Routledge
Taylor & Francis Group

Law & Literature

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rlal20

Getting Legal Reason to Speak for Itself: The Legal Form of the *Gutachten* and Its Affordances

Jacco Bomhoff

To cite this article: Jacco Bomhoff (11 Oct 2023): Getting Legal Reason to Speak for Itself: The Legal Form of the *Gutachten* and Its Affordances, Law & Literature, DOI: 10.1080/1535685X.2023.2259670

To link to this article: https://doi.org/10.1080/1535685X.2023.2259670

© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group

Published online: 11 Oct 2023.

Submit your article to this journal

Article views: 396

View related articles

View Crossmark data

Full Terms & Conditions of access and use can be found at
https://www.tandfonline.com/action/journalInformation?journalCode=rlal20

Check for updates

Getting Legal Reason to Speak for Itself: The Legal Form of the *Gutachten* and Its Affordances

Jacco Bomhoff

Abstract, Roughly translatable as "expert memorandum," the term *Gutachten* and its cognates refer to, at once, a textual format, a problem-solving technique, and a highly distinctive writing style at the heart of German law and legal education. This article is interested in what this format, technique, and style *do*, and in how they do it. To this end, it invokes the concept of affordances, to study the way the *Gutachten*'s formal characteristics are implicated in the production of legitimacy effects. The most important of these combine into a dual disappearance of both author and artefact. This leaves the abstract form of the *Gutachten* as a transparent and fractal rendering of legal reason itself. The article, finally, builds on this case study of a legal form central to German law and legal thought, to offer reflections on method for the comparative study of legal reasoning formats, techniques, and styles. The suggestion will be that grasping legitimacy effects and uncovering how they may help sustain local legal actors' commitments to their reasoning tools, will require a cultural study of legal form, containing at least some moment during which critique is suspended.

Keywords, Cultural study of law, form, affordances, legal education, Germany

This article gives an account of one of the key legal forms in German law: the *Gutachten*, understood as a textual format, a problem-solving technique, and a distinctive style of legal writing. The cultural – that is, broadly, formal, phenomenological, and socio-legal – approach taken in what follows has three related aims. The first is to use the format, technique, and style of the *Gutachten* as a way into a German "culture of expert legal knowledge," as an aspect of one of the most influential legal systems of the postwar era.[1] Secondly, the article is also intended as a

Law & Literature, pp. 1–27. ISSN 1535-685X, electronic ISSN 1541-2601.
© 2023 The Author(s). Published by Informa UK Limited, trading as Taylor & Francis Group
This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (http://creativecommons.org/licenses/by-nc-nd/4.0/), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way. The terms on which this article has been published allow the posting of the Accepted Manuscript in a repository by the author(s) or with their consent.
http://dx.doi.org/10.1080/1535685X.2023.2259670

contribution to our understanding of the internal structures and dynamics of technical legal knowledge formats and reasoning practices more generally. On this second level, this study engages more specifically with the relationship between the technical means of legal reasoning and their – aesthetic, epistemological, affective, social, and political – effects. In language to be developed further below, this will be called the question of the affordances of legal forms. Finally, this affordance concept will be invoked as part of an argument on the comparative cultural or humanistic study of legal reasoning. Here, the article suggests an approach that temporarily suspends critique, as a way towards grasping the production of the legitimacy effects that sustain the commitment of local actors to their reasoning techniques.

Briefly, then, to get underway, a very short introduction to the *Gutachten*, and to why this artefact of German legal culture might be worth a closer look. The term refers, firstly, to a highly specific textual format or professional genre, roughly translatable as that of the expert memorandum or report. But its cognates also indicate an analytical problem-solving technique (the *Gutachtentechnik*) and a distinctive style of writing (the *Gutachtenstil*). The technique, in short, consists of the step-by-step, syllogistic verification of all the necessary elements for the applicability of a given legal norm. In the German context this will typically mean a legislative provision from one of its main codes, or from its Basic Law. More extensive discussion of the aesthetics of the *Gutachten*-style will occupy much of what follows. But for now, one of its signature characteristics is the way the possible applicability of any relevant norm and the outcome to which this would lead, is always initially formulated *conditionally*, as a hypothesis, to be verified subsequently, and to be categorically affirmed or rejected in conclusion. As format, method, and style, the *Gutachten* occupies a position in German law and legal education that is simultaneously absolutely central and highly constrained, paradoxical, and contested. The format and the practice have a long history, going back to the preparatory memoranda legal trainees would be required to draft for judges supervising their education, as part of reforms of civil service entry requirements instituted in eighteenth century Prussia.[2] But as a prescribed writing style, the *Gutachtenstil* received the enforced prominence it has today only more recently, with the massification of German legal education and its State-organized final examinations, beginning around the 1970s. Writing *Gutachten* is, today, *the* prescribed format for all answers to problem questions on the state-organized component of the so-called First Juridical Exam, which students take at the end of their university legal training. A deluge of student-focused publications offers practical advice on how to think and write in this style, even as authors also lament its rigid enforcement by examiners as superficial and as imposing unrealistic demands. The format and the style are portrayed as a local German peculiarity, but also as the transparent reflection of an efficient and analytically rigorous problem-solving technique with claims to universal application.[3] Law students are told that writing *Gutachten* gives a good

preview of their later practical daily work. But the insistent focus on this specific format and style are also decried as largely irrelevant to actual legal practice.[4]

This article uses the notion of legal form to bring together the manifestations as format, technique, and style, listed above. To avoid overly cumbersome formulations, it will refer to all these guises taken together as (the) *Gutachten*, understood as both a thing and a practice.[5] The *Gutachten* is a "tool of reason," in a way similar to other knowledge formats and practices such as scientific diagrams or double-entry bookkeeping.[6] It is a medium for legal reasoning, in the double sense of being both a material artefact as well as a set of technical resources into which beginning lawyers are socialised.[7] The article's main project, then, is an inquiry into the kinds of effects this artefact and these technical resources help engender, and into the way these effects are produced. Many of these effects will be familiar from earlier socio-legal and critical studies of legal reasoning and legal education. They operate across aesthetic, affective, social, and political registers, and include grand "legitimacy effects," such as those of necessity and naturalness, objectivity and universality, "aptness or compelingness," "of-courseness" or obviousness; as well as more specific ones, such as effects of coherence, precision, commensurability, symmetry, balance, proportion, or the golden mean.[8] The relevant literatures exposing these characteristics and these effects, however, come with two significant limitations. The first is that even if their broad contours will often be familiar, as is already hinted at in some of the scare-quoted terms listed above and as Clifford Geertz has observed, formulating "stylistic features, marks of attitude, tonal shadings – whatever you want to call them" of a discursive or technical practice with any precision and depth, remains "something of a problem, because there is no ready vocabulary in which to do so."[9] Geertz gives the examples of mathematicians calling their proofs "deep," or of sommeliers characterizing a wine as "assertive;" in law one could think of cases that are "hot," or constitutional arguments that are "on the wall."[10] The problem here is not just one of finding the right terms but also the methodological means with which to grasp the "tone and temper," mood, or character of expert legal discourse.[11] And as Paul Friedrich has noted, writing on the anthropology of tropes, "pervasive moods," such as scepticism, or irony, or sincerity, "are egregiously difficult to analyze with our existing formal tools."[12]

The second, related, challenge is this. Even where we do manage to find suitable methodological means and terms for capturing these effects, what remains especially unclear are the dynamics of *how* they arise. In Duncan Kennedy's pithy formulation: it is simply "not at all obvious … how legal discourse manages to produce the 'effect of necessity,'" or, we might add, any of the other effects listed above.[13] This question, on what could be called the inner dynamics of legal reasoning, is hard to answer because it depends on numerous difficult background questions: on the interplay of actors and their tools; on the limits these tools impose on how their uses can be perceived; on the individual and social dimensions of interpretation, style and genre,

and of legal consciousness and legitimacy; on the effects of linguistic forms more generally, and on their social preconditions. Putting this point in a more critical language: we may long have known that legal form "does not function as a kind of neutral technology" and that legal language constitutes and frames what it purports to merely name.[14] What we are much less clear on is *how*, exactly, it does these things. And especially, on how it does these things, at different times and in different places, in ways that often seem both strikingly various and uncannily similar.[15]

As part of an effort to come to grips with these dynamics, Section I, below, first introduces the form of the *Gutachten* and its surroundings in German legal education. Section II then tries to, as it were, "isolate the means" by which the *Gutachten* produces, or rather co-produces, whatever effects it has.[16] These include, in particular, the form's conditional style and its linear and recursive structure. Section III introduces the concept of affordances as a way to capture means-effects relations in legal reasoning. It suggests that, taken together, these formal features afford an experience of legal reason "speaking for itself" – an affordance the article ultimately calls a "sovereignty effect." In this way, the *Gutachten* emerges – or rather disappears – as an authorless artefact, and as a fully transparent medium offering a fractal rendering of legal reason itself, as a unified, repeating whole. Section IV, finally, addresses the question of the possible relevance of these intricacies of German legal reasoning for debates within comparative law. In part, German law assumes significance simply as the origin for a range of influential "export products" in modern constitutional rights law. This creates a need for understanding the background intellectual infrastructure that makes these instruments "work" in their home jurisdiction.[17] But the study of the affordances of legal forms also has a more general relevance for methodological reflection on comparative methods, suggesting the importance and possibility of a comparative approach that temporarily suspends critique in order to better grasp the means through which faith in legal reason is locally sustained.

I. AN ARTEFACT OF GERMAN EXPERT LEGAL CULTURE

The idea that there might be something that could pass for "German Legal Style," capitalized and in scare quotes, must surely seem implausible. And the further suggestion that there could be one specific artefact that embodies – or at least provides a window into – many of that style's most distinctive traits, even more so. And yet, on both counts, the *Gutachten* really does come close, at least when it comes to internal or "expert" legal culture.[18] The reasons for why this is so have much to do with the structure and aims of German legal education. As has often been noted, legal education in Germany is geared, traditionally and still nominally, towards training *judges*, rather than attorneys.[19] This remains true today, even if only a tiny percentage of graduates will ever in fact become

judges. This default "judicial outlook" for law teaching has some important implications. One is that all law students will have to follow the same two-stage pathway, of university law studies followed by a two-year apprenticeship in a range of professions. This apprenticeship (*Referendariat*), during which candidates are remunerated by the State, has a heavy emphasis on work in judicial and prosecutorial offices. Another implication is that law students do not specialize, during either of these two stages, but are rather expected to master all areas of law. The German terms *Volljurist* and *Einheitsjurist* – comprehensively and uniformly educated lawyers – capture these professional ideals.[20] This mode of legal training imposes extremely powerful homogenizing tendencies. This poses something of a challenge for the reflexive suspicion of essentialization and coherentism that, for good reasons, often marks studies of culture, including of legal culture.[21] German legal culture, though, certainly at the professional or internal level often seems to go out of its way precisely to reinforce these ideas.[22] The contribution of the *Gutachten* technique and style to the production of homogeneity will be an important theme in what follows.

The practice of writing *Gutachten* accompanies law students all throughout the university-centred first part of their legal education. This begins with problem-solving exercises from the proverbial "Day One" of their studies, when they will have only seen very little actual law; an approach one advice publication for students likens to asking them to dance before they can crawl.[23] And it continues until the final, state-organized component of the First Juridical Exam, which concludes their university legal education. On this exam, the assignment to answer problem questions "in the manner of a *Gutachten*" is the uniformly prescribed format. It is important to note also that the same basic technique and writing style is required across all the major areas of law that feature on these final exams – private, criminal, and public.[24] But, after years of learning how to write in this specific style, however – that is: at the start of the period of apprenticeship, following the First Juridical Exam – something curious happens. For their Second Juridical Exam, candidates are supposed to retain the basic step-by-step problem-solving technique already familiar to them, but now to formulate their memoranda in a diametrically opposite way, with the conclusion stated upfront followed by the arguments necessary to support it. This writing style – the *Urteilsstil*, or judgment style – is seen as the "mirror image" of the *Gutachten*-style.[25] But even as the underlying technique is thought of as highly similar or even identical, the stylistic boundary between the judgment- and the memorandum-style is strictly policed. Maintenance of the *Gutachten*-format is officially recognized as an acceptable marking criterion in the statutes that govern the First Juridical Exam. Given that German law allows court appeals against state exam marks, and that such appeals are in fact fairly frequent in practice, examiners can find in the stylistic features of the *Gutachten*-style safe ground to stand

on in differentiating between scripts. Small deviations from this style of writing and reasoning, therefore, are likely to be sanctioned immediately with a dreaded mention of "*Urteilsstill!!!*" in the margins of any wayward answer script.[26] This official, enforced character of the format of the *Gutachten* contributes to making it a particularly suitable entry point from which to explore German legal style.

The technique – and for a crucial part of their training also the style – of the *Gutachten*, then, as prescribed format for exam questions, can function as a concise statement of what it means to "think like a lawyer" in Germany. Or at least: of the image of "thinking like a lawyer" that students are socialized into. As one recent overview in a student-focused publication put it: "The *Gutachten*-style is essentially your basic attitude as a lawyer."[27] As another author puts it: "Mastery of the *Gutachten*-style is essential to 'juristic thinking.'"[28] In the German context, this "thinking like a lawyer" turns out, to a large extent, to mean learning to *write* like a lawyer. It is through mastery of these specific rules for legal writing, another author tells students, that they will obtain not just better exam results, but a "deeper understanding of the law."[29]

Before moving on to a more detailed exploration of the *Gutachten*'s characteristic formal features, one further element of its background deserves mention. It is true, as just discussed, that the judicial connection is crucial for the character of this particular form. The typical addressee of a juristic *Gutachten*, as students learn to write them, is indeed a judge, or more realistically: an examiner, who will typically be either a judge or a law professor. But, crucially, a *Gutachten* – and the activity of *begutachten* – is not exclusively, or even originally, a *legal* practice or format. The term has its roots in "*für Gut achten*," or "to consider (as) correct, or true," and refers more generically to expert reports, such as those given by court-appointed medical examiners or psychologists, real estate surveyors, or experts judging the authenticity of works of art. In this sense, the *Gutachten* shows a close affinity to what John Guillory, in his work on the form of the modern corporate memo, has called the "information genre."[30] A *Gutachter*, outside the legal context, is an appraiser, or estimator. A *Gutachten* is an expert judgment, given on request, and in response to a specific question, or in relation to a specific factual matter (a *Sachverhalt*, which is the same term used to describe "the facts" in a legal problem question).[31] The English term "judgment," importantly, used here as a translation of the German "*Urteil*," in this context means the discerning judgment of, say, an art critic, rather than the decision of a court. A *Gutachten* is a practical document mediating expert knowledge for use by non-experts – "interested in objective information, and often in a hurry," as students are told – intended to help them solve a specific problem.[32] A *Gutachten* does not offer parallel solutions presented on an equal footing, but one overarching argument progressing towards one solution, taking counterarguments and contrasting opinions into consideration.[33] The etymology of the term also shows a shift over the past centuries, from an emphasis on

subjective opinion to a more "objective," "*fachmännisch*" – meaning "expertly," but in an applied, practical sense – judgment.[34] These associations to a more generic sense of expert judgment cloak the *Gutachten* with a sense of objectivity. "The essentially neutral position of the *Gutachter* is the same in every discipline," one author tells students, before offering a revealing image to underline his point. To get a sense of what is asked of them, he writes, students should think of "the monotone drone in which a coroner records their findings on a Dictaphone – at least in US TV series."[35]

II. CHARACTERISTIC FEATURES OF FORMAT, TECHNIQUE, AND STYLE

A *Gutachten* takes the form of an answer to a question, and in the context of this article, this will mean an answer to a question on a high-stakes exam. The opening line for such questions almost always follows a very similar format: "*In the manner of an expert memorandum*, and addressing all questions of law that present themselves, verify whether …," or a comparable formulation along such lines. This assignment, in short, instructs candidates to verify whether all necessary conditions for a particular legal consequence are met on the given facts. A useful first introduction to this form can be gleaned from two of the most common terms used to designate the standards for "good" answers and solutions written in this style. These are: "*brauchbar*" and "*nachvollziehbar*".[36] The first of these means "useable." In legal practice this would mean "useable" by the client requesting the expert advice (the *Mandant*). But in the examinations context the term refers rather to suitability for use by the judge to whom the memorandum is addressed, enabling them to adopt the reasoning as their own. This particular criterion is especially important because it also commonly serves as a standard in the official marking schemes for the First Juridical Exam, laid down by statutes in the different *Bundesländer*. The second term brings together a broad range of meanings that typically figure separately in English. These include comprehensible, reasonable, and accountable, but also, most strikingly, *replicable*, as in the context of scientific experimentation. These associations to scientific practice are reinforced through the consistent use of the verb "*prüfen*" – to verify, or to test; as in the quote above – to describe the central intellectual activity of the *Gutachten*-technique. The remainder of this Section sets out, in more detail, some characteristic features of what good – useable and replicable – answers in the *Gutachten*-format look like, as a way towards capturing its salient features as a legal form.

1. Monologic. As a matter of genre, the *Gutachten* is best qualified as a monologue, an "internal proceeding."[37] The memorandum presents neither a staged dialogue between competing positions, nor a partisan defense of one side of an imaginary dialogue before a judge. Its aim is rather to have the reasoning process it contains adopted in its entirety, by the judge to whom it is – at least

in theory – addressed, as that judge's own reasoning. This aspect of the *Gutachten*'s character fits with the "intensely non-dialogic quality" of civil law judicial reasoning more generally.[38] A slightly different way of capturing this is to say that the report has a critical target audience in the first person. The addressee is initially the writer her- or himself, and, later, the supervising judge, who, ideally, would adopt the entire report as their own, merely by transposing it into the declaratory form of the *Urteilsstil*.[39]

2. Conditional. Arguably the *Gutachten*'s most visible stylistic feature is its reliance on the subjunctive mood. A concise description of the form, to recall, is that it consists of the "step-by-step verification of an initial hypothesis by using the conditional form."[40] This description again points to the two dimensions of technique (step-by-step verification, on which more below under (3)) and writing style (the conditional form) that, as has been mentioned, can and do also appear separately, but in the *Gutachten* are typically and characteristically joined.[41] The subjunctive or conjunctive mood (*Konjunktivus II: Positivus*) lies at the heart of the *Gutachten*-style of reasoning and writing. A properly formatted *Gutachten* states that a particular legal consequence "would" or "could" obtain – that X could be liable; that public authority Y could have acted unconstitutionally – *if* all the necessary elements for that consequence, which are then listed upfront, are met. And it does this, over and over, for every potentially relevant legal norm, repeating a standard sequence: conditionally stated conclusion, verification of whether necessary conditions are met on the given factual constellation, affirmatively stated conclusion, repeat.[42] An example of what one such component part of an overall *Gutachten* could look like, is reproduced below from a student manual:

> "A könnte sich durch das Mischen des Gifts in den Tee des C wegen Totschlags gemäß § 212 Abs. 1 StGB strafbar gemacht haben [Einleitungssatz Gesamtgutachten]. (…) Fraglich ist, ob die Handlung des A kausal für den Tod des C war [Einleitungssatz Untergutachten]. Gemaß der 'condicio sine qua non'-Formel ist ein Verhalten ursächlich für den tatbestandlichen Erfolg, wenn die Handlung nicht hinweggedacht werden kann, ohne dass der Erfolg in seiner konkreten Gestalt entfiele [Definition Untergutachten]. (…). Vorliegend haben A und B eine jeweils tödliche Menge Gift in den Tee des C gegeben [Subsumption Untergutachten]. Somit ist die Handlung des A kausal für den Tod des C [Schlusssatz Untergutachten]. A ist strafbar wegen Totschlags zum Nachteil des C gemäß § 212 Abs. 1 StGB [Schlusssatz Gesamtgutachten]".
>
> "Through the act of mixing poison into C's tea, A may have rendered themselves punishable for homicide in the sense of Article 212(1)

Criminal Code [Introductory proposition for the *Gutachten*]. The question is whether A's action was a cause of C's death [Introductory proposition for the sub-*Gutachten*]. Pursuant to the '*conditio sine qua non*' formula, an action is a cause for a consequence as defined in a statute when, but for this action, this concrete consequence would not have occurred. (...) [Definition for the sub-*Gutachten*]. In the present case, both A and B respectively have each mixed a lethal quantity of poison into C's tea [Part of the syllogism for the sub-*Gutachten*]. Therefore, A's action is a cause of the death of C [Concluding statement for the sub-*Gutachten*]. (...) A is punishable for homicide of C in the sense of Article 212(1) Criminal Code [Concluding statement for the *Gutachten*]".

Example from: Valerius 2017: 23, with the qualifications of the relevant terms in square brackets as in the original, here reproduced also in a different font. The example shows the conditional verb form (... *könnte*); an alternative conditional formulation (*Fraglich ist* ...); the nested structure of a *Gesamtgutachten* and an *Untergutachten*, or sub-*Gutachten* (see further under no. 4, below); the centrality of the technique of *Subsumption*, or syllogistic reasoning; and the mirroring between opening proposition (*Einleitungssatz*) and conclusion (*Schlusssatz*) (see further under no. 7, below).

At a most general level, the mere fact of enforced stylistic consistency already lends the text a strong "homogeneity of tone," which, in itself, affords the impression of an absence of rhetorical "tricks."[43] But the subjunctive mood, coupled with the sequence in which the argument proceeds, can be tied to three more particular effects. First, this mood and structure accentuate, rather than hide, the idea that the reasoning process is meant to be syllogistic in nature.[44] The reasoning is transparently presented as based on logical inference, in line with the acknowledged primary role for *Subsumption* as the standard of validity in mainstream German conceptions of legal reasoning. Second, this form of writing highlights the requirement that *all* possibly relevant conditions for any relevant possible legal outcome be verified in a transparent way. This minimizes scope for a conception of legal reasoning as a matter of strategy, selective argument, or "mere" persuasion.[45] Third and most significant is the way the *Gutachten*-style projects an image of law and justice as dependent on, and embodying, both hesitation and certainty, openness and closure.[46] The form requires an upfront statement of any end conclusion to be reached, coupled with the immediate

acknowledgment of this conclusion's – for now – uncertain, hypothetical, contestable character. To a degree, this may in fact reflect the relevant analytical process: "Always start by thinking in terms of an open outcome ('could …,' 'the question is whether …,' 'in doubt is whether …')," one author advises students; this should allow your thinking and your writing style to match up.[47] But even if one is skeptical or agnostic about the actual, internal order in which reasoning proceeds, the result, in any case, is a text that draws simultaneously on the registers of the subjunctive and provisional, and of the declarative and final. On the one hand, the *Gutachten* is written *as if* its outcome was not yet fixed.[48] In this mood, any legal conclusions are explicitly kept in abeyance until the end of the relevant reasoning chains. At the same time, the requirement that the possible conclusion be stated upfront – provisionally, but in detail –, combined with the syllogistic scaffolding of the subsequent analysis, produces a strong *as is* effect for when this conclusion is ultimately either affirmed or rejected.

3. Linear. The reasoning form of the *Gutachten* is one of a linear progression towards a result (even if that result is also provisionally stated upfront as a hypothetical possibility, as just discussed). The step-by-step nature of the reasoning process by which the applicability of legal norms is "verified" has already been mentioned, as has the fact that the *Gutachten* does not present multiple alternative solutions for consideration but rather reasons towards one single outcome. When engaging with conflicting views, in case law or academic writing, candidates are also often advised to first deal with any views they reject, before moving on to the one they will adopt.[49] The linear character of the form still manifests in further ways. One of these is the strong suggestion to candidates to avoid using the conjunction "because" – *weil*, or *da* in German –, since in this construction the explaining reason only follows the statement of conclusion, even if just by a few words, thus scrambling the required order of argument. Instead of "because," candidates are told to favour "therefore" – *deshalb*, *daher* – since in those formulations reasons precede conclusions.[50] While this distinction, between because and therefore, may sound petty to outside observers, it is one other feature of the *Gutachten*-style of writing that is often strictly policed by examiners.[51] A final linearity-enhancing style-feature of the *Gutachten* is the often-repeated advice to avoid references to points to be made later in the text, of the kind "see further below … ."[52] Such references, again, would jumble the orderly progression of the argument. As one commentator puts it, summing up the ideal of reasoning that progresses step-by-step towards a conclusion: with this kind of memorandum, the reader should be "free to step out at any time, and ask someone else instead."[53]

4. Recursive. The argument structure of the *Gutachten* does not only proceed along a straight line; it also follows a recursive pattern. "Every overarching

Gutachten consists of many smaller *Untergutachten*," or sub-*Gutachten*, as in the example given earlier. Each of these "mini-reports" deals with one of the potentially "several hundred" steps of syllogistic verification on a typical exam question.[54] While it is true that it would often be unrealistic to expect the full *Gutachten* treatment of each of these elements, the basic style should remain recognizable, even in shortened form. As a result, the overall report achieves a kind of *fractal* appearance, replicating the same structure and stylistic features at different levels. In this way, "each component part" of the memorandum "is a smaller version of the whole."[55] Significantly, following a logic similar to the one Bill Maurer has identified in his ethnographic work on knowledge practices in Islamic banking, the relevant "whole" in this regard is, at least potentially, not just this individual *Gutachten*, but rather some conception of legal reasoning more generally, of which the memorandum is intended to be a mere transparent reflection. This last point, in particular, will be taken up in more detail in the following Section.

5. Flat. "A juristic *Gutachten* is no high literature, but rather a methodically derived, scientifically exact answer to a legal question;" the "literary value" of this kind of memorandum is "inherently low."[56] The didactic literature telling candidates how to write their exam answers in *Gutachten* form is replete with recommendations to practise "stylistic reservedness," so as to preserve the "objectivity" of the text.[57] Style elements, such as irony or exaggeration, or any attempt at lightness or entertainment, are to be avoided. The motto for the form should be "substance before beauty."[58] If, for instance, repeating the same term looks inelegant but is arguably more precise than any available synonym, then candidates should opt for the ugly repetition. In particular, candidates are told to avoid strong qualifications – "*juristische Kraftwörte*" – such as "absolutely" or "untenable;" or the kind of overtly – and overly – substantive terms law students are also often warned against in other legal systems, such as "ethically," or "unfair."[59] The result is a form of rhetoric "that occludes its own rhetoricity," and in this way "denies its own status as a modality of argumentation."[60] The ideal is a tone that is "tone-less"; an aesthetic that precisely does not aim "to convince on the force of its aesthetics."[61]

6. Focused. A good *Gutachten* should remain focused on central issues. This is true of this genre of practical, question-led memorandum generally. But the requirements of focus and emphasis are especially important for *Gutachten* written as answers to exam questions. As is the case for legal education elsewhere, "issue spotting" or *Schwerpunktsetzung* is an important element of general juristic competence in the German context. Unlike for court judgments, or for exam answers written in the "judgment style" for the Second Juristic Exam, it would not be exactly right to say that a *Gutachten* written for examination purposes should "not contain a single superfluous word." Such answers, unlike judgments,

should after all deal also with judicial or scholarly views they will reject. But a *Gutachten* – either in practice or on exams – is clearly not suited to scholarly excursus. On their exams, candidates should know when to use the "full" or extensive *Gutachten*-style, when to use its abbreviated form, and when to merely note more obvious points in the so-called *Feststellungsstil* (diagnostic or ascertaining style). The right admixture between these different approaches, more than commentator notes, will assist greatly in giving a *Gutachten* its "sovereign" appearance.[62]

7. Conclusive. A properly formatted and reasoned *Gutachten* works towards a definitive conclusion. This conclusion should mirror the initial hypothesis set out in the introductory sentence, and should, of course, no longer be formulated in the conjunctive mood. This point is related to a range of issues already mentioned. One is the basic neutral, or "judicial," perspective candidates are meant to adopt. Another is the matter of the tone of writing, already mentioned under (5), above. Just as they are not encouraged to employ excessively "strong" vocabulary, for example in rejecting contrary arguments, candidates are also told to avoid noticeably "weak" or hesitant formulations. There should be "no doubt" at the conclusion of a *Gutachten*.[63] This rejection of hesitation may, at first sight, seem to sit in some tension with the basic subjunctive mood that also pervades this style of writing, as discussed under (2). But it is important to note that the open-endedness afforded by this mood is kept within strict formal bounds. It is allowed to affect only the *order* of reasoning, and not its premises or is outcome. And so, as also mentioned earlier, it is precisely the integration of abeyance and closure that is a characteristic feature of this writing style. "As a rule of thumb: the conditional style [of the *Gutachten*] serves to introduce a process of verification that can be concluded by way of a definition" of the necessary elements of a legal norm, as matched to the given facts.[64] Reinforcing this tendency towards certainty, as part of their exam-prep, candidates are told to expect problem-case scenarios that do not leave salient matters open to doubt. If they do encounter such a question, this will likely be a matter of bad drafting, study manuals note; rather than, say, a deliberately crafted intellectual challenge.[65]

III. WHAT THE *GUTACHTEN* AFFORDS

Professionals trained in law commonly think of the skills they have acquired as merely a honing "of general analytic ability rather than a shift into a very particular, culturally laden *kind* of thinking and talking."[66] They have, in other words, not really learned to "think like a lawyer;" they have just learned how to think *better*. Elizabeth Mertz's observation, made in the context of US legal education, fits well with typical views on the thinking- and writing styles of the *Gutachten*. These, too, are commonly seen in generic terms, of logical reasoning

or presentational clarity, rather than as a deeply particular style of thought and expression. The aim for a cultural study of such discourse is precisely to bring out these particularities, as well the means and dynamics by which they are engendered. As part of this project, this Section invokes a tool taken up in recent work in literary studies and in anthropological investigations of technology: the concept of affordances. Developed initially in ecological psychology and later in design studies, affordances indicate "the potential uses or actions latent in materials and designs."[67] Caroline Levine, in a chapter on affordances from her book "*Forms*," gives some helpful examples:

> "Glass affords transparency and brittleness. Steel affords strength, smoothness, hardness, and durability. (…) Specific designs, which organize these materials, then lay claim to their own range of affordances. A fork affords stabbing and scooping. (…) Designed things may also have unexpected affordances generated by imaginative users: we may hang signs or clothes on a doorknob, for example, or use a fork to pry open a lid, and so expand the intended affordances of an object."[68]

In recent years, use of this concept has been extended to cover not just natural and material environmental factors, but also literary forms, as in Levine's own work; "socio-technical infrastructures" in studies of law and technology; and "patterned cultural practices" more generally.[69] Bringing together formal, phenomenological, and affective perspectives, the impetus behind these lines of work is to try to "focus on the concrete processes by which imaginative effects are engendered."[70]

Looking at legal forms such as doctrines or reasoning techniques through the relational lens of the affordance concept allows – *affords*, inevitably – keeping in simultaneous view elements that other perspectives tend to separate. First, thinking in terms of the affordances of legal forms means paying simultaneous attention to, both, the effects they help produce and to the means by which these effects are produced.[71] As Simon Stern has emphasized in his work on legal aesthetics (though without explicitly using the affordance concept), merely investigating pervasive effects in and of modern law – symmetry, balance, proportionality; obviousness, objectivity, naturalness, *etc.* – is not enough, since each of these effects can arise in multiple different ways. Rather, scholars should also pay attention to the means by which these effects are engendered, and to how these might change over time, or from place to place.[72] Secondly, the affordance concept opens up a middle ground between approaches emphasizing the agency and efficacy of – legal, literary, technological, or other – forms, on the one hand, and those stressing their indeterminacy and the corresponding spaces of

freedom available to individual users or authors, on the other.[73] This tracks a point Duncan Kennedy makes in his critical analysis of legal reasoning, about the aim of trying to make sense of the way effects arise as "the product of interaction between legal work and [its] materials," of course within a particular social setting that makes certain modes of discourse possible in the first place.[74] The affordance concept is also useful, thirdly, for its ability to capture a wide range of different possible means and effects, whether these are (more) rhetorical or (more) technical, (more) social or (more) individual, epistemic or affective, aesthetic or normative.[75] Looking at the *Gutachten* in the terms of the affordances of legal form, in short, can ground a study of both the capabilities and the constraints latent in this medium for legal problem solving. Finally, in a theme to be taken up in more detail in the next Section, the affordances concept – and formal and phenomenological approaches more generally – allow for an investigation of legal reasoning practices in which critique is temporarily suspended. This, in turn, opens up space for a good faith encounter with local forms of "faith" in legal reasoning and its means of reproduction.[76]

The legal form of the *Gutachten* clearly shares many of its affordances with other legal reasoning styles and formats. These include effects like neutrality, precision, and coherence, and probably also a brand of political centrism and valorisation of the status quo.[77] The main claim to be put forward here is that the individual technical, formal characteristics listed in the previous Section combine into, and are reinforced by, a more general overarching affordance perhaps best described as a double disappearance effect. In this way, both the concrete memorandum and its individual author fade away, leaving only the abstract form of the *Gutachten* as an unmediated, transparent, fractal rendering of the fabric of "mere" legal reason.

Production of this effect begins, along Barthesian or Foucauldian lines, with the disappearance of the author. This has several aspects. One of these, typical for legal discourse in many familiar settings, is a prohibition on first-person writing.[78] More specifically for this context, there is a sense, firstly, in which the *Gutachten* never had an "author" to begin with. In a revealing term, the person drafting this kind of legal memorandum, at least in the exam setting, is called an "editor" (*Bearbeiter*); a term expressing a sense of "working with" or "on" the relevant legal materials, rather than any kind of authorial invention. Secondly, the figure of the *Gutachter*, not just in the examination context, disappears in the homogeneity ideals of German legal education and the German legal profession. Recall the two main labels to describe fully qualified lawyers in Germany, already mentioned above in Section I: *Volljurist* and *Einheitsjurist*. These "complete" and "uniform" jurists have had to study all areas of the law in equal depth, pass an extremely demanding double set of (State-organized) exams, and undergo an extensive period of apprenticeship covering all main fields of judicial

and legal practice. They are, in short, unreservedly and comprehensively qualified, at least in theory, with their expertise warranted by the State. But in this homogenized and homogenizing system of qualifications, the individual juridical expert or craftsperson disappears; each expert becomes quite literally as good as the next one. And so, part of the ideal of the *Gutachten* a as document format, is that it does not matter who the *Gutachter*, as expert, is. As has been mentioned: one ideal for this style of argument was explicitly that a reader could "step out at any time and ask someone else".

Crucially, however, it is not only the individual author who disappears behind her or his *Gutachten*. The memorandum itself, as a concrete artefact, also never achieves independent form or force. The principal means affording this effect are transparency and homogenization. To begin with the first of these: a *Gutachten* memorandum presents itself as entirely hyaline. "A *Gutachten* merely fixes, in written form, the thought process of its editor."[79] Numerous features of the *Gutachten*, as has been seen, contribute to affording this image of a "mere" transparent reflection of legal thought: from the routine, semi-obligatory, open-ended initial formulation of hypotheses to be verified, through the explicit syllogistic scaffolding of these verification steps, to the final declarative conclusion mirroring the initial opening statement. The sense of a transparency intended here, as a mere recording of thought "already there," shows important parallels to, and overlaps with, *sincerity* as a discursive mood. In the description of the anthropologist Webb Keane, "[s]incere speech adds and subtracts nothing in words that was not already there in thought."[80] And this impression, of nothing added and nothing left out, is afforded not just by the transparency of the *Gutachten*'s structure and writing style, but also by its flat and homogeneous character. On this point too, many of the relevant elements have already been noted in Section II, above. This is a writing style that demands equal application across all fields of law, all types of cases, and all stages of the relevant reasoning chains. There is no space for exaggeration or hesitation, or – especially relevant in relation to the "sincerity" point just noted – strategy, irony, or humour. The monologic character of the *Gutachten*, as also noted, works to counter, rather than promote, the "linguistic duelling" and switching of perspectives that is so central to legal writing in some common law jurisdictions, including notably the United States.[81] It is, rather, an advisory document to be presented to a judge and, upon acceptance, to be pronounced by them, ventriloquially. The *Gutachten*, in short, is written from a position that is no position; in a style that works very hard to present itself as the absence of style. It is this kind of extreme "homogeneity of tone" that Clifford Geertz has identified as one of the means by which individual sentences can be made to read as though they all end "with an implied 'of course.'"[82]

Deciding what to call this effect of a dual disappearance of author and artefact, is not so easy. For reasons that go well beyond the scope of this article,

what might in some ways be the most obvious label – some form of "objectivity-effect" – is not ideal. Part of the difficulty is that objectivity seems at once too obvious for participants, and too hard to take seriously for critics. To give just one example from the critical angle: While Duncan Kennedy's well-known "*Critique of Adjudication*" offers careful analyses of the way effects of necessity, coherence, consistency, and rationality are produced in different fields of law, "the pretension to objectivity" appears in the book only as the target of critique – quite literally, as "the enemy" – rather than as an object of study in its own right.[83] Closer to the spirit of this article would be Elizabeth Mertz's study of the linguistics of US legal education, which does inquire into the ways in which law "*achieves* objectivity". As Mertz argues: "the means to … objectivity is through language: through insistent dialogic exchange and questioning, taking each side, trying on different positions and roles".[84] But while this is illuminating on US legal education, it also neatly illustrates the main difficulty of invoking "objectivity" as a label to designate what a specific legal form like the *Gutachten* affords. The term is simply too broad and has too many meanings to be useful. The *Gutachten*, for example, may afford the objectivity of the "trained judgment" of the expert, but also the objectivity of mechanical, syllogistic reasoning, and – through the practice of "verifying" hypotheses – associations to the objectivity of modern scientific practice.[85] And all these, in turn, are still radically different from Mertz's own emphasis on dialogue and duelling. In short: using "objectivity" in the description and analysis of how legitimacy effects are produced and experienced in law – let alone in the comparative study of such effects! – would require an enormous amount of background work to become meaningful.[86]

There is one intriguing term that crops up within the German discourse surrounding the *Gutachten*, where it is used from time to time to describe the tenor of the reasoning and writing style exam candidates should aim for. Students are told their memoranda should be based on a "sovereign" (*souverän*) *Gutachten*-technique presented in a "sovereign manner."[87] In this context the term suggests a form of seemingly effortless, embodied, technical mastery,[88] of which the main manifestation would be an ability to distinguish between legal problems requiring more extensive analysis, and those that can be dealt with summarily (a good *Problembewüsstsein*, presented by way of a "sovereignly mixed writing style"). The term is also used, in these same publications, to describe the institutional status of the *Gutachten* – or rather: the lack thereof – again to describe the kind of tone candidates should go for. "A court judgment is an authoritative public act," students are told; "a *Gutachten* is not."[89] This is meant to suggest that all of its legitimizing force should come from the strength of its arguments alone. Court judgments in Germany are pronounced "*Im Namen des Volkes*," or in name of the people, with the phrase appearing below an image of the Federal Eagle. A *Gutachten* is explicitly *not* given in anyone's name, even where its

reasoning is ultimately intended for adoption by a court. These notions, then, of seemingly effortless, natural – *sovereign* – technical mastery, and of full reliance on the independent – *sovereign* – force of reason alone, seem useful for depicting the characteristic effect of the *Gutachten* that we are trying to capture: This is the effect of legal reason speaking for itself. Of the form of the *Gutachten* as an entirely transparent medium for legal reason speaking directly, authoritatively, and in a unitary voice; identifying within itself both problems and solutions. And of every individual *Gutachten* – and every miniature sub-*Gutachten* within it – as a localised, fractal rendering of the fabric of this legal reason as a unified whole.

IV. AFFORDANCES OF LEGAL FORM, AND WHY THEY MATTER: CRITICAL COMPARISONS AND THE HERMENEUTIC OF SUSPICION

In comparative studies of legal reasoning practices and associated worldviews, the question "how does this work?" is often only a small distance away from an incredulous – and at least implicitly critical: "how can such a system *possibly work?*".[90] More specifically, this reformulated question asks, "how can local actors really be committed to these doctrinal tools and these outlooks, *in good faith?*". This question becomes especially relevant where, as in the case of Germany, a legal system is influential far beyond its own borders. Many of the most familiar components of what has been called "generic constitutional law" or the "global model" of constitutional rights law, find some of their roots, or their paradigmatic example, in German post-war legal thought and judicial practice.[91] This is true, in particular, for such widely used reasoning tools as proportionality review and purposive interpretation.[92] The study of German legal education and expert legal knowledge practices can provide insight into the thick webs of background conditions allowing these instruments to "work" – that is: have disciplinary or aesthetic appeal and afford experiences of functional efficacy and legitimacy – in their home jurisdiction. Understanding these background conditions has obvious implications, not just for a grasp of the way these instruments operate in German law, but especially also for comparative law, in spurring reflection on the ways in which they may, or may not, be replicated or have close analogues elsewhere.

This final Section aims to show how the cultural study of the affordances of legal forms like the *Gutachten* can speak, more specifically, to critical comparative studies of law. The idea, building on recent writing in literary scholarship, is that attention to form can work to *suspend* critique. On such an approach, the search for the "absent causes" and hidden beneficiaries of legal reasoning that are the hallmark of critical readings, can at least be supplemented with micro-level studies of how and why legal materials "find resonance and can

create strong responses" for those who work with them.[93] Suspending the search for the hidden sources and distributive effects of legal reasoning, this (neo)formal and (neo)phenomenological perspective can carve out space for efforts to grasp the internal dynamics, the felt efficacy, and the local character of the sheer phenomenon of the force of legal reason.[94] These suggestions will be briefly illustrated by reference to two examples: Mariana Valverde's critique of Aharon Barak's book on "*Purposive Interpretation in Law*," and Duncan Kennedy's work on the "hermeneutic of suspicion." In neither case does the study of the affordances of legal form provide any kind of inoculation against their critical analyses, whether they target judges excessively confident in their ability to discern "the needs of society" (Valverde), or lawyers routinely attributing bad faith to their opponents while remaining committed to the legal necessity of their own arguments (Kennedy). But it does offer alternative ways of understanding when and how these phenomena arise and are sustained in specific local contexts, and in this way opens up, perhaps, new avenues of critique.

A first example concerns the practice of purposive, or teleological, interpretation. This is a technique with both a long tradition in German legal thought and close connections to currents in "the migration of constitutional ideas" that links the work of influential courts in jurisdictions such as Canada, South Africa, and Israel, to the postwar German constitutional order.[95] In a devastating critique of former Israeli Supreme Court Chief Justice Aharon Barak's book "*Purposive Interpretation in Law*," Mariana Valverde finds some of the unstated assumptions of the legal outlook sustaining this practice "nothing short of astounding".[96] These include, in particular, an apparent commitment to "the idea that 'the legal system' is one and indivisible," and that it responds, by way of judicial interpretation, to the "needs" of a homogeneous "society".[97] Valverde does not use the language of good – or bad – faith. But she clearly finds astonishing the vision of law as a "harmonious unity" which appears to sustain the "magisterial style" that is a common characteristic of purposive judging. Particularly telling for the uncritical, unreflective character of this brand of reasoning, she finds, is the way in which "[l[egal texts are antropomorphized – or deified." Statutes always speak, on this view; even if they are "powerless without their earthly interpreters, the judges."[98] Now, as mentioned: the cultural study of background legal reasoning forms like the *Gutachten* is not intended to provide a rebuttal to this kind of critical interrogation. What it can do, however, is help make sense of the mechanics and means through which a legal worldview such as the one exhibited in "*Purposive Interpretation in the Law*" may work to sustain commitment. From a critical viewpoint, for example, the good faith self-understanding of purposive judges authorized and competent to speak "in the name of" a homogeneous "community" or "society" may well remain perplexing. A

cultural study of the kind undertaken earlier in this article, on the other hand, can reveal, in detail, the production processes for the legitimacy effects through which this kind of self-understanding may be sustained and reproduced in specific settings. In the German context, for example, the vision of law as a harmonious unity can build on the powerful homogenizing effects of the *Gutachten*'s format and tone, as well as from the way this form presents any legal argument as a fractal image of the "whole" of legal reason. Similarly, assumptions of a "one-to-one relation between 'legal system' and 'society,'" or of a legal system having its own intentions, susceptible to judicial divination, can derive support, in this context, from the affordances of the *Gutachten* as a fully transparent medium through which legal reason can be seen to speak "for itself."[99] This kind of cultural investigation, then, may help explain the appeal, force, and sustainability of a particular mode of reasoning (such as purposive interpretation) for a given context, by relating it to the formal features and the affordances of the artefacts through which it may be operationalized (such as the format, technique, and style of the *Gutachten*). At the same time, from a comparative standpoint, this analysis may prompt a search for similar, or perhaps very different, support mechanisms and their legitimacy effects in other settings, such as in this case Israel or any of the other jurisdictions for which Barak's theory claims relevance.

A second, related illustration is tied even more closely to German law and the *Gutachten* specifically. It can be found in the work of Duncan Kennedy. German law and legal thought, along with French materials, figure in important ways in Kennedy's writings, both as source of inspiration for his critical analysis of law, and as objects of study in his work on the globalization of legal thought.[100] In more recent work, Kennedy has brought together many of the themes of his earlier writings in support of the claim that "contemporary elite jurists pursue, vis-à-vis one another, a 'hermeneutic of suspicion'."[101] Kennedy uses this label to designate the disposition of US lawyers to "work to uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents, while affirming their own right answers allegedly innocent of ideology."[102] This thesis is focused on elite legal practice in the contemporary US. One key example Kennedy gives for the operation of the hermeneutic of suspicion, however, is the technique of proportionality balancing. This example invites a comparative investigation of any potential role for this hermeneutic and its "twin," what Kennedy calls, following Paul Ricoeur, a "post-critical *faith*" in legal reason, in relation to German law, as a jurisdiction in which proportionality analysis is pervasive and where it arguably originates.[103] This is how Kennedy characterizes the relationship between proportionality balancing and the hermeneutic of suspicion:

> "The rise of proportionality after World War II was in part a self-conscious response to the critiques of induction/deduction and

> teleology. The internally critical destructive part of the hermeneutic of suspicion had undermined 'precritical' faith in legal reason to the point that a new 'last resort' seemed necessary. But balancing as a last resort is, …, particularly vulnerable to the charge of easy manipulability for covert ideological purposes."[104]

Two dynamics are especially important in this account of how the hermeneutic of suspicion is sustained in legal consciousness. The first is the notion of "role conflict," and the second the production of the "effect of necessity." Kennedy identifies "intense skepticism about the opponent along with righteousness about one's own freedom from ideological bias" as "one of a variety of mechanisms through which jurists deal with an inner condition of role conflict".[105] This sense of role conflict, in turn, stems from the fundamental uncertainty lawyers face as to whether the experience of an "effect of necessity" that their legal work is aimed towards, will in fact arise in any given case. Lawyers construe their arguments "in the hope that we will end up able to affirm the necessity of an answer. There is never a guarantee before the fact that we will be able to make an argument that will have the effect for us.".[106]

The cultural study of the role of the *Gutachten* in German legal reasoning suggests that this form may come with affordances especially well-suited towards inhibiting precisely these dynamics. The reason this matters, from a comparative perspective, is that it opens up space for an exploration of proportionality reasoning as compatible with, or even sustained by, a hermeneutic of "faith" – at least in specific circumstances and in specific settings.[107] This, instead of, or even alongside, the prime manifestation of suspicion that Kennedy takes it to be. Two of the *Gutachten*'s formal attributes are especially relevant in this regard. First, recall the fact that these memoranda are written in the form of a monologue, and from a perspective intended for a judge to adopt as their own. This means that there is very little scope for the kind of "linguistic duelling" that characterizes legal training in the United States.[108] The *role homogenization* that marks this particular format, in other words, inhibits *role conflict*. There simply is no opponent whose motives can be doubted. And if the notion of an authorless legal reason "speaking for itself" has any purchase, there is no real *proponent* either. Secondly, there is the uncertainty Kennedy mentions, over whether the "effect of necessity" will manifest for some reasoning actor, at some point in the process of crafting their legal argument. Here again, it is striking how the *Gutachten* seems formatted precisely so as to increase the chances of this effect arising. The conclusion that the memorandum will work towards either affirming or rejecting, is, after all, set out in its opening sentence. And it structures the entirety of the analysis to follow. This analysis is clearly signposted as the operation of a syllogism, where each

conditional statement or open question – "*X könnte …*," "*Fraglich ist ob Y …*" – is brought to a close by way of a technical legal definition, as in the example given earlier. There is no scope for irony or exaggeration; and the structure of the argument precludes impressions of strategizing. And finally, again related to the role homogenization point just mentioned: because there is no imaginary dialogue between opposing positions to begin with – no "continual shifting between adversarial points" – there is also little scope for a sense of legal argument coming to a halt at some arbitrary point, due to "time running out."[109] The *Gutachten*, rather, comes to a stop at a natural and clearly announced resting point: with an affirmative reformulation of the hypothetical statement it opened with.

CONCLUSION

Gutachten, it turns out, really are quite extraordinary documents. They can draw on the registers of the scientific and the practical, the expert, and the judicial. They afford both abeyance and finality, openness and closure. Their unitary perspective and homogenized tone can serve to ward off suspicion of strategic reasoning and ideological motivation. And their recursive, nested structure suggests a fractal representation of legal reason as an overarching, cohesive and gapless, unity. By presenting each reasoning step as a miniature version of legal reason "as such," the *Gutachten* seems to able to strengthen, both, the force of the concrete instance and of the whole. At a most general level, the form affords a double disappearance of both its "editor" and of the concrete memorandum as artefact. What remains, then, is not so much a legal expert speaking "in name of the law," or even a legal document written "in name of the people." Rather, in the space vacated by author and artefact, the form itself of the *Gutachten* – as abstracted format, technique, and style – is able to emerge as a transparent rendering and fractal image of legal reason, speaking sovereignly for itself.

This article has invoked a cultural study of legal form to bring out these effects. Part of the argument has been that such a perspective requires a temporal suspension of critique. In schematic terms, and linking literary theory to critical legal studies: a "symptomatic reading," as a search for hidden causes and motives, based on a hermeneutic of suspicion, may well be a bit too likely to find just such a disposition at work among its subjects. Understanding the commitments of local legal actors to their instruments, in other words, has to avoid assuming, both, their complete self-evidence and their utter implausibility. It should, instead, focus on the concrete mechanisms by which they produce whatever effect they appear to have.

The argument put forward is certainly not that the *Gutachten* is unique, or that it has affordances no other legal form has. The form shows many similarities to legal reasoning formats, techniques, and styles found elsewhere. Also, as

Mariana Valverde has repeatedly emphasized, it would be a mistake to assume too close or determinate a connection between the means of legal reasoning and the production of effects – be they epistemological, affective, social, political, or otherwise. Finally, from this angle: especially intriguing and worthy of further study, is the *Gutachten*'s recursive or fractal structure. In other contexts, such a nesting pattern could easily form the basis for a critique of indeterminacy – as it has in pioneering work within the Critical Legal Studies movement. The notion that legal reasoning looks the same at every scale *could* well afford experiences of the fragility and relativity of any particular vantage point. But it can, apparently, also afford an effect of stability and an almost overwhelming sense of unquestionableness.[110] Such a contrast, however, is precisely why the indeterminacy inherent in the affordances concept, as well as close attention to local context, are so important. It also demonstrates the need for a comparative approach to legal reasoning that integrates a culturalist focus on the "surface" of forms, sociological attention to their surroundings, and a critical exploration of their politics, while also not trying to do all of these things at every moment.

ACKNOWLEDGEMENTS

For their generous and helpful comments on earlier drafts, I am very grateful to Maurice Adams, William Ewald, James Fowkes, Michaela Hailbronner, Jan Kleinheisterkamp, Simon Stern, and Catherine Valcke. The usual disclaimer applies.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).

1. Annelise Riles, "Comparative Law and Socio-Legal Studies," in The Oxford Handbook of Comparative Law, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 806; Kim Lane Scheppele, "Jack Balkin is an American," *Yale Journal of Law and the Humanities* 25, no. 1 (2013): 3–23. This part of the project can be read as a brand of "comparative jurisprudence," but with a particular focus on the formal – stylistic and organizational – dimensions of legal thought and on its material artefacts, precisely as a way of getting to grips with locally pervasive "styles of legal thought." William B. Ewald, "The Jurisprudential Approach to Comparative Law: A Field Guide to 'Rats'," *American Journal of Comparative Law* 46, no. 4 (1998): 701–704. For an influential project along these lines, see Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004) (a literary analysis of discourse formats of French, US, and EU judicial decisions as a way to "gain access to the *ideolects* that characterize foreign legal systems," at 11–13, italics in original).
2. The term *Gutachten* has also been used traditionally to refer to the *responsa* of learned Roman jurists. See e.g. Werner Gephart and Siegfried Hermes, *Max Weber Gesamtausgabe*,

Band I/22(3) (Tübingen: Mohr Siebeck, 2010), 502. There is a long tradition of judges writing manuals for students, on legal and judicial drafting, that continues today. The standard reference is the handbook *Bericht, Gutachten und Urteil*, first published in 1884 by Hermann Daubenspeck, a judge in the *Reichsgericht*; continued – including during the Nazi years – under the same title by Paul Sattelmacher; and published today as *Zivilrechtliche Arbeitstechnik im Assessorexamen: Votum, Urteil, Aktenvortrag, Anwaltsgutachten*, 36th ed. (München: Vahlen, 2022).

3. Otto Lagodny, Marco Mansdörfer, Holm Putzke, "Im Zweifel: Darstellung im Behauptungsstil: Thesen wider den überflüssigen Gebrauch des Gutachtenstils," *Zeitschrift für das Juristische Studium* 7, no. 2 (2014): 157; Lutz-Christian Wolff, "Structured Problem Solving: German Methodology from a Comparative Perspective," 14 *Legal Education Review* (2003): 19.
4. Christoph Wolf, "Kleine Stilkunde für Jurastudenten: Ein Leitfaden für die richtige Formulierung der Fallbearbeitung (nicht nur) im Strafrecht," *Zeitschrift für das Juristische Studium* 13, no. 6 (2020): 553; Brian Valerius, *Einführung in den Gutachtenstil* (Berlin: Springer, 2017), 15; Lagodny and others (note 3).
5. The verb form is "*begutachten*." There are also adjective or adverb forms: *gutachtlich* (or *gutachterlich*) meaning "expert" or "authoritative," or "in the manner of an expert report."
6. See e.g. Greg Priest, Silvia De Toffoli, Paula Findlen, "Tools of Reason: The Practice of Scientific Diagramming from Antiquity to the Present," 42 *Endeavour* 49 (2018); Bruce G. Carruthers, Wendy Nelson Espeland, "Accounting for Rationality: Double-Entry Bookkeeping and the Rhetoric of Economic Rationality," 97(1) *American Journal of Sociology* 31 (1991).
7. Dominic Lopes, Beyond Art (Oxford: Oxford University Press, 2014): 133–139, cited in C. Thi Nguyen, "Games and the Art of Agency," *The Philosophical Review* 128, no. 4 (2019): 423–433. For an illuminating recent exploration of artefacts in law, see Maksymilian Del Mar, *Artefacts of Legal Inquiry: The Value of Imagination in Adjudication* (Oxford: Hart Publishing, 2020). For Del Mar, artefacts are forms of language, or "devices," that "signal their own artifice" and that, in doing so, can contribute to modes of legal inquiry that are more collaborative, more creative, and more genuinely informed by the "values, vulnerabilities and interests" at stake (at 1). The differences between Del Mar's definitions and interests and the project undertaken here may well track broader divergencies between legal reasoning in common law courts (his context) and in German law and legal education.
8. For overviews see Simon Stern, "Effect and Technique in Legal Aesthetics," *Critical Analysis of Law* 2, no. 2 (2015): 496; Duncan Kennedy, The Rise and Fall of Classical Legal Thought (Washington, D.C.: Beard Books, 2006 [1975]), 21; Duncan Kennedy, *A Critique of Adjudication {fin de siècle}* (Cambridge, M.A.: Harvard University Press, 1997), 2, 236; John Guillory, "The Memo and Modernity," *Critical Inquiry* 31, no. 1 (2004): 108–123; Pierre Bourdieu, Language and Symbolic Power (Cambridge, M.A.: Harvard University Press, 1991), 132; Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," Hastings Law Journal 38 (1987): 805–820; Patrick O. Gudridge, "The Persistence of Classical Style," *Pennsylvania Law Review* 131 (1983): 663–702; Clifford Geertz, "Common Sense as a Cultural System," in: *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 85; Jack M. Balkin, "Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence," Yale Law Journal 103 (1993): 105; Wendy Nelson Espeland and Mitchell L. Stevens, "Commensuration as a Social Process," *Annual Review of Sociology* 24 (1998): 313.
9. Geertz (note 8), 85.
10. Duncan Kennedy, "Legal Education as Training for Hierarchy," in *The Politics of Law*, ed. David Kairys (New York: Basic Books, 1982); Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Cambridge, M.A.: Harvard University Press, 2011), 179.
11. Geertz (note 8), 92.
12. Paul Friedrich, "Polytropy," in *Beyond Metaphor: The Theory of Tropes in Anthropology*, ed. James W. Fernandez (Stanford: Stanford University Press, 1991), 31.

13. Kennedy 1997 (note 8), 275. Perhaps, the most famous example from within literary studies of an investigation into how a particular effect is produced is Roland Barthes, "The Reality Effect," in *The Rustle of Language*, trans. Richard Howard and ed. François Wahl (Berkeley: University of California Press, 1989).
14. See e.g. Gudridge (note 8), 699; Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective," in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983); Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* (New York: Oxford University Press, 2007), 5.
15. The question of similarities and differences across and within different legal contexts remains unsettled. See e.g. Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale, and Govenance* (New York: Routledge, 2009), 3 ("The epistemological workings of law, I suggest, cannot be reduced to any one general thesis").
16. Clifford Geertz, *Works and Lives: The Anthropologist as Author* (Stanford: Stanford University Press, 2007 [1988]), 58. Note that, as will be discussed later, in the conceptual language of affordances, "means" and "effects" cannot be neatly separated.
17. See for an earlier contribution to this project Jacco Bomhoff, "Making Legal Knowledge Work: Practising Proportionality in the German *Repetitorium*," *Social & Legal Studies* 32, no. 1 (2023): 28.
18. Cf. Lawrence Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage, 1975).
19. See e.g. Reinhard Zimmermann, "*An Introduction to German Legal Culture*," in *Introduction to German Law,* eds. Werner F. Ebke and Matthew W. Finkin (The Hague: Kluwer Law International, 1996), 32.
20. Cf. Annette Keilmann, "The Einheitsjurist: A German Phenomenon," *Geman Law Journal* 7, no. 3 (2006): 293–310; Valerius (note 4), 7.
21. Eg. Robert Leckey, "Cohabitation and Comparative Method," *Modern Law Review* 72, no. 1 (2009), 71; Riles (note 1), 794
22. Note that the distinction between "elite" and other forms of legal education does not apply in the same way in Germany as it does in conventional understandings of US law schools and, to a lesser degree, of those in other common law jurisdictions. This is probably true also, to a lesser degree, of different forms of legal practice, but this would be difficult to show in any rigorous way.
23. Valerius (note 4), 15. A great deal of learning how to write and to solve problems in this prescribed format in fact occurs not in university classrooms, but with commercial exam-prep providers. See further Bomhoff (note 17).
24. Hannes Beyerbach, "Bemerkungen zur Gutachten, Hilfsgutachten und Gutachtenstil," *Juristische Arbeitsblätter* (2014): 813; Valerius (note 4), 4, 14.
25. Christian Fahl, "Bemerkungen zum Urteilsstil," *Juristische Schulung* (1996): 280; Valerius (note 4), 26; Wolf (note 4), 558. Unless stated otherwise, all translations from the German are the author's own.
26. Lagodny et al (note 3), 160.
27. Wolf (note 4), 558.
28. Beyerbach (note 24), 814, 819.
29. Henrik Wieduwilt, "Die Sprache des Gutachtens," *Juristische Schulung* (2010): 288. This emphasis on writing sets up a revealing contrast with Elizabeth Mertz's observation that in US law schools learning to "think like a lawyer" mostly means "learning to read like a lawyer". See Mertz (note 14).
30. Guillory (note 8).
31. The *Institut für Sachverständigenwesen*, or "the Institute of Experts," an industry group based in Bonn, offers the following guidance: "A *Gutachten* is an expert assessment of a … factual situation, that is understandable [or rather 'follow-able', *nachvollziehbar*] to the lay person, and verifiable [*nachprüfbar*] for another expert. *Gutachten* should follow a logical order, be clearly structured, and reduced to essentials. All mentioned results and final conclusions should be supported with arguments and be verifiable. The *Gutachten* should demonstrate clarity, impartiality, and methodical soundness." Importantly, these subject-matter experts are explicitly told to avoid including any legal assessments in their reports. See: https://ifsforum.de/fileadmin/user_upload/Merkblatt_Gutachtenaufbau2017.pdf (last accessed August 30, 2023).

32. Valerius (note 4), 15; Wieduwilt (note 29), 292.
33. Beyerbach (note 24), 813, 818.
34. See: Deutsches Wörterbuch von Jacob Grimm und Wilhelm Grimm https://woerterbuchnetz.de/?sigle=DWB&lemma=Gutachten#1 (last accessed August 30, 2023).
35. Wieduwilt (note 29), 289.
36. E.g. Wolfgang Zimmerling, "Die aktuelle Rechtsprechung zu den juristischen Prüfungen," *Neue Zeitschrift für Verwaltungsrecht* (2009): 359–364.
37. cf. Walter Weyrauch, "The Art of Drafting Judgments: A Modified German Case Method," *Journal of Legal Education* 9 (1956): 311, 322.
38. Lasser (note 1), 33.
39. Christoph Möllers and Hannah Birkenkötter, "Towards a New Conceptualism in Comparative Constitutional Law: Reviving the German Tradition of the Lehrbuch," *International Journal of Constitutional Law* 12 (2014): 603–611.
40. Wolff (note 3), 29.
41. Some authors, e.g. Lagodny et al. (note 3), distinguish between (1) *Gutachtentechnik* as reasoning technique of subsumption, and (2) *Gutachtenstil* as writing style. In their view, the style is considerably less important than commonly argued, and should be saved only for problematic issues (at 159–160).
42. In a typical description, the order of the *Gutachten* reasoning style is *Einleitungssatz*, *Definition* (or: *Obersatz*) *Subsumption*, *Schlussatz* (Introductory sentence, legal definition or abstract statement of the relevant legal requirements, subsumption, concluding sentence).
43. Geertz (note 16), 60.
44. E.g. Beyerbach (note 24), 814.
45. This point requires some nuance. Candidates are also evaluated on their ability to place the right emphases in their answers, and to distinguish between difficult questions and more obvious points (which can be dealt with in an abbreviated *Gutachten*-style, or even be merely stated by way of the *Feststellungsstil*). The point here is that this type of memorandum would never include any explicit statement such as "This analysis will focus on issues (1), (2), and (3), as these are the most difficult [or contested] in the matter at hand."
46. On the role of hesitation in law, see e.g. Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (Cambridge: Polity, 2010), 95. On closure and openness in legal reasoning, see e.g. Karen Knop and Annelise Riles, "Space, Time, and Historical Injustice: A Feminist Conflict-of-Laws Approach to the Comfort Women Agreement," *Cornell Law Review* 102 (2017): 853.
47. Wolf (note 4), 558.
48. Valerius (note 4), 18; Lagodny et al. (note 3), 2014: 158; Beyerbach (note 24), 814.
49. Valerius (note 4), 31.
50. See e.g. Lagodny et al (note 3), 158, 160; Beyerbach (note 24), 815. As Catherine Valcke suggests, this invites further comparative analysis with the temporalities of the "whereas" in classical French judicial language (personal communication to the author).
51. See e.g. Lagodny et al (note 3), 160.
52. Wolf (note 3), 565; Beyerbach (note 24), 815; Valerius (note 4), 41.
53. Wieduwilt (note 29), 290.
54. Valerius (note 4), 16; Lagodny et al. (note 3), 159.
55. Bill Maurer, "Anthropological and Accounting Knowledge in Islamic Banking and Finance: Rethinking Critical Accounts," *Journal of the Royal Anthropological Institute* 8, no. 4 (2002): 645–656.
56. Wolf (note 4), 554 (citing Gerhard Wolf); Valerius (note 4), 41.
57. Wieduwilt (note 29), 289.
58. Wolf (note 4), 554.
59. Valerius (note 4), 40–41; Wieduwilt (note 29), 289.
60. Maurer (note 55), 662.
61. Wieduwilt (note 29), 289–290.
62. Beyerbach (note 24), 815–816; Wolf (note 4), 558.
63. E.g. Valerius (note 4), 4. This un-equivocality is again shared more widely within civil law systems. See e.g. Lasser (note 1), 33 (on the structure of French judicial discourse as resisting "any discussion that could introduce uncertainty or debate").
64. Wieduwilt (note 29), 290.
65. Beyerbach (note 24), 819.
66. Mertz (note 14), 98 (emphasis added).

67. Caroline Levine, *Forms: Whole, Rhythm, Hierarchy, Network* (Princeton: Princeton University Press, 2015), 6; Rita Felski, *The Limits of Critique* (Chicago: University of Chicago Press, 2015), 164; Isis Chong and Robert W. Proctor, "On the Evolution of a Radical Concept: Affordances According to Gibson and Their Subsequent Use and Development," *Perspectives on Psychological Science* 15, no. 1 (2020): 117.
68. Levine (note 67), 6.
69. Maxwell J.D. Ramstead, Samuel P.L. Veissière, and Laurence J. Kirmayer, "Cultural Affordances: Scaffolding Local Worlds Through Shared Intentionality and Regimes of Attention," *Frontiers of Psychology* 7 (2016): 1–7; Mireille Hildebrandt, "Law As an Affordance: The Devil is in the Vanishing Point(s)," *Critical Analysis of Law* 4, no. 1 (2017): 116–117; Levine (note 67); Winfried Fluck, "The Limits of Critique and the Affordances of Form: Literary Studies after the Hermeneutics of Suspicion," *American Literary History* 31, no. 2 (2019): 229.
70. David Sneath, Martin Holbraad, and Morten Axel Pedersen, "Technologies of the Imagination: An Introduction," *Ethnos* 74, no. 1 (2009): 5–11.
71. Sneath et al. (note 70), 11; David Sneath, "Reading the Signs by Lenin's Light: Development, Divination, and Metonymic Fields in Mongolia," *Ethnos* 74, no. 1 (2009): 72–85.
72. Stern (note 4).
73. Cf. Levine (note 67), 152; Fluck (note 69); Annelise Riles, "A New Agenda for the Cultural Study of Law: Taking on the Technicalities," *Buffalo Law Review* 53 (2005): 973; Valverde (note 15); Sneath et al. (note 70).
74. Duncan Kennedy, "The Hermeneutic of Suspicion in Contemporary American Legal Thought," *Law and Critique* 25, no. 2 (2014): 91–127. See also Fluck (note 69), 232, citing Rita Felski.
75. Cf Carruthers and Nelson Espeland (note 6); Maurer (note 55); Caitlin Zaloom, "How to Read the Future: The Yield Curve, Affect, and Financial Prediction," *Public Culture* 21, no. 2 (2009): 245; Mertz (note 14).
76. Cf. Felski (note 67); Levine 2015 (note 67); Fluck (note 69).
77. See e.g. Kennedy (note 8); Lasser (note 1), 22; Bomhoff (note 17), 47.
78. E.g. Wieduwilt (note 29), 289; Valerius (note 4), 44.
79. Valerius (note 4), 24.
80. Webb Keane, "Sincerity, 'Modernity,' and the Protestants," *Cultural Anthropology* 17, no. 1 (2002): 65–74.
81. Mertz (note 14).
82. Geertz (note 16), 58–60, citing the literary critic Denis Donoghue.
83. Kennedy (note 8), 239, 341. It is possible that "objectivity," in Kennedy's view, simply sums up all the other effects listed individually, but that too would not speak for the concept's usefulness. On this critical stance more generally, see further Section IV.
84. Mertz (note 14), 132 (emphasis added).
85. See the different meanings of "objectivity" – including the notion of "trained judgment" – explored in Lorraine Daston and Peter Galison, *Objectivity* (New York: Zone Books, 2010).
86. See again Daston and Galison (note 85).
87. See e.g. Beyerbach (note 24), 813, 816; Wolf (note 4), 559, 564.
88. The connection to bodily *hexis* is significant: the term *soverän* figures commonly in promotional materials for coaches offering help with public speaking or business presentations.
89. Wieduwilt (note 29), 288.
90. Cf. Lasser (note 1), 39 (emphasis added).
91. See eg. David S. Law, "Generic Constitutional Law," *Minnesota Law Review* 89 (2005): 652; Lorraine Weinrib, "The Postwar Paradigm and American Exceptionalism," in *The Migration of Constitutional Ideas*, ed. Sujit Choudhry (New York: Cambridge University Press, 2006); Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012).
92. See e.g. Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Governance* (Oxford: Oxford University Press, 2019); Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005).
93. Cf. Fluck (note 69), 232, citing Rita Felski. See also e.g. Riles (note 73), 973–983.
94. This formulation is taken from Geertz's discussion of "the sheer phenomenon of aesthetic force". See Clifford Geertz, "Art as a Cultural System," in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 97.

95. See eg. Lane Scheppele (note 1); Weinrib (note 91); Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford: Oxford University Press, 2014).
96. Mariana Valverde, "Book Review: Purposive Interpretation in Law, by Aharon Barak," *Political and Legal Anthropology Review* 30, no. 1 (2007): 131–135.
97. Ibid., 132–135.
98. Ibid., 134, 132.
99. Ibid., 131.
100. See eg. Kennedy (note 8); Kennedy (note 74), 92; Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (Cambridge: Cambridge University Press, 2006).
101. Kennedy (note 74), 91.
102. Ibid.
103. Ibid., 106 (emphasis added). Kennedy offers Hans Kelsen as "a perfect example of a 'post-critical' believer … in Ricoeur's sense" (at 122).
104. Ibid., 116. It could easily be countered that whereas Kennedy has in mind the kind of complex, unprovided-for, instances where traditional modes of legal interpretation are felt to "run out," the *Gutachten* has been studied here primarily in its role as answer-format for legal exam questions, which are drafted precisely so as to be "solvable" by way of standard legal techniques. This would be a valid *caveat* to accompany any comparison between the two perspectives, but it only goes so far. Recall that *all* German lawyers, including all judges, will have spent their formative years endlessly drafting legal answers in the *Gutachten* style, and that this will be the format in which they will have first encountered, and developed their mastery of, essentially *any* legal technique in their repertoire, including deduction/subsumption and proportionality analysis.
105. Ibid., 92, 124.
106. Ibid., 126.
107. For arguments along these lines, see e.g. Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge: Cambridge University Press, 2013), and Hailbronner (note 95).
108. Mertz (note 14), 132.
109. Kennedy (note 74), 127; Mertz (note 14), 59.
110. Cf. Maurer (note 55).

Jacco Bomhoff is Associate Professor of Law at the London School of Economics and Political Science.