in the name of security. On the other hand, it recognizes the existence of a new dimension of threats, particularly in the aftermath of the terror attacks of 11 September 2001. As John Ferejohn and Pasquale Pasquino (2004: 228), for instance, contend: 'We are faced, nowadays, with serious threats to the public safety that can occur anywhere and that cannot terminate definitively. [...] If we think that the capacity to deal effectively with emergencies is a precondition for republican government, then it is necessary to ask how emergency powers can be controlled in modern circumstances.' Adequate legal frameworks and institutional designs are required that would enable us to 'reconcile' security with (human) rights, as Goold and Lazarus (2007a: 15) propose, and enduring emergency situations with the rule of law.

Traditional problems in the relationship between law and security government within this debate form a point of departure of critical considerations:[2] Emergency government today, rather than facing the problem of gross abuses of power, has to deal with the persistent danger of the exceptional becoming normal (see Poole 2008: 8). Law gradually adjusts to what is regarded as 'necessary'.[3] Hence, law not only constrains, but

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[1] For an excellent differentiation between the concepts of precaution, pre-emption, and preparedness, as anticipatory actions related to the identification of disasters along with their varying degrees of (pro-)active intervention, see Anderson (2010).

[2] For volumes that insightfully bring different perspectives into communication with each other see, for instance, the editorial work by Goold and Lazarus (2007), on security and human rights, and Ramraj (2008), on the emergency government debate.

[3] If the fight against terrorism takes place within the normal statutory process, mostly on the basis of temporary legislation and thus subordinated to the ordinary parliamentary and juridical controls, this does not necessarily prevent emergency measures from gradually being integrated into the regular system. On the contrary, this is observable in several Western countries. See, for example, the Patriot Act in the US, the Anti-Terrorism, Crime and Security Act in the U.K., and the 'Security Packages' in Germany, all of which were issued shortly after 9/11 and have brought about further security legislation.

at the same time also authorizes governmental interference. Furthermore, mainstream approaches that try to balance security and liberty are rarely able, or willing, to fully expose the trade-offs of their normative presuppositions. '[T]he metaphor of balance is used as often to justify and defend changes as to challenge them' (Zedner 2005: 510). Finally, political responses to threats never overcome the uncertainty that necessarily accompanies any decision addressing future events. To ignore this uncertainty, in other words, is to ignore the political moment any such decision entails, thus exempting it from the possibility of dissent.

Institutional arrangements that enforce legislative control and enable citizens to claim their rights are certainly the appropriate responses to the concern in question, namely that security gradually seizes political space and transforms the rule of law in an inconspicuous manner. They provide sticking points against all too rapidly launched security legislation, and with a 'culture of justification', as David Dyzenhaus (2007) has it, they establish political spaces for dispute, thus forcing the law to be enforced. Nonetheless, most of these accounts, in a way, simply add more of the same legal principles and institutional arrangements that are well-known to us. To frame security as a public good and ensure that it is a subject of democratic debate, as Ian Loader and Neil Walker (2007) for example demand, is a promising alternative to denying its social relevance. The call for security to be 'civilized', though, once again echoes the truly modern project of dealing with its inherent discontents (2). The present account brackets the normative question so as to focus on the practice of law itself. Conceiving of law within a Foucauldian perspective as a practice renders law's reliance on forms of knowledge visible (3). Contrary to the prevailing debate on emergency government, this perspective enables us, on the one hand, to capture how certain forms of knowledge become inscribed into the law in a way that goes largely unnoticed. The susceptibility vis-à-vis security matters exposes law's limitations. This point will be illustrated on the example of automated surveillance technologies, which facilitate a particular rationality of pre-emptive action (4). The conception of law as a practice, on the other hand, may also be understood as a tool of critique and dissent. The recent torture debate is an extreme example of this, whereby torture can be regarded as a touchstone of law's resistance to its own abrogation (5).

2. Law and reasoning

The idea that a 'culture of justification' (so termed in the name of brevity) would be able to bring about the desired results should be treated with caution – both as regards the particular logic of legal reasoning and justification and because of at least two empirical observations that shed light on law's limitations vis-à-vis security government. Firstly, the establishment of a 'culture of justification' itself presupposes what has yet to arise, namely a common concern about governmental encroachment in the name of security and a willingness of all parties to join in that discourse, if not share in its related arguments. This presupposition, to be sure, is indispensable for inspiring communication and facilitating the exchange of arguments. Moreover, in order to take effect the tried and true liberal legal principles, like that of proportionality and necessity, clearly need to be concretized by reasoning about actual cases. Yet, the assumption of a common concern goes hand in hand with a general trust in a form of communicative reason that will allow for transparency eventually on the matters at stake. Reason and to reason within 'a transparent, structured process of analysis to determine what degree of erosion is justifiable, by what measure, in what circumstances, and for how long' (Zedner 2005: 522), is considered basic to the solution. However, just as legal norms and principles are open to interpretation, they do not determine any normative orientations underlying the interpretative process. As Benjamin Goold and Liorna Lazarus (2007a: 11; see also Poole 2008: 16) observe: '[P]re-emptive measures designed to increase security can never be truly objective or divorced from our political concerns and values.' Typical for the acknowledgement of competing claims still to be weighed (Zedner 2005: 508), therefore, is that they end up being couched in a rather appealing rhetoric ('we should', 'judges should'). In a liberal vein, this requires a resorting to the least intrusive measures. Competing claims are thus relegated to the normative framework of balance (see ibid.: 528; Waldron 2003).

Secondly, a move in security legislation is noticeable in Western countries in which the threshold of governmental intervention has been gradually disposed in order to forestall actual offences, concrete suspicion and danger. 9/11 may be regarded as a catalyst here, as well as the fight against terrorism in general. But rather than being recent

phenomena, these transformations in fact represent a continuity over decades in the identification of ever new dimensions of threats, from sexual offenders and organized crime right up to transnational terrorism.[4] Although a tendency can be discerned, this is not to suggest that there haven't been any disruptions to it. Civil and human rights organisations have time and again countered these developments, and so have higher-court rulings. Even new basic rights have been established.[5] Though successful, these processes were unable to thwart the general trend of making private space accessible to surveillance in a way that would have been unimaginable decades ago. In this sense, paradoxically, new basic rights are rather indicators of new spaces of vulnerability. A closer look at higher courts' decisions on security legislation and additional recommendations by human rights bodies suggests that these lead to the amendment of the laws in question but not necessarily to a change in practice. 'For, as law becomes ever more closely intertwined with a proliferating assemblage of expertise, risk consulting, administration, and discretion, it inhabits an inescapable paradox', as Louise Amoore (2008: 849) neatly put it. Law for civil and human rights activists and lawyers is the very medium for challenging governmental encroachment, and, notably, the 'rule of law' represents the very principle to be defended. Under review, however, law encounters its own legislation – the modes of risk management it once itself authorized, and that will now have to be amended in accordance not only with the principles of the rule of law but also with the identified necessities of security government.

Thirdly, even though much security legislation has been passed in recent decades, human rights regimes have become very influential, as well (Snacken 2010). Today, it may be a matter of course that law first of all has to be appropriated and rights have to be claimed (Douzinas 2007). We have learned the lesson from Hannah Arendt's (1951) insightful analysis into the failure of human rights when those rights only counted for those who already disposed of them instead of those millions of stateless refugees who

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[4] For an overview, see Zedner (2009); for a link between the combat of terrorism and general tendencies, see Díez (2008); Krasmann (2007).
[5] See, for example, the right to 'informational self-determination' in Germany (BVerfGE 65, ruling of December 15, 1983), commended for putting the data user, not the subject of surveillance, into the position of having to explain him- or herself; and also in 2008 the right 'to the guarantee of the confidentiality and integrity of information technical systems' (BVerfGE, 1 BvR 370/07, 595/97, ruling of February 27, 2008).

were badly in need of them while seeking asylum during the Second World War. Furthermore, we may well have realized that the Universal Declaration of Human Rights in 1948 and the subsequent implementation of international conventions should not be considered merely as a progress in the history of human rights but, instead, as a response to the experience of the political and humanitarian catastrophes of the 20th century, marking a rupture with the presumed process of civilisation (Menke and Pollmann 2007). Nonetheless, some telling proof that the implementation and amendment of human rights and related institutions does not guarantee their realisation and improvement is found in, among other things, the fact that 'black sites' could have been established as far as into the 21st century, exposing terror suspects to the exercise of sheer and arbitrary force of security and military agents (Mayer 2008); that renditions, that is the illegal extradition of terror suspects into third countries where they will probably be tortured, could have been undertaken systematically, before and in the aftermath of 9/11, and not only by the US but by European states as well;[6] and, finally, that camps detaining migrants exist between the borders of states and far away from any possible access to law. Moreover, even though these forms of violent exclusion fundamentally contradict civilised democracies' claims to treating their enemies humanely and lawfully, they are at the same time being legally authorized. Rather than disappearing in 'legal black holes' (Steyn 2004), emergency measures are, in an irony of the law, subject to conclusive legal regulation (Aradau 2007).

3. Analysing law in relation to security government

The norm itself does not stipulate its application, Giorgio Agamben (2005: 40) contends. As a symbolic abstraction that stands apart from actual, or 'real', concerns and practices, the norm can exist independently of its enforcement. On the basis of this observation, Agamben extrapolates the nature of the state of exception. The exception is not exterior to, but rather an integral element of the law. It is 'the rule' that, while 'suspending itself, gives rise to the exception' (Agamben 1998: 18). The norm thus

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[6] As Human Rights Watch (2005) reported, in the case of renditions of terror suspects in the aftermath of 9/11, diplomatic assurances repeatedly served to render the practice legal, though only on the level of appearance without factually providing the necessary safeguards against the subjects' torture.

'applies by ceasing to apply'. It is suspended without being abolished. Deprived of its force, it instead gives way to 'a pure force' that disregards the norm (Agamben 2005: 40). Whereas Agamben's theory is illuminating in view of contemporaneous processes of the exception becoming normal, thus leading to an erosion of the rule of law, it has been criticized for conceiving of these mechanisms a-historically. Law sees itself deprived of the possibility of being thought of in terms of social forces and political dissent (Huysmans 2008).

Conceiving of law in a Foucauldian vein as a practice in a way reverses Agamben's perspective. It enables us to focus on forms of knowledge constantly shaping positive law. Foucault is not famous for having elaborated a comprehensive theory of law. Some critics have famously attributed this fact to Foucault's allegedly underestimating law's political and social relevance, most notably on the grounds of his analysis of governmental knowledge intruding into or invading the law.[7] Still, it is precisely this figure of thought that has led the author to quite insightful observations on how forms of power and law interact, which the present account seizes on.[8] Hence, Foucault elaborates how criminological expertise by the end of the 19th century turns out to be a 'practice of veridiction' (2008: 34) that in the name of empirical knowledge claims to speak the truth about the delinquent. Criminological veridiction not only challenges the early liberal conception of penal 'jurisdiction' that limited its focus on the criminal act. Moreover, it provokes the emergence of a variety of new procedures aimed at transforming the offender which in turn have to be regulated in legal terms (Foucault 2000a). Foucault then may have abstained from developing a theory of law for at least two reasons. On the one hand, he identified law itself as a governmental tool and mode of subjectification. It is the moral and normative authority of law that renders governmental power acceptable; and it is the 'juridical form' that allows for the

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[7] Some statements by Foucault, indeed, may have provoked this interpretation, among them the assertion that law historically 'recedes' with government increasingly addressing people and the population instead of the state and sovereignty (Foucault 2007: 99); and similarly that law is being 'colonized' by normalizing procedures (Foucault 2003: 38-9).
[8] On the relevance of this figure of thought with regard to the 'truth of the market' in our present shaping the notion of the legal subject, see Frerichs (2010); also Ericson (2007) who takes up Foucault's (1977: 222) notion of 'counter-law' in order to scrutinize today's governmental enchroachment in the name of security, though without much theoretical specification.

governed to articulate dissent as well as to be subjected to these democratic modes of participation (see Foucault 2008: 321; 1978: 144). On the other hand, Foucault's theoretical reluctance is quite consistent with his analytical account in general that did not aim at formulating grand theories nor rely on concepts and definitions with a determinate meaning (Valverde 2010). Instead, Foucault studied particular phenomena within their historically and locally specific contexts. He preferred to develop his method and theory of study out of the subject itself, thus accounting for both the subject's singularity and the conditions of its emergence (Foucault 1991). Social phenomena cannot be isolated from and are indeed only decipherable within the practices, procedures, and forms of knowledge allowing them to surface as such. In this sense, 'all phenomena are singular, every historical or social fact is a singularity' (Veyne 2010: 11). This, in turn, also involves that those forms of knowledge are intrinsically relational in a nominalistic sense. They are indissoluble from the possible experiences of their time (Macherey 1992).

Law is not 'antecedent to power', as Mariana Valverde (2010: 55) rightly observes – as nothing, in a Foucauldian perspective, is antecedent to power, even power itself. Power is not a substance that exists before being exercised. Rather, it effectuates as a force in the very moment of addressing its subject that simultaneously marks a point of resistance (Foucault 2000c). It is the 'contact point' (Foucault 1993: 203) where power takes shape and materializes, gaining its drive. It may be distracted but also well be incited and intensified. Similarly, law needs to be enacted in the first place in order to be able to make its own claims. It is in this sense that law is to be analysed in relational terms. It is, in other words, only conceivable as a practice, presenting itself in the forms and in the moment of its materialization. Law therefore is not comprehensible as a whole nor is it predictable, since law's action is never merely a reaction (Foucault 1987; Douzinas 2000). Its invocation is always an invocation of law's modes of codification and knowledge.[9] For the same reason, law can never be a mere instrument of power. It

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[9] Systems theory employs a similar perspective on law as being able to reproduce itself by its own rules of codification (Fischer-Lescano and Teubner 2004). Instead of the production of sense, though, a Foucauldian perspective focuses on the materiality of practices producing their own truth effects.

'eludes encapsulation by power' (Golder and Fitzpatrick 2009: 79) precisely because it is indissoluble from the forms of knowledge that enact it and that its enactment invokes. In this sense, law is to be analysed in relational terms.[10]

The notion of governmentality (Foucault 2007; 2008) most clearly elucidates these figures of thought, as it is concerned with the question of how modes of thinking translate into practices, procedures and technologies and thus render reality conceivable and manageable (see Gordon 1980: 248). Rationalities of government are in themselves relational. They depend upon our assumptions about the nature of a problem and our subsequent assessment of suitable means. Rather than reducing the classical governmental question to a simple relationship of adequate means and aspired ends, the assessment of what counts as rational varies with the assumptions about both. It depends on how the problems in question are being addressed and defined in the first place. The same holds for the law. The nature of the problem a legal argument is about centres on the concepts we have in mind. Instead of being ideologically inspired and resting on individual discretion (Kennedy 2008), these concepts are rather implicit forms of social knowledge. Like social imaginations (Taylor 2002), they are neither due to explicit doctrines nor are they merely 'embodied knowledge of habitus' (Calhoun 2004: 377). With a Foucauldian perspective this concept shares the idea that any form of thinking, and imagination, itself is a form of practice. Thinking of law in ideal terms, as designed to contain governmental interference or to provide citizens' rights, for example, is thus always a form of practice. There is no abstraction, as John Law (2009: 2) insists: 'Abstraction is always done in some practice or other'. Equally, there is no 'law' as ideal, other than we think of the law and we enact the law while thinking of it as ideal.

Rationalities, or modes of thinking, do not to simply programme reality (see Miller and Rose 2008: 39). Rather, they translate into technologies (Bröckling, Krasmann, and Lemke 2010). Technologies of government in turn produce certain truths and modes of seeing things. They do not merely address and describe their subject, as if this existed as

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[10] Contrary to other approaches that conceive of law in relation to the social, economic or political (for an overview, see Tomlins 2007), 'relationality' here is concerned with (micro-) practices and related knowledge.

such before being accessed. They constitute it. There is, in this sense, no transparency. Legal reasoning first and foremost produces a normative reality. Any enforcement of law, in turn, also invokes certain forms of knowledge. Technologies produce their own truth effects, they facilitate certain rationalities of action.

Two analytical implications of this account of law are relevant for the present context of scrutinizing law's normative authority vis-à-vis security matters. Law, on the one hand, may be analysed in relation to the problems and subjects that technologies render visible in a particular mode. This will be relevant in the following section that inquires how risk technologies shape the law. On the other hand, this account provides us with a critical perspective, as the example of the recent torture debate will demonstrate, for it dissolves the common binary thinking that distinguishes between the validity of a norm on a symbolic level and related governmental practices.

4. Anticipatory technologies and the creation of suspicion

Security matters arise within certain forms of knowledge and are manufactured by certain techniques and procedures of anticipating dangers and threats. Security government, moreover, exposes a particular relationship with knowledge: Any form of averting dangers entails uncertainty and therefore a productive or speculative moment. It requires dealing with an unknown and, at the same time, presumably threatening future. Preventing harm thereby aims at having certain facts not eventuate at all. Action has to be taken before danger materializes. A danger is to be anticipated, even if it is difficult to conjecture. The unknown has to be approached and assessed in order to render it accessible, both in the sense of being intelligible and manageable (Aradau and van Munster 2011). The identification of threats, thus, may be understood as a form of dividing the known from what is unknown and what is to be known (see Kessler and Werner 2008: 290) – even though no clear demarcation here is possible. Anticipation rests upon experience, that is, on what is known from the past. And our imagining the unknown future reflects back to the present. It governs our presumptions on adequate or inadequate measures, and our activities. Ethics and the governance of security, as Peter Burgess (2011: 4-5) has pointed out, follow a similar rationale. They are both about a gap, between what is and what should be, and between what is (to be) known

and what is (radically) unknown. In the face of threats, an 'ethics of uncertainty' and an 'epistemology of the unknown' intermingle indissolubly – and to this extend denude the political moment within law.

It is, paradoxically, the state of uncertainty that enables security matters to be implemented in opposition to legal norms. Indications of dangers or threats have to be taken seriously, while these threats at the same time are difficult to dispute, because they escape determination. This is all the more the case, the more abstract the danger or threat and the greater the expected harm is. The identification of catastrophic risks therefore is subjected to a rationality of pre-emption. It requires threats to be averted before they have a chance to emerge, and action to be taken before the addressed threat is even intelligible. This, in turn, means creating knowledge and producing indicators that provide clues on where and how to act. This creation of knowledge, however, never dispenses with uncertainty (Ewald 2002). Law that is designated to regulate and restrict governmental interference therefore sees itself confronted with the 'veridiction' of a threat that can neither be ignored nor simply disputed. This is particularly the case with automated knowledge techniques that are designated to gather and generate risk indicators, and related practices of surveillance and policing (Harcourt 2007; Hildebrandt and Gutwirth 2008).

By assembling certain knowledge techniques, practices, and procedures, anticipatory technologies unfold their own rationalities of action and create their own truth effects. On the basis of anonymous digitally sorted data, these technologies, firstly, abstract from concrete individuals. They create rather 'dividuals' (Deleuze 1995). As criteria of risk that are inscribed into automated screening and targeting technologies, particular patterns of behaviour, appearance or association to a certain group may thus already provide a basis for suspicion, independently of any actual acts. Technically generated suspicion in this sense reverses the notion of 'innocent until proven guilty' (see de Goede 2008; 109; McCulloch and Carlton 2006: 404). Secondly, the data and information these technologies provide are difficult to dispute. Whereas indicators of threat vary along with distributions of risk, the technical and virtual processes themselves are

rather opaque (see Rosga and Satterthwaithe 2009: 305; Lyon 2007).[11] Moreover, as technically generated, empirical knowledge, 'categorical identities' are less negotiable compared to social identities. Indicators like gender, income, educational background, and bodily features, which are codified as biometric data like eye colour, finger print etc., are apparently able to issue their own verdict, as security authorities tend to take them as empirical facts (see Aas 2004: 386; de Goede 2011). Thirdly, data mining and screening techniques for automatically targeting people – like the US-American border control system, or video cameras that are able to recognize faces or 'suspicious' movements – not only aim at clarifying, but generate and distribute suspicion. In contrast to the classic police concept of averting a manifest danger, the task here is not only to render visible what has not yet been discovered, but, most notably, to anticipate what is as yet unknown. Hence, by automatically comparing heterogeneous data and identifying particular combinations as being suspicious, these anticipatory techniques do not merely screen data according to predefined norms. They constitute norms (Amoore 2007). While they are not necessarily pre-emptive in themselves, they create knowledge that allows for pre-emptive action, and, in this way, may also affect the rule of law.

Measures like preventive detention, 'backlisting' and asset freezing,[12] or denying access to a country on the basis of – among other forms of intelligence gathering – automated risk modelling typically 'operate in place of, and in advance of the legal thresholds of evidence and decision' (Amoore 2008: 850). To the extent that they are being authorized by higher court rulings with the imposition of some procedural amendments, the mode of generating suspicion and legitimisation for encroachment on the basis of indicators, rather than actual acts, becomes inscribed into the law. As a consequence, the targeted persons' access to law tends to be relegated to a defensive position, as the recent European Court of Justice's ruling on backlisting and asset freezing exemplarily, according to Marieke de Goede (2011), reveals. A person or an organisation that has

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[11] 'Indeed, a key concern of legal activists seeking to contest risk profiling is that the population targeted cannot know the norm against which they will be judged' (Amoore 2008: 853).
[12] This technology primarily operates on the basis of both tracking money flows and social network analysis deducing suspicion from the contacts and financial relationships between individuals and organisations (de Goede 2008).

been subject to a backlist order is not accused of a criminal act and therefore does not benefit from the due process rights that are part of a trial. The reasons and evidence of suspicion are kept secret. The person concerned may, however, become aware of the listing if they are denied the opportunity to board a flight, refused entry to a country or have their accounts frozen. As a consequence of having a frozen asset order cut them off existential resources needed to participate in normal social life, the targeted person may litigate their cause. The European Court demanded that there be an amendment to the European Union regulations in place for implementing UN Security Council decisions that specifically addressed 'the right to be heard, and the right to effective judicial review'.[13] The Court, nonetheless, principally recognized the practice itself as legitimate and legal measure in the war on terror.[14]

The question of whether legislation and adjudication lead to an infringement or a transformation of the rule of law is a relational matter, but by no means arbitrary. Within discursive theory (Staeheli 2004), the anticipatory techniques that produce knowledge on threats may be regarded as being located at law's exterior. From here, they enter into a productive relationship with the law. This exterior transforms into law's other, in the sense of a counterpart, once related surveillance practices lead to disavowing law's own basic principles, which were inscribed, for example, at a certain historical moment into a constitution. It may not be easy to always demarcate the respective turning point. And it may be taken as a matter of further debate whether the recent development in Western countries, in which the threshold of governmental intervention in the name of security has been gradually moved in order to forestall actual offences and danger, constitutes such a disavowal. Nevertheless, analysing the recent torture debate, which will be the subject of the following subsection, exposes similar transformative mechanisms with regard to the law. The debate, notably, equally rests upon and operates with the claim to take today's existential threats seriously.

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[13] European Court of Justice, Judgement of the Court In Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation versus Council of the European Union and Commission of European Communities, September 3, 2008, § 334; quoted in de Goede (2011).
[14] Mohamed el Morabit, European Court of Justice, T-37/07 and T-323/07, September 2, 2009, §42-43; quoted in de Goede (2011).

5. Torture as law's other? A practice beyond the symbolic

Torture may be understood as signifying law's other. Although the prohibition of torture is an absolute norm of national and international law, it has been challenged anew recently. This discourse shares a concern with the debate on emergency government in general about a new dimension of threats, particularly in the face of transnational organized terrorism.[15] While purportedly upholding the absolute prohibition, Oren Gross (2004: 107), nonetheless, points to an exception and thus echoes a familiar argument: 'However in truly catastrophic cases the appropriate method of tackling extremely grave national dangers and threats may call for going outside the legal order, at times even violating the absolute prohibition on torture.'

Contrary to the presuppositions of the normative discourse theory, it is not reasoning in a narrow sense but rather a rhetoric that incites the imagination of threats and the audience's affects that challenges the absolute prohibition. Typically, the 'ticking bomb' scenario is enacted: a person in police custody knows the hiding place of a ticking bomb that threatens to kill many people, and yet the person remains stubbornly silent. This leads to the overt moral message: wouldn't you yourself torture this person, if it could save lives? This scenario has been widely recognized as a highly improbable, artificial construction that only gained more currency after 9/11 (Waldron 2005: 1713-4). The point, however, is exactly this: in order to fully realize its suggestive power, the scenario does not need to get it right. A scene that may be perceived and re-imagined in analogous situations incites affects (see Görling 2011: 25). Consequently, a threat that by its nature 'is unknowable' (Massumi 2005: 35), since it has not yet materialized, becomes real. It may be transformed into articulable feelings, political claims or consent. Moreover, by adding a moral component that allegedly contradicts legal norms, the rhetorical figure paves the way for the inconceivable to intrude into legal thinking. To put it in terms of systems theory: the moral argument here is being rendered perceptible to the law in a way that is compatible with the modes of legal codification (Luhmann 1993).

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[15] For a comprehensive overview of that debate, see Greenberg (2006); Levinson (2004).

A 'culture of justification' would, in this context, at once meet and miss the point. By systematically questioning the normative and empirical assumptions of the suggestive rhetorical figure it aims at destroying the affect in question. But it will not be able to challenge the argument once affective politics has done its work, so that a threat *indeed appears* to be grave, imminent, evident, and so on. Furthermore, implementing legal safeguards in order to render a practice transparent does not necessarily lead to the desired result, either, for it also means invoking the law and subsequently allowing the law to make its own claims. Subjecting a banned practice to judicial overview by a warrant that establishes procedural restrictions, as proposed in the torture debate (Dershowitz 2004), may well render a procedure visible and, in this sense, controllable. At the very same moment, however, torture would be institutionalized as a practice that now, under certain circumstances, would be considered lawful and acceptable, disregarding its absolute prohibition. Oren Gross's (2004) alternative conception of torture as a declaredly exceptional and 'extra-legal' measure that ex post would have to be submitted to an inquiry does not make a principle difference here. To officially think the unthinkable as a possible option is the same as to admit and facilitate it.

Common arguments like these rest upon the rather implicit presupposition, following a venerable sociological tradition, that the question of the validity of a legal norm will be decided primarily on a symbolic level. This account is quite plausible with regard, for example, to penal law. Since the symbolic is the representation of an absence, it is not necessary that each offence actually be prosecuted and punished in order to assert the norm in question and the reliability of the legal apparatus.[16] Rather, it is important to communicate the message, which in turn also requires that the performance of trials or acts of punishment, or some equivalent, must not be neglected. In a similar vein, a sociological account sees the validity of a legal norm first of all manifesting itself on a symbolic level. The validity depends on the belief that the norm is being abided by, rather than on whether this is actually the case. This account, however, allows for arguing that torture as an exception would not affect the law at all, whether it be in the

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[16] This insight has been most clearly conveyed by David Garland (2010), in his research on the death penalty as a 'peculiar institution' in the US. Though a persistent practice, the discrepancy between the death penalty actually carried out, and its being a normative and moral issue forms part of its currently dominant rationality.

form of an extra-legal practice (Gross 2004) or a warrant (Dershowitz 2004); it suggests that we tolerate a clandestine practice rather than have an open debate on torture's legitimacy (Žižek 2002); and it even indirectly approves the practice of outsourcing torture. These approaches, while upholding the norm symbolically, help to keep the practice off the public stage. Taken by itself, the legal norm is being recognized, but this does not mean that the norm will actually be respected. On the contrary, it is the discrepancy between the absolute ban on torture, on the one hand, and the persistence of torture as a practice that states have always resorted to in the name of their own defence (see Kahn 2008: 76), on the other, that obviously calls the symbolic account of law into question. Within a conception of law's validity that becomes manifest on a symbolic level, incidents of torture can be dismissed as exceptions, so long as the general belief about governments and security authorities (or legal scholars) sticking to the norm can be cherished. However, in Agamben's sense (2005: 40), this is exactly what designates the state of exception: the 'pure force' of law with 'a norm whose application has been suspended.'

Torture as a practice indeed eludes the law which, by itself, is incapable of containing it. But this does not mean that the practice does not affect the law. Torture forms law's other in that it is its negative constituent. Since it has been socially *experienced* and subsequently recognized as fundamentally being destructive, the practice has been legally banned. Thought of as an 'archetype' (Waldron 2005) of a legal norm, torture marks the end point of a range of practices that fundamentally contradict society's self-understanding of how to treat fellow human beings. Torture is able to destroy its victims, as well as societies that pursue and tolerate this practice. As the other of law's order, torture is nevertheless able to invade the law and, moreover, transform or even destroy the rule of law. Torture as a practice is at the same time a practice of the law. It expresses and manifests, and thus brings to light, how we understand – and practice – the legal norm. The absolute norm may be questioned and abrogated, but its erosion would also amount to society's self-dissolution in the form that it once understood and constituted itself.

This is perhaps something that Foucault wanted to tell us with his scepticism about a blind belief in law's normative force: to apprehend law as practice literally means that the burden is on everyday citizens to invoke the law and to claim their rights (Foucault 2000b). If law eludes encapsulation by power, the same holds for resistance. Law is an instrument of articulating dissent, though only in the moment of our actually doing it (Rancière 1998), and only if we take justice as a promise of law that is yet to come (Derrida 1990).

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