

## On the boundaries of knowledge

### Security, the sensible, and the law

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#### The preoccupation of security legislation

Security is intrinsically linked to emotions and affect, since it concerns undesired events or those dangers we do not wish to materialize. Security law is characterized by these particular temporal and affective dimensions. It operates with that which has not yet happened, but already preoccupies us. It does not limit itself to responsiveness to specific cases, since its focus is on potential dangers and threats. It is designed to be anticipatory, as it seeks to avert harm through the authorization of particular measures. Yet, there is always a gap between our preoccupations or fear right now, and the future to come.

In order to anticipate dangers and threats, societies generate diverse practices of knowledge production. The limits of knowledge, however, due to the difference between the present and the future, cannot truly be overcome by our »faculty of foresight,« as Immanuel Kant (2006, § 35) put it. That *praevisio* demarcates the boundary of the inaccessible that it seeks to transgress. It takes hold of the future. As Warren TenHouton (2005, 190), drawing on George Herbert Mead, observed: the »real« future, like the »real« past, »is unobtainable,« but »through the action of mind open to us in the present.« The act of anticipation, through our imaginations and related sites of knowledge production, fills in that gap between present and future.

Precisely this moment of anticipation of and attraction towards the future has received relatively little attention so far in legal theory. Drawing on the example of a supreme court decision, namely that of the German Federal Constitutional Court on the question of employing military forces

on national territory, this article first discusses how modes of thinking about security necessarily rely on social imagination and related emotions and feelings. Social imagination is not the opposite of knowledge. It is a part of anticipatory knowledge practices, but goes beyond the realm of language and representation to the extent that it is, first of all, about images and the sensible. Security is inscribed into the law because dangers and threats affect us. But law, and accordingly legal theory, tends to ignore emotionality, the sensible, and affect. It lacks sensitivity for the »other of reason« (Fischer-Lescano 2013, 13), which is not to be confused with irrationality but rather alludes to what is a-rational. As legal theorist Andreas Fischer-Lescano has observed: »Until the present, law has defined itself as the embodiment of rationality, reason, and objectivity« (ibid.). For, as literary scholar Stanley Fish (1994) famously insisted: »The law wishes to have a formal existence.«

Generally, procedures that reinforce legal norms and politics of fear that allude to threats are seen as operating on a symbolic level. However, this view fails to capture the ways in which security becomes a matter of concern through particular practices of knowledge production that shape our perceptions and feelings. Anticipatory knowledge practices always constitute a fictive reality that is distinct from the supposedly »real reality« but is nonetheless real. They produce their own evidence. Thus we are not working on the symbolic level, but must take the materiality of the fictive into consideration—and the corresponding imaginations, emotions, and feelings—when analyzing the relationship between security and the law. This argument will be discussed further on. First, however, it is worth taking a closer look at how the Constitutional Court came to its historic decision.

### **The people and the constitution under threat**

In July 2012, the plenary of the Federal Constitutional Court made a far-reaching decision, though it was largely ignored by the public. That decision paved the way for Federal Armed Forces combat missions within the borders of Germany, thus advancing a cause the Christian Democratic and Christian Social Union parties had advocated for more than twenty

years. The indispensable majority of two thirds of the members of parliament had never been achieved. Now, the Constitutional Court declared that »deployment of the armed forces and of specific military weapons« *were* in fact permissible under the constitution.<sup>1</sup> Critics considered this legal interpretation and its application a form of relinquishing the essence of the Federal Republic's political self-understanding. As the single dissenting judge, Reinhard Gaier, opined, the decision breached a fundamental principle of the Constitution founded in historical experience, specifically, the separation of the military and the police force.<sup>2</sup>

How did this come to pass? The basic facts of the case, which were of legal concern for almost a decade, can be briefly recounted. In 2006, the Federal Constitutional Court scrapped an amendment of the German Air Safety Law (*Luftsicherheitsgesetz*) that the legislature had passed two years earlier to allow the carrying out of air force operations in matters of public safety.<sup>3</sup> Among others, the First Senate of the Constitutional Court pointed out that parliament lacked the authority for such a far-reaching decision.<sup>4</sup> As a consequence, the Bavarian and the Hessian state governments initiated a judicial review (*Normenkontrollverfahren*) that six years later led to the above-mentioned plenary decision,<sup>5</sup> amounting to no less than a unilateral amendment of the constitution en passant.<sup>6</sup>

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1 BVerfG, 2 PBvU 1/11, July 3, 2012 (48); Press Release no. 63/2012, August 17, 2012. All translations from the German by the author.

2 BVerfG, 2 PBvU 1/11 (63). »The constitution,« the dissenter (62) went on to argue, »is also a renunciation of the German militarism that led to unimaginable horrors and millions of deaths in two world wars.«

3 The act that amended the legislation on aviation security tasks came into effect on January 11, 2005 (BGBl I, 78).

4 BVerfG, 1 BvR 357/05, February 15, 2006.

5 BVerfG, 2 BvL 8/07, May 4, 2010. This plenary decision was required, since in the judicial review the Second Senate had intended to deviate from the legal opinion that was essential for the First Senate's decision of February 15, 2006.

6 »Ultimately,« Judge Gaier opined (BVerfG, 2 PBvU 1/11 (61)), »the interpretation of the rules concerning a state of emergency reached by

But what exactly initiated this momentous decision? In the end, it was a minor incident which occurred in 2003 and received wide public attention that provided the opportunity to amend the Air Safety Law. A tiny power glider had gone astray over the skyline of Frankfurt. The unauthorized pilot, who had never obtained a flight license, threatened to crash the hijacked private machine into a skyscraper. This outcome, however, was averted by missions involving police helicopters and eventually a phantom jet fighter. As commentators observed at the time, this episode testified to »the power of images«—and, we may add, of emotions—to affect legal procedures, and security legislation in particular.<sup>7</sup> Even though things turned out well in the end, the federal government felt the need to take action. Otto Schily, at the time Minister of the Interior, introduced the contentious issue of employing military forces on national territory and, already in 2004, added amendment of the Air Safety Law to the parliamentary agenda.<sup>8</sup> In the public debate, the minister painted a scenario that clearly echoed the 2001 terror attacks on the twin towers of the World Trade Center in New York City, invoking the emotions this terrifying event had generated in the public. A passenger plane, he suggested, could be captured by terrorists and flown over a major German city. For the sake of the inhabitants' safety, he argued, approval must be given to shoot the plane down, which would require employing real jet fighters and hence the armed forces.

Lawyers subsequently weighed the issue of how to decide whether a hijacked plane and a destructive intention were at play and when it was warranted to approve shooting the aircraft down. Moreover, Otto Schily

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the plenary decision is in effect an amendment to the constitution.« Similarly, see Prantl (2012).

7 Taking up this observation made by commentators Janisch (2012) and Zeh (2012), the following argument draws on a discourse analytical perspective. This includes speaking of a general public security discourse and the way in which its terminology intrudes into legal discourse.

8 See German Bundestag, Plenary Protocol 15/98, January 30, 2004, agenda item 18. Pertinent here was § 14.3 of the Aviation Safety Law (LuftSiG), regulating the use of weapons for protection against threats.

himself later had to concede that downing a plane over a major city and thus threatening the lives of many people would be inadmissible (see Hipp 2005). It is thus all the more remarkable that this minor incident could function as a vehicle to transfer to the German context the New York City attack and the emotions and fears it triggered, resulting in such a far-reaching parliamentary decision.<sup>9</sup> Even if the power glider had not been intercepted, the city of Frankfurt would most likely not have sustained major damage. The financial district, rarely busy on Sundays anyway, had been partly evacuated and traffic redirected. Moreover, the incident did not involve a passenger plane and, most importantly, it was not even a terror attack. In reality, the small private machine that had been hijacked had no one but the pilot on board. Nonetheless, the endeavor that even Judge Gaier placed on the record in his dissenting vote—»to counter effectively the threat of international terrorism that had come to the fore with September 11, 2001«—had by then already shaped the political and juridical agenda.<sup>10</sup> Rather than on the basis of concrete intelligence, the decision had been inspired by fear-laden imagination.

Otto Schily evoked the typical »ticking-bomb scenario« familiar from the debate on torture (see Levinson 2004). In this hypothetical situation, a person is in custody who refuses to talk and who is aware of the location of a ticking bomb that directly threatens the lives of many people, for example, at a school or in a major city. Essentially, the question is whether it does not make sense to torture this person in order to obtain the desired information. Employing a highly emotive language, the ticking-bomb scenario makes »moral absolutes look ridiculous« (Waldron 2005, 1713). Implying that torture should no longer be prohibited absolutely, but should be an option in a state of emergency in the name of saving lives, it goes to the heart of constitutional democracy. The legal and moral problem that the scenario poses comes close to the issues raised in light of a hijacked

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9 In its 2006 decision, the Federal Constitutional Court also paralleled the terror attacks of September 11, 2001 and the 2003 power glider incident, noting the multiple security measures and laws triggered by these incidents: BVerfG, 1 BvR 357/05, February 15, 2006 (2–4).

10 BVerfG, 2 PBvU 1/11, July 3, 2012 (64).

passenger plane: Can the human dignity of terrorists be weighed against the lives of innocent people? Are we allowed to risk the lives of some people in order to save the lives of others?

Citing the guarantee of human dignity and the fundamental right to life,<sup>11</sup> exactly these kinds of legal questions troubled the First Senate of the Federal Constitutional Court, which in 2006 declared the amendment of the Air Safety Law unconstitutional. According to German law, a human life is not a variable that can be traded off against another human life.<sup>12</sup> This argument still held in the 2012 decision of the plenary, for while employing military forces within national territory was made permissible under certain circumstances, their mandate does not include shooting down passenger planes. The Court also imposed strict limitations. Putting the Federal Armed Forces into operation may be done only as a last resort, such as in a state of emergency of catastrophic dimensions.<sup>13</sup> This definition meant to thus exclude mass demonstrations from situations in which military intervention would be legitimate. What is more, the Minister of Defense is not able to decide independently, but only the entire Federal Cabinet. Even so, the use of military force, including the entire arsenal of the air force, marines, and army, is in principle permissible in the future to combat terrorist attacks (understood as »grave accidents« according to article 35 of the German Constitution).

Critics were concerned that the suspension of the principle of the division of authority between the police and the military could unleash further authorizations. Journalist Heribert Prantl (2012) voiced the concerns of many when he remarked: »The Karlsruhe decision is the first step towards

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11 German Constitution, art. I, § 1 and art. II, §2.

12 See also Roxin (2011, 554): »Hence, killing people who do not threaten the life of third parties is prohibited categorically. Conversely, saving the life of people is only imperative if possible without killing people who do not represent a danger.« For a further differentiation of this argument and a critique of the lack of clarity of the Constitutional Court's decision, see Merkel (2007).

13 BVerfG, 2 PBvU 1/11, July 3, 2012 (43, 46).

a process of militarization of internal security that is not in line with the German history and constitution.«<sup>14</sup> And, in fact, this critique was also expressed in the dissenting vote. Judge Gaier argued that the caveat articulated in the plenary's decision—that the state of emergency must be defined by an imminent damaging event of catastrophic dimensions—was sufficiently indeterminate to subsume mass demonstrations critical of the government under this definition in some future of escalated tensions.<sup>15</sup> Moreover, the question alone of the legitimacy and legality of shooting down an airplane that was allegedly hijacked by terrorists prompted a huge legal debate. Significantly, most commentators, eager to discuss and defend presumably pertinent legal norms such as the duty to save lives versus human dignity, and the fundamental right to life or the question of a state of emergency or of a legal black hole, took the scenario itself for granted. They disregarded entirely the difficult problem to be tackled in advance, namely how to ascertain whether a »significant incident in the air« is in progress.<sup>16</sup>

Against this backdrop, the question indeed arises as to how such a crucial decision could simply pass, quasi *en passant*, by an order of the plenary of the Federal Constitutional Court after decades of strong opposition—an order for this reason associated with a general tendency to extend enforcement powers in the name of security, for which the events of 9/11 functioned as a catalyst (Hecker 2006; Huster and Rudolph 2008; Mitsch 2005).<sup>17</sup> Is it in fact the power of imagination and emotion linked to security matters that allows for legal constructions to be dismissed that

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14 The German Federal Constitutional Court is located in the city of Karlsruhe.

15 BVerfG, 2 PBvU 1/11 (85).

16 This was pointed out in the first judgement of the Federal Constitutional Court in 2006 (BVerfG, 1 BvR 357/05 [126–128]); see also Roxin (2011).

17 Rather than an evaluation of whether or not that decision was appropriate and in accordance with respective security exigencies, what is at issue here is the political conditions that made this decision possible at a certain point in time and, most notably, the absence of a broader public debate on a matter essential to German political identity.

once, and for good historical reasons, were deemed indisputable? To answer this question, let us first take a closer look at what it means to anticipate dangers and threats in the governing of security.

### **Thinking in scenarios as an emotional gateway**

Security, to state the obvious, addresses that which is not desired and is feared. The possible, that which has not yet materialized, is (existentially) threatening. It is characterized by a particular intensity—insofar as the threat affects us—and temporality, to the degree that it is urgent and, by definition, cannot be ignored. In this sense, the unwanted possibility evokes an option, if not an obligation, to intervene. It is in this context that we may perhaps tend to agree with Otto Schily and be able to imagine that a catastrophic attack could also occur in Germany. And, likewise, it is in this context that the idea of the power of images and emotions appears plausible; in other words, that images and the perceptions related to them may have prompted the decision on the use of the military in the realm of internal security at the highest level of jurisdiction.

But what exactly does this mean, the »power of images« and emotions? Generally, more suggestive force is attributed to images than to words. Yet images do not have an inherent meaning. They are not self-evident, but rather signs (Schade and Wenk 2011) that receive their particular meaning only within a certain cultural readability. They are dependent on the context that frames them.<sup>18</sup> Hence, on the one hand, we may contend that images, as visual signs, are more easily accessible to sensuous experience than verbal signs: »Because visuals convey important meanings more rapidly and subconsciously than words alone do« (Feigenson 2014, 21). Images may affect us before and also independently of the particular meaning we explicitly attribute to them. As media theorist William J. T. Mitchell (1994, 114) observed: »If writing is the medium of absence and artifice, the image is the medium of presence and nature, sometimes

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18 See, for example, Judith Butler's (2010, 100) reflections on how to render the particular moral-political meaning of the torture photos of Abu Ghraib visible by re-contextualizing them and thematizing »the forcible frame.«

cozening us with illusion, sometimes with powerful recollection and sensory immediacy.« In this sense, material as well as immaterial images are to be understood as producers of meaning: »Images are active players in the game of establishing and changing values« (Mitchell 2005, 105). On the other hand, the readability of pictures and images relies on verbal language—or legible contexts that are shared on an emotional level. It is the captions, comments, subtexts etc. that contextualize the images provided by mass media (Blair 2004). What is more, it is a cultural repertoire that allows for reading these images in a particular way. Imagination, by contrast, may be understood as the faculty of our »consciousness that transcends mere visualization« (Mitchell 1994, 115). It transgresses the world of language and representation insofar as it is, first of all, about the »sensible« (Rancière 2004) and the formation of images.<sup>19</sup> It is this moment that imagination shares with the notion of affect. In a Spinozistic sense, affect may be understood as the ability of a body to affect and be affected. Affects emerge and are the result of encounters. As a form of the susceptibility of our body or of our senses, affects provide us with access to the virtuality of dangers we sense or are sensible to before we are cognitively aware of them (Massumi 2010). Although affects may be conceived of »as the initial component and mediation of experience by the body and the brain,« this does not mean that they are not culturally conditioned. On the contrary, and the political question is how they are, in »later reflection,« translated into categories of individual feelings and social emotions (Holland and Solomon 2014, 264).<sup>20</sup> As Holland and

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19 As Jacques Rancière points out, the sensible, in contrast to the sensorial, is always already discerned, distributed, and related to meaning (2004, 43). However, as an effect of forces (ibid., 39), the »partition of the sensible« comes before representation, as defined by Stuart Hall (1997, 17): »Representation is the production of meaning of the concepts in our minds through language. It is the link between concepts and language which enables us to refer to either the »real world of objects, people or events, or indeed to imaginary worlds of fictional objects, people and events.«

20 Holland and Solomon (2014, 264) address that »complex relationship« with the acronym of »ABCDE.« *Affect* is a *Biological* response to an event, which is conditioned by *Culture*, and later named within *Discourse* as *Emotion*. Affect, therefore, is that experience of an event which is biological, cultural

Solomon (*ibid.*, 273–74) observed in their study of US security governance post-9/11, »states« or governmental authorities »retain a quite influential position in their ability to articulate affect as emotion—to name that which citizens ›felt«—»affect is what states make of it.«

The mode by which images and the sensible take effect in processes of negotiating security matters should then be conceived as a complex interplay of related experiences and their mediations—actual incidents and their translation into social meanings and emotions—and political continuations of social imaginaries. The incident in Frankfurt, for example, clearly would not have had such a powerful impact on the public debate were it not for the images of the September 11, 2001 attacks and the emotions bound to them. The depictions of the destruction of the Twin Towers, and the concurrent feelings of powerlessness, helplessness, and incomprehensibility undoubtedly left a deep impression on most everyone. Nonetheless, Jacques Derrida (2003, 89) drew an important distinction here. On the one hand, the attacks induced »compassion« with the victims, outrage, and »sadness« as a response »to an undeniable ›event« in a way that exceeded mass mediation. On the other hand, it was only through the mass media that the »interpreted, interpretative, informed impression« and hence the »belief« could arise »that this is a ›major event.«<sup>21</sup> As media theorist Richard Grusin (2004) has pointed out, unlike any other comparable incident before, 9/11 became a media event because the images

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and somehow before and beyond its discursive articulation.« Affect theory that follows the thinking of Spinoza and Deleuze insists on the pre-verbal and pre-personal nature of affects. Speaking of affects as unformed and unstructured »intensities« that emerge in the encounter of bodies, Brian Massumi (1995, 107) for example contends that affect »is not entirely containable in knowledge, but analysable in effect, as effect.« Affects may materialize, for example, in spontaneous corporeal reactions such as increased heart rate, outbreaks of sweating or blushing before we realize these effects and are able to translate them into (individual) feelings or (social) emotions, though without fully capturing them in language.

21 A philosophic debate ensued on the aesthetics and iconic status of the image. For a critical account of this discussion with reference to Baudrillard, see Bronner and Schott (2012).

were perpetuated medially the very day of the attacks. The actual event re-occurred constantly in real time. In this way, the images not only became symbols, but part of our cultural register. Pushing the argument even further, Slavoj Žižek (2002) contended that these images were already part of our cultural register. Specifically, the phantasm of the destruction of skyscrapers by flying objects had already been pre-mediated by Hollywood movies and provided an emotional script for reading such events, a fact which led the philosopher to remark that the relationship between image and reality was inverted in the event of 9/11: »It is not that reality entered our image: the image entered and shattered our reality (i.e. the symbolic coordinates which determine what we experience as reality)« (ibid., 16). Similarly, Albrecht Koschorke (2005, 93) observed: »Fact came after fiction.« The cultural imageries that mirrored our own imaginaries of hostility came true.

Like Otto Schily's vision of a hijacked passenger plane hovering above a major German city, disaster scenarios may rely on experiences and imageries that have already independently taken on the shape of a scenario through media reproduction. As constellations of people and things that abstract from concrete situations, catastrophes are literally and figuratively enacted (Collier 2008). In this way, they may become real for us or »felt to be real« (Massumi 2010, 53). They are imaginable and, as imaginations, emotionally tangible. Precisely because constellations do not provide for specific identities and positionings (see Görling 2011, 24), they are malleable and may be applied to a variety of distinct imaginable situations. Scenarios that follow the well-known pattern of envisioning an extraordinary situation of threat as possible or probable thus enter into actual experiential contexts and function as elements of a politics of affect. Consequently, affect may also merge with phantasm, that is, with visions of threats that lack a particular object (see ibid., 25). What is felt to be real, or possible, and what is fictive is indistinguishably interwoven.

Hence, the threat of, and our imagining of, dangerous situations that could materialize in the future also shapes our expectations. Scenarios literally emerge before our mind's eye. They work as scripts that frame and form our feelings and emotions. Anticipating and foreseeing is at the same time

seeing, perceiving, and experiencing (Amoore 2007). Reality sensed in this manner, and this is Brian Massumi's (2010, 54) critical point, may subsequently justify the need to employ anticipatory action and to pass attendant legislation, as Otto Schily intended. The argument raised by Constitutional Judge Gertrude Luebbe-Wolff during a hearing on the judicial review of the Air Safety Law took up a similar scenario, which forcefully demonstrates that it is the constellation—played out in a scenario of threat with varying actors and addressees—that suggests the need to take action, in this case, constitutional amendment. What if, she asked, a hijacked tank were on collision course with a chemical factory? Wouldn't this incident disclose a significant security gap if in such a situation the hands of the armed forces were tied?<sup>22</sup>

The flourishing of scenario thinking in today's security policy debates only exposes a peculiarity of security management in general. The US government *9/11 Commission Report* on the failure of the secret services can be seen as paradigmatic. The report argued that the available intelligence and the indications of an upcoming threat were not correctly deciphered due to an inability to imagine that civil planes might morph into weapons of mass destruction. In short, one was unable to see what might have otherwise been evident and decipherable.

Donald Rumsfeld's (2002) catchphrase »unknown unknowns« was probably the most articulate way of summing up this failure of imagination. This phrase, delineating a new state of (in)security after 9/11, is a clear manifestation of speech act theory, for in the very moment of articulation it brought into existence that which it claimed existed. That was possible because it envisioned a yet unknown threat which, given its abstractness, was irrefutable. We do not know, and cannot even conjecture (*unknown*), who, what, when or in which manner (*unknowns*) the next disaster will

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22 Cited in Janisch (2012).

arise. What can be said for certain, however, is that we will have to reckon with it.<sup>23</sup>

The idea of pre-emptive action is inscribed into this logic. The intervention ignores the facts to the extent it is supposed to avert threats pre-emptively, that is, even before any symptoms emerge. Strictly speaking, in order to preclude any possible risk, we have to act and intervene before we even know, or are able to see, the enemy or threat (see Amoore and de Goede 2008, 11). This figure of thought has a convenient punch line, for it verifies itself. A catastrophic threat is per definition unforeseeable and incalculable (Massumi 2007) or, according to Rumsfeld (2002): »Simply because you do not have evidence that something exists does not mean that you have evidence that it doesn't exist.« The threat is potentially always already there and may be endlessly re-imagined.

One might think, this attitude is simply a reflection of the paranoia of one Secretary of State under the aberrational presidency of George W. Bush. But it is a narrative that has become predominant in the field of security governance. The concern is with those threats that are unforeseeable and incalculable.<sup>24</sup> Admittedly, although the expression »unknown unknowns« suggests otherwise, we are able to name expected catastrophes, so that we can face terrorist attacks or environmental disasters. Still, the temporal as well as the modal dimension—that is, the suddenness of a catastrophe's emergence and its actual appearance—are assumed to be unforeseeable and unpredictable.

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23 »Was it a failure of the imagination,« Errol Morris simply asked Donald Rumsfeld in his film *The Unknown Known*, »or a failure to look at the intelligence that was available?« (cited in Danner 2014, 65).

24 In Germany, since 2004 the Federal Agency for civil protection (*Bundesamt für Bevölkerungs- und Katastrophenschutz*, BBK), for example, organizes trans-regional exercises on crisis management based on scenarios of unforeseeable and incalculable catastrophes, available at: [http://www.bbk.bund.de/DE/AufgabenundAusstattung/Krisenmanagement/Luekex/Luekex\\_node.html](http://www.bbk.bund.de/DE/AufgabenundAusstattung/Krisenmanagement/Luekex/Luekex_node.html), accessed November 4, 2015.

### **Anticipatory knowledge practices and the reality of the fictive**

So far, it has been possible to establish two interrelated moments of security governance. On the one hand, security necessarily operates at the boundary of what is knowable (Burgess 2011). That is because it is oriented towards the future: threats are unknown insofar as they have not yet materialized. Dealing with the possible is therefore at the heart of security. The limit of the knowable is the non-transgressive boundary of our knowledge about the future. Security is always also concerned with its opposite: insecurity and uncertainty, and hence with that which is inconceivable. On the other hand, governing security involves transgressing precisely that boundary. That is its business as well. Security accordingly involves transgressing the boundary of what is knowable in order to avert a threat. The threat must be anticipated to render it accessible and manageable. Scenario planning and risk prognosis thereby function as knowledge practices that aim at achieving precisely this objective—without, however, ever actually reaching it. The future remains contingent. It cannot be grasped but in terms of the possible or probable.

How then do anticipatory practices and techniques convert the unknown into knowledge? These obviously replace the unknowable with a different form of knowledge. Anticipatory knowledge practices may be conceived of as modes of »affective time taking« (*affektive Zeitnahme*) (Opitz 2015), as they bridge the gap between the present and the future. However, it is not merely a matter of time, but also of speculation or »conjecture« (Aradau and van Munster 2011). Common to all anticipatory knowledge practices is that they operate on the basis of the unknown and at the same time constitute reality. In this context, the Italian sociologist Elena Esposito (2007, 31), following Luhmann, speaks of a »duplication of reality.« The duplicate does not compete with »real reality« but rather adds to it an »alternative description.« It is a fictive reality that does not simply approximate a certain truth, but forms a reality of its own. As narratives or imaginaries, fictive realities open up new perspectives and realms of experience that they then render tangible and comprehensible. Yet modern thinking is still shaped by the idea that we are actually capable of

distinguishing between author and imagination and between reality and fiction (Esposito 1998).

In contrast to the analytical concepts of social phenomenology, such as interpretative schemes and types, the discourse of the duplication of reality does not assume a »single reality.« Instead, it includes the idea of a »horizontal« division of the world into spheres of meaning (Esposito 2007, 68) that always only partially capture and describe reality. The literary notion of the fictive operates with the idea of multiple and overlapping realities that do not add up to a whole and consistent reality (Law 2003). Esposito refers to a »surplus of realities« (2007, 68). The fictive, then, is not the opposite of reality and alludes neither to »pure fantasy« (ibid., 120) nor to mere illusion. Rather, it is a practice of imagining, anticipating, and attributing meaning. It is a mode of operating within reality, of making sense of and, as it were, concretizing the imaginary. In this sense, the fictive may be understood as a reality of its own (for example when imagining the future) that appears to us as real—in the sense of imaginable, visible, and tangible—as the so-called real reality. In principal, it is distinguishable from real reality (e.g. we know that the imagined attack on a chemical factory or a nuclear power plant is fictive) and at the same time it takes effect in the real (Esposito 1998), meaning that we not only conceive of an anticipated terrorist attack or environmental disaster as a real possibility, but also act accordingly. Moreover, fictive realities always materialize within certain procedures and thus may deploy their own schemes of reference. Hence, risk schemes allow for comparing proverbial apples and oranges, for speaking of increasing or decreasing risks, and for focusing on quite disparate objects and activities as regards a certain risk, for example, to our health.

There is, however, a decisive difference between risk management techniques and scenario techniques as regards their relationship to the past and the future. This disparity reveals much about their varying ideas of reality. Risk management techniques analyze probabilities on the basis of past experiences. The presupposition of a certain continuity of our being in the world

allows for a projection into the future:<sup>25</sup> »The prognosis implies the diagnosis which introduces the past into the future« (Koselleck 2004, 22). Scenario techniques, by contrast, break away from that principle. In assuming a world of discontinuities, that is, of radical uncertainty, they aim to stimulate our faculty of imagination and thereby surpass the already known and familiar. In this sense, they ignore the idea of the singularity of events. As Jacques Derrida (2007) maintained in his deconstructive reading, for an event to deserve this attribution, it must be impossible to anticipate and foresee, or even to talk about in advance of its occurrence. In other words, there »is a certain impossible possibility of saying the event.«<sup>26</sup> Hence, the declared aim of scenario techniques is to transgress precisely this impossibility in order to render »the unimaginable imaginable.«<sup>27</sup> They are not merely a form of »affective time taking,« but also of affective reality creation. However, scenario techniques recognize that the faculty of imagination is always already culturally embedded. Fictional material, such as literature or movies, serves as a means of transcend our established modes of thinking and the limitations of our imagination.<sup>28</sup>

To be sure, both practices of knowledge production constitute reality by anticipating threats. That is true not only in that they produce knowledge as procedures for gathering insights. They also presuppose a certain order

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25 Consider the principle of insurance: the higher the risk of a disease or an accident, calculated from past experience, the higher the insurance premium.

26 Alluding to the idea of an invention that likewise is »possible only on the condition of being impossible,« Derrida (2007, 451) continued: »The event's eventfulness depends on this experience of the impossible.«

27 This catchphrase was coined as far back as the Cold War, when scenario planning was developed as a practice of knowledge production by, among others, the RAND Corporation to create civil defense strategies in the event of atomic attacks (Ghamari-Tabrizi 2005).

28 At issue here are risk management and scenario techniques as practices and modes of thinking. On the actual impact of the practice of systematically employing fictional material in scenario planning in the aftermath of 9/11, see Elmer and Opel (2006).

of reality that they simultaneously reproduce. Risk thinking »inserts the phenomenon in question [...] within a series of probable events« (Foucault 2007, 6), while suggesting calculability. As it is subject to the principle of accuracy, the claim, at least in principle, is that it can make the correct prognosis (one is not interested in conjecture but in knowing as precisely as possible the risk of a nuclear power plant disaster or the probability that a sex offender will recidivate). Risk thinking is thus about reassurance. It presumes that in the end a particular reality will materialize. Consequently, advocates of risk management only reluctantly concede that predictions, as part of the order of the probable, are only relatively accurate. As a form of knowledge that organizes a milieu of different elements in relation to each other, risk constitutes a fabricated and, accordingly, fictive reality that opens up a space of »speculative thinking« (O’Grady 2013).<sup>29</sup>

Scenario thinking, by contrast, acknowledges precisely this. It assumes that we live in a world of imagination in the first place. Here, the plane of reference is a possibility to be imagined (i.e. that of a catastrophic event), not a probability to be calculated. Rather than prediction, scenario thinking is a form of »premediation.«<sup>30</sup> Although insisting »on the reality of the premeditated future,« premediation, unlike prediction, as Richard Grusin (2004, 28) observed, is »not chiefly about getting the future right.« Scenario techniques aim at preempting the catastrophic event within our imagination, and in this sense they are about reassurance as well. Yet scenario techniques dismiss the idea that experience and expectation must be reconciled. They address the activity of premediation in order to prepare us for, and mitigate the horror of, the unforeseeable. The possible future that thus emerges is not antithetical to the real. It is rather, in Deleuze’s sense, the virtual future that exists in the present: »a future to come that is already with us, but which remains ungraspable« (Braun

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29 Ordinary conversation about a residual risk only euphemistically points to the fact that the remaining risk is actually unknown.

30 In contrast to *premeditation*, the term accentuates that *premediation* is always *mediated*: »knowledge, truth, or facts are never independent of mediation but are constructed and stabilized through the mediation of political, cultural, and technological networks« (Grusin 2004, 30).

2007, 17). A scenario's quality, then, rests not on its accuracy, but instead its vividness, or, as ethnographers would put it, verisimilitude. Truthfulness results when a presentation is convincing and has »internal coherence« (Atkinson 1990, 381). The fictional thus stipulates what shall be considered realistic.<sup>31</sup>

Both anticipatory knowledge practices thus serve to stabilize our expectations. At the same time, however, they may also have the effect of upsetting us, since there is potentially no limit to the imagination of threats. The experience of contingency is a key feature of our modern condition, and is also reflected on the etymological level. As the literary critic Burkhardt Wolf (2011, 19) insisted, modernity (from Latin *modernus*, from *modo*: »just now,« »only just«) represents a »state in-between« in a temporal and modal sense:

[T]he modern presents [itself] as something that has emerged just now from the given and the certain and only just been inscribed into the future to be and to come. [...] Because of their circular relation to the respective future, action and decision become contingent upon themselves. If there were just now sufficient reasons, then these only just need to be approved. Hence modernity has to prove itself not in the face of a particular reality, but with regard to those possibilities.

Modernity then is constantly engaged with the possible. And security is only a concurrent problematization of this experience of the contingent, though from the outset it is shaped by the idea of feasibility. Contingency, in this modern sense, is not the same as being inaccessible and inconceivable. As Reinhard Koselleck (2004) pointed out, for Kant it is not only the projections of our fantasy but also of our reason that proverbially

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31 Scenario techniques have in common with the modern novel that they suspend the opposition of the fictional and the real: the novel is not the »fiction of reality but the fiction of the reality of realities« (Blumenberg 1969, 27). Fiction presents conditions that are usually not encountered in the life world. It portrays conditions that render reality »realistic.« Hence, in order to appear realistic, the novel must not be real (Esposito 2007, 17).

knows no limits. Precisely this limitlessness as regards the anticipation of possible dangers and threats characterizes scenario techniques as well as risk management techniques. »Data doubles« that duplicate our personal features, for example, are also representations. They may be reproduced, recombined, and re-calculated virtually without limits, precisely because as empirical data they are at the same time derived from and detached from the »real reality« they claim to describe. What is more, risks are not merely calculations; they also affect us. They affect us through our imagining of dangers and threats. Knowledge about and representations of risks translate into perceptions and feelings; they produce, in this sense, »effects in the real« (Foucault 1991, 85).

If these observations are true, this would also imply that the symbolic meaning of things, processes, and actions acquires materiality and efficacy in the real. The »duplication of reality« is not just a matter of introducing another layer of representation. The established differentiation between the symbolic and the world of meanings and representations on the one side, and the material world of procedures, arrangements, and practices on the other, would be suspended. »Discourse, in this sense, is any form of experience—linguistic or otherwise—which is even minimally organised« (Gilbert 2004).

### **Security matters, and fictive beings matter as well**

As regards the analysis of law and its relationship with security matters, the observation above gives rise to two implications. First, »the struggle for law« (Jhering 1992) does not play out merely on a symbolic level. What is at issue, rather, is the practice of »dingpolitik,« as William Walters (2014, 104) has recently elaborated, leaning on Latour. Dingpolitik is to be distinguished here from realpolitik. Whereas the latter »is politics built on the belief in and assertion of indisputable facts,« the former is »a politics oriented around unsettled »matters of concern.« Realpolitik implicitly assumes a division of the world into real things or facts, on the one hand, and sense and the attribution of meanings (that are nonetheless already at hand), on the other. We are, in other words, able to designate the things surrounding us more or less clearly through linguistic means. The notion

of »matters of concern,« by contrast, focuses on the question of »how matter comes to matter« (Barad 2003), that is, of how discursive objects determine what can be said and done. »Discourse is not what is said; it is that which constrains and enables what can be said. Discursive practices define what counts as meaningful statements,« and also what counts as meaningful emotions. Hence, discourse cannot be reduced to »linguistic or signifying systems, grammars, speech acts, or conversations« (ibid., 819), but is always a material and emotional practice. And objects or certain constellations that become subjects of the security discourse as matters of concern are »not just the result of a complex assemblage of social practices and values« but emerge »as an object whose materiality has both enabling and constraining effects on what can be said and done to secure it« (Aradau 2010, 492). There is, in this sense, »no ultimate distinction between the material and the ideal, the physical and the mental, between practice and meaning« (Gilbert 2004).

If we wish then to comprehend what accounts for the »force of law,« we should examine how particular »matters of concern« make their way into the law. In keeping with our example, we should try to explain how the threat represented by a power glider that went astray over the city of Frankfurt was able to merge with the images of the horrendous attack on New York City's Twin Towers and how these images have come to be tied to a narrative of catastrophic events and terrorist threats that has also inspired anticipatory knowledge practices aimed at producing evidence of just those threats. As legal studies has long-since emphasized, legal judgments and the »life of the law« in general rely on language and rhetoric as much as on legal procedures and practices of adjudication that authorize the speech act and the speaker in the courtroom. Yet what counts as law, as lawful, and as a pertinent legal norm, also depends on social imageries and imaginings and related perceptions that exceed language and representation in the first place.

Not only security law, but law in general is organized around cases that have not yet materialized. Liberal law does not, indeed, premeditate on the legality of future acts (see Opitz 2015, 167). Nonetheless, provision is inherent in its norms: to do justice to a particular case, legal norms have

to be sufficiently indeterminate, even vague (Waldron 2011). Hence, like any term, legal norms try to deal with that which is not yet imminent (see Blumenberg 2007, 12) and, in this sense, be prepared. Yet, security law does not limit itself to preparedness, it commends itself for being preemptive.

The idea of the formal existence of the law ignores its reliance on any kind of knowledge in order for its norms to be activated. The difficulty with security law is its reliance on anticipatory thinking which also provides us with certain forms of knowledge—with an idea of how to think about the future and how to face the concomitant uncertainties. Security law is susceptible to dangers and threats that, as fictive realities, are also real. And to the extent that we are preoccupied with the future and prepare for the worst case, security matters may become inscribed into the law so as to extend the norm or create new norms of intervention. What is more, if there is no ultimate distinction between the material world of things and practices and the world of meaning and imagination, it means that we live in and with fictive realities that take on a life of their own. The law itself produces such fictive realities that deploy their »own principle of being« (Pottage 2014, 162). One need only think of figures like the legal person, the legally protected good, or events that are not really determinate such as, in the case of the plenary decision above, an imminent occurrence of catastrophic dimension. As »cognitive or epistemological forms,« Alain Pottage explains, these are artefacts »that have been turned into procedures.« They are »substances« (ibid., 159) that are able to generate and sustain themselves. They are »practicable and intelligible without reference to [their] possible actions upon a social context« (ibid., 162). We should therefore, perhaps, be more aware of what Bruno Latour (2013, 242) has designated as »beings of fiction [that] populate the world.« These fictional beings, such as scenarios of terrorist attacks, invite us to follow their trajectory, that is, their own narrative and »course of action,« in order for them to make »sense« and »persist in being« (ibid., 236). And while we reprise them and prolong their existence, they in turn not only constitute our subjectivities (ibid., 243), but also fill certain legal norms with meaning.

If the »force of law,« understood as the »force within the law« to enforce the law, is not only determined by reason, rationality, and objectivity in a narrow sense, but also by a-rational moments which, »as energy, emotion, and desire are part of the law« (Fischer-Lescano 2013, 15), then we may likewise contend that the force of law is also inspired by imaginations and fictive beings that translate fears and hopes—and experiences and anticipations—into legal operations. And it is in this sense that the law »needs to develop a culture of a *sense* of justice (*Rechtsgefühlskultur*) that is reflected in legal constructs« (ibid., 118; emphasis added)—and that we should analyze the materiality of the »partition of the sensible« (Rancière 2004) when theorizing on legal mechanisms.

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