
Human rights and the belief in a just world

Günter Frankenberg*

Human rights law has made an astounding career as a globally available vocabulary and narrative for abuses of power, miserable living conditions and a vision of a better world. This success story is challenged by three attempts to unsettle the routines of the overly normativist and romantic discourse: reading the human rights narrative of justification as mythology, ideology, and a story of normalization. The more pragmatic and skeptical assessment is meant to defend the polemical origins of human rights.

1. The belief in a just world: human rights between romance and tragedy¹

From psychologists we learn that “the ‘belief’ in a fair world is one of the most basic and also one of the most fundamentally deluded characteristics of the human brain.”² This desire for justice is so strong that victims of injustice, unless they are masochists who enjoy their suffering, will protect their faith in a just world by either denying or minimizing the unfairness they have experienced, or by believing that “these injustices are *en route* to being amended, or that they are counterbalanced by greater benefits, or that they are inevitable,”³ or by seeing themselves as the source of all the problems that may have caused it.⁴

* Goethe University Frankfurt (Germany). Email: frankenberg@jur.unifrankfurt.de.

¹ For commenting on earlier drafts I am indebted to Cathérine Dupré, Anuscheh Farahat, Klaus Günther, Stefan Kadelbach, Outi Korhonen, and Anne Orford. Asmaa El Idrissi, Cara Röhner, and Helena Lindemann provided invaluable research assistance.

² STEFAN MERRILL BLOCK, *THE STORY OF FORGETTING* 197 (2009).

³ TERRY EAGLETON, *IDEOLOGY. AN INTRODUCTION* 27 (new ed. 2007).

⁴ According to Claudia Dalbert’s analysis of empirical studies concerning the own or observed experience of injustice: CLAUDIA DALBERT, ÜBER DEN UMGANG MIT UNGERECHTIGKEIT. EINE PSYCHOLOGISCHE ANALYSE (1996) based on the just-world-hypothesis in Melvin J. Lerner, *The Desire for Justice and Reactions to Victims*, in ALTRUISM AND HELPING BEHAVIOUR 205 (Jacqueline Macauley & Leonard Berkowitz eds., 1970); for an overview of the justice-related research, see Melvin J. Lerner, *The Justice Motive: Where Social Psychologists Found It, How They Lost It, and Why They May Not Find It Again*, 7 PERSONALITY & SOC. PSYCH. REV. 388 (2003).

In other words,⁵ victims recode their experience as tragedy that, at best, offers a somber reconciliation, and they resign themselves to the conditions in which they live and labor. Or they recast the injustice they experienced as a comedy that holds out hope for the temporary triumph of humans over their world and the prospect of temporary reconciliation and harmony. Or, in a move to self-victimization, they simply replace the lead player of the tragic plot.

By the same token, witnesses to injustice, unless they are cynics who do not mind inhabiting an exploitative social order,⁶ uphold their hope in a just world by means of narratives told from a normative point of view, emplotting reality as romance and thus transcending the world of nasty experiences. Such a view allows narrators to confront the facts of a “bad reality,” where individuals are abused, groups discriminated against, and their basic needs neglected, with the counterfactual force of stories they find encapsulated in legal norms or principles of justice, prominently embodied in human rights law. They change the register from tragedy (or sometimes comedy) to a romantic plot, and invoke “salvation descend[ing] on the bruised [human] spirit”⁷ by presenting human rights as redeeming insights and instruments to overcome the evil.

Human rights law has made an astounding career as a globally available vocabulary⁸ and narrative for either scandalous abuses of power and miserable living conditions or a vision of a better world—a world where rights guarantee that conflicts are solved in a civil way, trials are fair, children grow up not suffering from privation, women receive equal pay, the police don’t profile racially, persons with disabilities participate fully in all spheres of life, and even the interests of future generations command adequate concern and respect.⁹ Reading human rights as a drama of redemption or occasional reconciliation draws its liberating appeal from the widespread view that these rights are inventions of reason and justice and therefore very much incarnate the good and offer the last resort in an evil world.

⁵ I borrow the categories of tragedy and romance from Northrop Frye’s and Hayden White’s archetypal genres providing emplotments and rather freely transfer them from history to biography, and later to the narratives of human rights law. See NORTHROP FRYE, *THE ANATOMY OF CRITICISM* (1957); HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION OF THE 19TH-CENTURY* (1973). See also ROLAND BARTHES, *SUR RACINE* (1963); DAVID SCOTT, *CONSCRIPTS OF MODERNITY: THE TRAGEDY OF COLONIAL ENLIGHTENMENT* (2004). Regarding human rights, see, in particular, Susan Marks’s fascinating reading of the human rights discourse as basically split between tragedy and romance: Susan Marks, *Human Rights in Disastrous Times*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 309 (James Crawford & Martti Koskenniemi eds., 2012), and Anne Orford, *Biopolitics and the Tragic Subject of Human Rights*, in *THE LOGICS OF BIOPOWER AND THE WAR ON TERROR* 205 (Elizabeth Dauphinee & Christina Masters eds., 2007), especially on the tragic tradition infusing human rights.

⁶ See EAGLETON, *supra* note 3, at 27.

⁷ GEORGE STEINER, *THE DEATH OF TRAGEDY* (1961).

⁸ Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 *MOD. L. REV.* 1 (2007).

⁹ From the vast literature, see *only* THEORIES OF RIGHTS (Jeremy Waldron ed., 1984); THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* (2002); JAMES NICKEL, *MAKING SENSE OF HUMAN RIGHTS* (2d ed. 2006); and JAMES GRIFFIN, *ON HUMAN RIGHTS* (2008). For a skeptical evaluation of the performance of UN organs and committees responsible for human rights protection: *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* (Philip Alston & Fred Mégret eds., 2011).

The success story of human rights¹⁰ has always been challenged by critics who emplot reality as tragedy, setting narrow and unreliable limits on what can be aspired to in the quest for security and sanity in the world, or even as satire—a drama of redemption.¹¹ However, the prospect of redemption from tyranny and misery (romance) or reconciliation after trials and tribulations (comedy) could hardly be obscured by narratives criticizing “human rights fundamentalism”¹²—the absolutism of the human rights rhetoric—or “the contrast between the celebratory and self-congratulatory rhetoric of human rights and the perception of the world’s reality”;¹³ realist accounts of the (lacking) effectiveness of human rights treaties to change the behavior of states for the better;¹⁴ analyses of the ambivalence of human rights;¹⁵ or skeptical assessments of their value or strategic advantage over other competing—political, economic, etc.—vocabularies.¹⁶

Notwithstanding these critiques, the romantic, normative point of view of human rights law has been progressively anchored in human rights treaties and defended by human rights institutions; and it has been proliferating in the ever-more burgeoning human rights literature. The following considerations are not meant to downplay the positive effects of human rights law but intend to unsettle the routines of the ongoing, too narrowly normativist discourse, and call into question the moral high ground that discourse explicitly or implicitly claims to occupy. This is why I first introduce the concepts of narrative and justification, before taking a look at crucial varieties of human rights narratives—mythology and ideology. Finally, the human rights narratives are read as a story of normalization; and I ask what gets lost when these rights intervene in the way things are and are used to manage controversy. Against the overwhelming romanticization of routine,¹⁷ this article renders a more pragmatic and skeptical

¹⁰ Karen Engle calls them, more carefully, “affirmative approaches”: see Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT’L L. 517 (1992). Anne Orford stresses that the “human rights discourse has been extremely effective at maintaining public awareness of the treatment of detainees” in “the infamous Woomera Immigration Reception and Processing Center” located in the Simpson Desert in Australia: see Orford, *supra* note 5, at 207 and 211.

¹¹ To use again the categories provided by Northrop Frye and Hayden White. See also Barthes, *supra* note 5.

¹² See Klaus Günther, *Diskurstheorie des Rechts oder Naturrecht in diskurstheoretischem Gewande?*, 4 KRITISCHE JUSTIZ 470 (1994).

¹³ Frédéric Mégret, *That Springbreak Feeling. Pragmatism, Irony and Belief in the Age of Human Rights* (unpublished paper, on file with the author).

¹⁴ On the basis of her quantitative study, Oona Hathaway concludes that despite the progressive ratification of human rights treaties (and increased human rights advocacy by NGOs) violations appear to have increased. Non-compliance with treaty obligations (except for the Genocide Convention) appears to be common and not infrequently treaty ratification is associated with worse practices, in particular due to weakly enforced and/or monitored human rights. See Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1870 (2002).

¹⁵ See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE. REASSESSING INTERNATIONAL HUMANITARIANISM* (2004). “Perhaps ambivalent porosity [of human rights—G.F.] is their secret strength.” David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS J. 101, 106 (2002).

¹⁶ Martti Koskenniemi, *supra* note 8; KENNEDY, *supra* note 15; and Günter Frankenberg, *Ambivalenzen zivilgesellschaftlicher Praxis*, 1 KRITISCHE JUSTIZ 21 (2004). For other skeptical views, see *SCEPTICAL ESSAYS ON HUMAN RIGHTS* (Tom Campbell, K.D. Ewing, & Adam Tomkins eds., 2001).

¹⁷ Anne Orford suggested this reading of my arguments here.

assessment of human rights, their vocabulary and narrative, as well as defends their polemical origins (a truly romantic moment), which I believe will do more for the human rights project than merely reiterating the normative point of view.

2. Human rights as narratives of justification

2.1. Legal narratives: coming to terms with contingency

A narrative may be tentatively defined as a story created in a constructive format as a written work, a speech, an image, etc., that describes a sequence of fictional or non-fictional events, thus joining description, explanation, and argumentation as another rhetorical mode of discourse. In the social and legal sciences, the understanding of narrative¹⁸ has been influenced by the assumption, elaborated in narrative psychology, that human beings give their life meaning by rendering their experience in the form of a story. The point of departure is not a collection of facts but the embeddedness of the narrating subject in space and time. While in psychology, the biographical story functions as a construction of the self,¹⁹ in historiography, the social sciences, and literary theory, the narrative style—allowing a historical, political, or social event to develop the way one would expect it to in a story—may be regarded as a reaction to the linguistic turn informed by postmodern theories.²⁰ In one of the most influential manifestoes, Hayden White characterizes “narrativity” as “a discourse that feigns the world speak itself and speak itself as a story”:

The historical narrative, as against the chronicle, reveals to us a world that is putatively “finished,” done with, over, and yet not dissolved, not falling apart. In this world, reality wears the mask of a meaning, the completeness and fullness of which we can only imagine, never experience. Insofar as historical stories can be completed, can be given narrative closure, can be shown to have had a plot all along, they give to reality the odor of the real. This is why the plot of a historical narrative is always an embarrassment and has to be presented as ‘found’ in the events rather than put there by narrative techniques.²¹

The academic and forensic citadels of law have for a long time resisted the influx of narrative style. Lawyers and legal scholars have traditionally tended to insist that their texts are strictly factual accounts (the facts of a case) and/or purely logical-doctrinal deductions (legal reasoning)—that no one utters but the law itself tells.²² Gradually, however, this resistance has caved in as it was realized that narrative gives a language

¹⁸ For a brief discussion of the meanings of “narrative,” see OSWALD DUCROT & TZVETAN TODOROV, *ENCYCLOPÉDIE DICTIONNAIRE DES SCIENCES DE LA LANGUE* 297–299 (1983).

¹⁹ See Daniel C. Dennett, *The Self as Center of Narrative Gravity*, in *SELF AND CONSCIOUSNESS: MULTIPLE PERSPECTIVES* 103 (Frank Kessel, Pamela Cole & Dale M. Johnson eds., 1992).

²⁰ Concerning the intense and controversial debate about narrative and narrativity, see only CLAUDE LÉVI-STRAUSS, *THE SAVAGE MIND* (1966); Georg Lukács, *Narrate or Describe*, in *GEORG LUKÁCS, WRITER AND CRITIC AND OTHER ESSAYS* 110 (2005); Paul Ricoeur, *Narrative Time*, 7 *CRITICAL INQUIRY* 169 (1980). For a critical view of Ricoeur, see KURT HÜBNER, *DIE WAHRHEIT DES MYTHOS* 357 *et seq.* (1985).

²¹ Hayden White, *Narrativity in the Representation of Reality*, in *HAYDEN WHITE, THE CONTENT OF THE FORM. NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* 1, at 2 and 21 (1990).

²² White, *supra* note 21, 3.

to communicate ideas, events, and feelings in the (deluded?) search for justice.²³ Scholars—some tracking the linguistic turn, others following a postmodern or just a different, unlabeled path, yet others joining the law and literature movement—tentatively approached or were ready to embrace narrativity.²⁴ They analyzed the narrative techniques of law, recognized that narrative has always already been present in law, or used legal storytelling as more authentic, concrete, and embodied in legal analysis or syllogism.²⁵ They paved the way for an understanding of legal narratives not as a product of some distant time or an abstract logic, but an attempt of the narrator to map out, from the perspective of the here and now, a coherent story about a series of disparate past events.

Like narrations in the everyday world or other sciences, legal science stories establish a relationship between why, or at least how, something happened and turned into a memorable event, and what will come of it. Courts routinely state “the facts of a case” as a story. Similarly, theoretical and doctrinal legal narratives try to come to terms with contingency by embedding singular events or facts in a historical or logical connection. This connection may be a systematic scheme or (ideological) pattern, such as stories of “generations of human rights,”²⁶ their “migration,”²⁷ and transfer.²⁸ Especially the continuous flow of constitutional or legal history lends itself to narrative corroboration:

Our Constitution is a covenant running from the first generation of Americans to us and then to future generation. It is a *coherent* succession.²⁹

Strong narrative components of the law have always been, albeit not always duly recognized, the story of the case at hand interwoven with the precedent or a rule and the courts’ attempts to present their opinion as “seamless webs of arguments”:³⁰

²³ According to Cathérine Dupré, human rights narratives may have reached the limits of the language they invented, as we are running out of stories to tell about human rights victims and violators.

²⁴ See, generally, RICHARD WEISBERG, *THE FAILURE OF THE WORD* (1984); and *LAW’S STORIES. NARRATIVE AND RHETORIC IN THE LAW* (Peter Brooks & Paul Gewirtz eds., 1996); Gerald Lopez, *Lay Lawyering*, 31 U.C.L.A. L. REV. 1 (1984) introduces story-telling as an element of human problem-solving by lawyers. In her autobiographical essay *THE ALCHEMY OF RACE AND RIGHTS* (1991), PATRICIA WILLIAMS presents, in a narrative style, the intersection of race, gender, and class. OUTI KORHONEN, *INTERNATIONAL LAW SITUATED* (2000) introduces legal narrativization into her analysis of the situation of the international lawyer. David KENNEDY, *supra* note 3, uses a distinctly and provocatively narrative style in *THE DARK SIDES OF VIRTUE* (particularly: the chapters “Spring Break” and “Autumn Weekend”). See also Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT’L L. 379, 381 (1999), exploring the “silences of international law.”

²⁵ Peter Brooks, *The Law as Narrative and Rhetoric*, in *LAW’S STORIES*, *supra* note 24, 16; Lopez, *supra* note 24.

²⁶ See, e.g., CHRISTIAN TOMUSCHAT, *HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM* 26–29 (2008).

²⁷ The consecutive waves of transnational migration of fundamental rights are analyzed by Stefan Kadelbach, *The Territoriality and Migration of Fundamental Rights*, in *BEYOND TERRITORIALITY—TRANSNATIONAL LEGAL AUTHORITY IN AN AGE OF GLOBALIZATION* 295 (Günther Handl, Joachim Zekoll & Peer Zumbansen eds., 2012).

²⁸ Concerning constitutional transfer and experimentalism: Günter Frankenberg, *Constitutions as Commodities. Notes on a Theory of Transfer*, in *ORDER FROM TRANSFER. COMPARATIVE CONSTITUTIONAL DESIGN AND LEGAL CULTURE I* (Günter Frankenberg ed., 2013), and Günter Frankenberg, *Constitutional Transfers and Experiments in the 19th Century*, in *ORDER FROM TRANSFER* 279.

²⁹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) at 837 per Souter J—emphasis added.

³⁰ Brooks, *supra* note 25, at 21.

Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, 410 *Roe v. Wade* 113 (1973), that definition is still questioned. . . . Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion" Our precedents have respected the private realm of family life³¹

Legal narratives also come as legislative histories accompanying statutes, or are encapsulated, at times elaborated, in the preambles of constitutions.³² They differ from ordinary stories, though. While the utility value of the latter depends on their informational content, suspense, or entertainment, moral uplift, etc., law's conventional narratives require a coherent or at least plausible structure (reasoned doctrinal elaboration, chain of precedents) to lend credence or rationality to the counterfactual meaning and authoritative force.³³

2.2. Justifying injustice

Human rights narratives are cast in a language of entitlement concerning their holders, and in terms of responsibility with respect of states, international and national institutions, and courts that provide for the protection of those rights. Both entitlement and responsibility also imply exoneration and justification: "[W]hat is not in is out. To prohibit abuse is to authorize whatever does not constitute abuse. . . . With rights come rationales for setting them aside."³⁴ Thus, human rights have become central to justificatory arguments for war and military intervention.³⁵

In fact, however, human rights offer an array of narratives, for instance, justifying organized (state) violence: in the international context the doctrine of just war, "humanitarian intervention," and more recently the "responsibility to protect" feature prominently.³⁶ In the domestic context, lawyers come to the defense of the rights of "innocent victims" in "ticking bomb" situations by legitimizing "rescue torture" and the intercepting and downing of "renegade aircraft" hijacked by terrorists.³⁷

In everyday usage, justification refers to a dimension of social interaction, namely the way in which a participant or an advocate, from a first-person perspective, defends her actions or decisions, standards or beliefs to others so as to make them (appear) "right" or "acceptable." The impression of commonness fades once different disciplines advance their peculiar meanings of justification.³⁸ The term is anything but

³¹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)—emphasis added.

³² See, e.g., the preambles of the constitutions of Bolivia (2009), China (1982), East Timor (2002), Vietnam (1992), South Africa (1996), and Myanmar (2008).

³³ In recent years, narrative approaches have left behind these conventions and moved from persuasion through the force of logic to emotive, intuitive, aesthetic, and other forms of persuasion which question received wisdoms, definitions and presuppositions.

³⁴ Marks, *supra* note 5, at 320.

³⁵ DAVID KENNEDY, *OF WAR AND LAW* (2006); Marks, *supra* note 5, at 320.

³⁶ See ANNE ORFORD, *READING HUMANITARIAN INTERVENTION. HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* (2003); ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* (2011); and KENNEDY, *supra* note 35.

³⁷ See GÜNTER FRANKENBERG, *POLITICAL TECHNOLOGY AND THE EROSION OF THE RULE OF LAW. NORMALISING THE STATE OF EXCEPTION* ch. VII (forthcoming January 2014).

³⁸ See LUC BOLTANSKI & LAURENT THEVENOT, *ON JUSTIFICATION: ECONOMIES OF WORTH* (Catherine Porter trans., 2006).

unequivocal, even if we disregard the technical concept of alignment, the religious connotation of the forgiveness of sins, the psychological usage of justification as a defense mechanism,³⁹ and the narrow notion in criminal jurisprudence of a defense against criminal charges or exemption from criminal liability.

In the political–legal realm, justification as a rhetorical mode usually responds to a real or imaginary challenge by giving reasons in an elaborate, story-like way. A justifier tries to render acceptable actions, decisions, beliefs, or programs which deviate from a given standard, break a promise, or disappoint the expectation of justice (otherwise, it would suffice to “explain” how things turned out). A justification is meant to alleviate dissatisfaction or curb disobedience, and, quite often, prevent or settle a controversy by “explaining away” a cognitive, normative, or emotional dissonance. In this vein, the US and UK governments tried to justify their violating international law by ordering the military invasion of Iraq without a clear and present mandate of the UN Security Council, with a fabricated story of “weapons of mass destruction” (WMD) stockpiled in that country and threatening humankind.⁴⁰

Legal justification figures as a crucial element of conflict management by communicating a normative point of view. Narratives of justification throw a light—tinged by law, ethics, or morality—on what is narrated, and, thus, bestow it and also how it is narrated with an authoritative meaning and legitimizing force: *Just war, humanitarian intervention, civilizing mission, rescue torture, detaining illegal combatants, war on terror, etc.*, are concepts elevated by the sound of *rightfulness*.

What then needs to be *justified* in law and politics? Generally speaking, the operation of making something just is provoked by a why-question and based on a comparison requiring that a certain asymmetry be “explained away.” Regarding the burden of justification, two ideal-typical situations can be distinguished: *First*, if something is *clearly unjust* the difference between the way things are and the way they should be needs to be “explained away” contrary to the evidence of injustice. In such situations, typically presented as extreme or extraordinary cases, justificatory narratives elaborate why injustice is necessary or has to be tolerated for the time being in the name of a higher value or interest often located outside the law. Accordingly, the infamous “Enabling Act” and the “Decree for the Protection of People and State,” which suspended the Weimar Constitution and paved the way for the Nazi regime, were declared to remedy “the distress of the people” and to “stave off communist violence.”⁴¹ The occupation of foreign territories, unless claimed to

³⁹ ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENSE* (1937).

⁴⁰ See, e.g., US Secretary of State Colin Powell, addressing the UN Security Council, on Feb. 5, 2003; Prime Minister Tony Blair, Answer to Parliamentary Question, June 29, 2011: “Regime change in Iraq would be a wonderful thing. That is not the purpose of our action; our purpose is to disarm Iraq of weapons of mass destruction” See also Parliamentary debate, Sept. 24, 2002, www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020924/debtext/20924-05.htm.

⁴¹ REICHSGESETZBLATT [law gazette of the German Reich] I, p. 83 (Feb. 28, 1933) and REICHSGESETZBLATT I, p. 141 (Mar. 24, 1933).

be “devoid of all civil inhabitants,”⁴² and their exploitation have been legitimized by one or the other “mission:”

[T]he intervenors, when challenged, always resort to a moral justification—natural law and Christianity in the sixteenth century, the civilizing mission in the nineteenth century, and human rights and democracy in the late twentieth and twenty-first centuries.⁴³

Executors of the “dictatorship of the proletariat” had regularly, if implicit, recourse to their superior insight into the scriptures of Marxism-Leninism or, more abstractly, the “scientific laws of socialism.” History, class, and the demands of the revolution transcended what the individual might consider her right or legitimate interest:

Being guided by the interests of the working class as a whole, the Russian Socialist Federated Soviet Republic deprives all individuals and groups of rights which could be utilized by them to the detriment of the socialist revolution.⁴⁴

However, the more justificatory narratives diverge from expectations of justice or perpetuate themselves with scant empirical content, they resort to myth or mutate into ideology masking blatant injustice—despotism, extreme poverty, or the infliction of unwarranted cruelty—and turning the belief in a just world into what once was somewhat innocently called “false consciousness,” as will be shown below.

The comparison of the way things are with how they should be becomes more complex and entails more sophisticated argumentative techniques of justification, if something *may* be considered *unfair* or *illegal* because it *arguably* deviates from or violates a given normative standard or rule or disappoints reasonable expectations. Justificatory narratives may then try to bridge the gap between the “is” and the “ought,” and clear some action, decision, or event of blame or criticism by offering one of the following storylines: (a) they admit that *in this one* case, justice was miscarried and the mistake will be corrected on appeal; (b) they claim that *the law* provided for an exception; or that (c) the disadvantaged will be duly compensated.

Accordingly, politicians (and their legal advisors) will justify secret government practices, if they cannot be condoned routinely, by arguing that, as a matter of constitutional law, an executive privilege shields them from any obligation to disclose information.⁴⁵ They may claim to be exempt from criminal prosecution or refer to “implied powers” that come with the office or function.⁴⁶

⁴² By way of justification the Pilgrims counterfactually spread the tale of the emptiness of the land they were out to settle and reduced the few native American present to “savage and brutish men . . . little otherwise than wild beasts,” who could be “discounted” normatively speaking: see WILLIAM BRADFORD, *OF PLYMOUTH PLANTATION* 25–26 (S.E. Morison ed., 1967).

⁴³ IMMANUEL WALLERSTEIN, *EUROPEAN UNIVERSALISM: THE RHETORIC OF POWER* 27 (2006); TONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* (2001).

⁴⁴ *RUSSIAN CONSTITUTION* 1918 No. 23.

⁴⁵ With this argument, the Nixon Administration sought to prevent further publication of the Pentagon Papers, which revealed the genealogy of the Vietnam War and the systematic disinformation of the American public about the war by US Governments. See *New York Times Co. v. U.S.* 403 U.S. 713 (1971).

⁴⁶ Still instructive are the legal arguments of the President’s defenders in the Watergate Scandal, see *WATERGATE AND AFTERWARD—THE LEGACY OF RICHARD M. NIXON* (Leon Friedman & William F. Levantrosser eds., 1992).

Beneficiaries of a given distribution of goods or entitlements tend to vindicate their benefits as obtained “of right” or “within the law.” To veil the lack of legitimacy or the impression of unfairness, legislators (or any elite) taking over, without authorization, the constituent power, are likely to invoke a special mission (*see supra*) and think of compensating those excluded:

[The deputies] entrusted with legislative power, will seize constituent power on behalf of the nation even in the absence of any explicit charge to do so, in this revolutionary usurpation of power, the gap in legitimacy will be filled by “presenting the people with the tables of the essential rights, under the title of ‘Declaration of Rights’.”⁴⁷

2.3. Narratives of justification and human rights

Human rights stories have different layers—variations of justification—as will be shown later. In politics and academia, they play a crucial, albeit at times questionable, role which illustrates to what extent human rights have become icons of modernity, aspects of socio-political identity, and benchmarks for judging other societies and polities.

Ritually, political leaders, traditionally in Russia, China, and peripheral countries, have to respond to queries (from Western politicians) regarding the human rights situation in their country, before the delegations then go ahead with concluding economic deals or sitting down to dinner. In the context of foreign policy, national interests, economic intentions, and ideological hegemony are reconstructed in human rights terms.⁴⁸ Meanwhile, even the organizers of sports events have adopted the human rights terminology. Therefore, Russian anti-gay laws banning the “propaganda of nontraditional sexual relations to minors” and, incidentally disregarding a ruling of the European Court of Human Rights,⁴⁹ sparked protests against the 2014 Winter Olympics in Sochi; but once again, the indomitable opportunism of the International Olympic Committee is likely to prevail.

Finally, with the proliferation of the human rights language as a global idiom, military commanders have also learned to dress up military actions in terms of justice and human rights:

[J]ustice has become, in all Western countries, one of the tests that any proposed military strategy has to meet . . . moral theory has been incorporated into war-making as a real constraint on when and how wars are fought.⁵⁰

A world apart, it would seem, in the academia, narratives of justification follow a different path. They present and set normative standards for the way things ought to be, and no longer or not always strictly compare the “is” with the “ought,” but initiate

⁴⁷ Keith Baker, *The Idea of a Declaration of Rights*, in *THE FRENCH IDEA OF FREEDOM* 169 (Dale van Kley ed., 1992).

⁴⁸ See *only* ALISON BRYSK, *GLOBAL GOOD SAMARITANS—HUMAN RIGHTS AS FOREIGN POLICY* (2009); NOAM CHOMSKY, “HUMAN RIGHTS” AND AMERICAN FOREIGN POLICY (1978).

⁴⁹ In *Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08, and 14599/09, Oct. 21, 2010, the Court held that banning gay pride rallies violates arts. 11 and 14 of the European Convention on Human Rights.

⁵⁰ MICHAEL WALZER, *ARGUING ABOUT WAR* 12 (2004); see also KENNEDY, *supra* note 15, at 287 and 289, who argues that humanitarian norms have been “metabolised into the routines of the US Navy.”

a philosophical or jurisprudential project of reasoned elaboration. It often starts from past memories of injustice, fear, and oppression.⁵¹ On the mode of normative construction, visions of humanity and society, of needs and interests, are translated into possibly more coherent, well-grounded principles of justice⁵² and human rights⁵³ guaranteeing primarily dignity,⁵⁴ integrity, autonomy, and equality.

As distinct from stories informed by a practical political-legal purpose, these normative narratives invariably claim to take human rights seriously and are preoccupied with the systematic rational elucidation of normative propositions, ideas, and beliefs. It is virtually impossible to recount here the richness and variety of minimalist or maximalist, individualist or collectivist, ethical–moral or political–legal, universalist or relativist stories elaborating human rights as situated on national, transnational, or international planes, with or without a “free-standing moral normativity”—developed from basic needs or interests, informed by a “global public reason,” based on an “overlapping consensus” or emanating from discursive procedures. Nor do I wish to participate or take sides in the “race to the bottom,” to wit, the search for the ultimate and most fundamental of all human rights. The list is already long (enough), covering the “right to have rights” (Hannah Arendt), the “right to equal concern and respect” (Ronald Dworkin) and dignity (Pico della Mirandola); the equi-original concept of private and political autonomy (Jürgen Habermas) and the “right to justification” (Rainer Forst); the right to membership in a political society (Josiah Cohen), the right to enjoy minimal conditions of a good life (John Tasioulas) and freedom from fear (Franz Neumann). An addition to the list is not really called for.

In general, philosophers and jurists alike transcend the world of experience and normalcy. Their theoretical vocabulary and also their intention to ameliorate the way things are hold out hope for liberation and reconciliation in a world the (return to?) fairness of which hinges upon rights. These theoretical narratives and the human rights law they have helped to forge and profile on the domestic and international plane, are to be appreciated as “a search for absolutes in a world whose complexity has created the danger of unfettered relativism, . . . bureaucratic abuse,”⁵⁵ and arbitrary power, as well as a search for limits to cost–benefit calculations, administrative or managerial discretion, and the cyclical fluctuations of political preferences.

Rather than (or before) emplotting reality as romance, I argue in the next section, that political–legal narratives of justification as introduced and elaborated by

⁵¹ Klaus Günther, *Human Rights and Political Culture*, in *THE EU AND HUMAN RIGHTS* 126 (Philip Alston ed., 1999).

⁵² See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996); THOMAS SCANLON, *WHAT WE OWE TO EACH OTHER* (1998); ALLAN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION. MORAL FOUNDATIONS FOR INTERNATIONAL LAW* (2004); RAINER FORST, *DAS RECHT AUF RECHTFERTIGUNG. ELEMENTE EINER KONSTRUKTIVISTISCHEN THEORIE DER GERECHTIGKEIT* (2007); STEFAN GOSEPATH, *GLEICHE GERECHTIGKEIT. GRUNDLAGEN EINES LIBERALEN EGALITARISMUS* (2004).

⁵³ See *only* THEORIES OF RIGHTS, *supra* note 9; POGGE, *supra* note 9; NICKEL, *supra* note 9; GRIFFIN, *supra* note 9.

⁵⁴ Cathérine Dupré, *Human Dignity in Europe: A Foundational Principle*, 19 EUR. PUB. L. 319 (2013).

⁵⁵ See Martti Koskeniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 HUMANITY 47 (2010).

individuals, groups, elites, or social movements have a more immediate practical agenda: They are designed to *legitimize* either the political-social status quo or the demands that the status quo change in situations of conflict. They function as a timely mythology of legitimate entitlement.

3. Human rights narratives as mythology and ideology

Narratives of human rights law, as I want to show, follow the grammar, and share some structural features, of what appears to be a modern mythology. Like myths,⁵⁶ as the term is used here, human rights mythology establishes a connection between human existence and human suffering. It spans tales of justification that construct, first, a comprehensive narrative connection of disparate (past) events; second, advance claims concerning the validity of the narrative of legitimate entitlement, occasionally with religious or otherwise transcendent underpinning; and third, have a political and educational agenda of how things legitimately should be, often but not necessarily couched in a vision of progress and redemption.⁵⁷ By removing human rights from their all-too earthly moorings, these three aspects may legitimize the defense of the status quo or call for its reform or amelioration. Aside from the fascination with the juridical, I believe the affinity for myth accounts for the peculiar purchase of, and redemptive power ascribed to, human rights narratives.⁵⁸

3.1. Structural connection

Regarding their internal *structural connection*, narratives of justification, like any other good story, have a beginning, albeit mysterious and dark, and an end, however temporary and elusive. And they construct a plausible transition from beginning to closure that creates a developmental connection between singular, contingent events, or a systematic or logical link between various, disparate facts or concepts. As against merely factual accounts, such narratives attempt to capture and direct the listener's or reader's attention through complex clusters of facts by couching what is narrated in a not too thin description, however brief it may be, and a convincing interpretation whose persuasive power hinges upon their appeal to emotions (empathy). More often than not, these narratives contain gaps and dark passages (they may try to hide), represent the conflicting voices of autonomy and authority, and oscillate between the apology of the way things are and their utopian other.⁵⁹

⁵⁶ From the vast body of literature see only ROLAND BARTHES, *MYTHOLOGIES* (1957); LÉVI-STRAUSS, *supra* note 20; CLAUDE LÉVI-STRAUSS, *TOTEMISM* (1963); and HANS BLUMENBERG, *ARBEIT AM MYTHOS* (1979).

⁵⁷ For a fascinating analysis of US mythology, see RICHARD SLOTKIN, *REGENERATION THROUGH VIOLENCE. THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600–1860* (1973).

⁵⁸ And therefore the focus on the dark side of human rights and their relationship to narrative and myth should not be read as a denial of their achievements.

⁵⁹ See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA. THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2d ed. 2005).

Tales from constitutional mythology most effectively start with a momentous decision on the part of the rulers or a dramatic act of liberation or protest on the part of the ruled as a founding moment or the triggering of the process of foundation of a polity. For example, the narrative structure of stories about the French Revolution spans across a series of events. They arguably begin with the Convocation of the General Estates, are then dramatized by the presentation of the *cahiers de doléances*, the Women's March on Versailles, and the Storming of the Bastille. In retrospect, justificatory narratives connect these moments and reconstruct a plausible flow of events to the moment of closure. Depending on the perspective or agenda, the closure may be moved to the end of the revolutionary movement: its transformation into a rights revolution⁶⁰ or its authoritative representation in the most concise and abstract form as pure script by three consecutive, solemnly sealed documents. These documents reconstituted the French polity, if only briefly, as constitutional monarchy (1791), revolutionary regime (1793), and the Directorate (1795). Thus told, the story incidentally legitimizes a considerable amount of acts of violence, or even terror, and, in the end, the restorative move to stability.

While the French Revolution, more than the democratic revolution in the US, was to become paradigmatic for later mythical narratives of liberation, it allowed for a variety of internal structural connections, beginning with the revolution and first successful slave revolt in Saint-Domingue (Haiti) from 1791 to 1804,⁶¹ followed by, *ex negativo*, the political restoration in Nineteenth Century Europe.

Decolonization and liberation movements in the former colonies and in Eastern Europe produced waves of constitution-making, not necessarily following the path of rights constitutionalism. Yet, some of the more recent constitutional documents have adopted a narrative style by undertaking in their preambles to connect the different historical moments and draw a line from the mythical founding of the polity to the present.⁶²

3.2. Claim to validity

Like myths, legal narratives of justification have moments of idealism and fiction, and like myths, they come with a *claim to validity* concerning some legitimate entitlement, in particular of the authors and the message. Manifesto constitutions,⁶³ for example, routinely base their claim to validity on common knowledge, shared experience, or what is considered to be evident: "That all men are by nature equally free and

⁶⁰ For a most informative narrative of the various constitutional projects, see MARCEL GAUCHET, *LA RÉVOLUTION DES DROITS DE L'HOMME* (1989). MICHAEL P. FITZSIMMONS gives a detailed account of the debates in the National Assembly 1789–1791: see *THE REMAKING OF FRANCE. THE NATIONAL ASSEMBLY AND THE CONSTITUTION OF 1791* (1994).

⁶¹ See C.L.R. JAMES, *THE BLACK JACOBINS. TOUSSAINT L'OUVERTURE AND THE SAN DOMINGO REVOLUTION* (rev. ed. 1938) and Marks, *supra* note 5.

⁶² See, e.g., the constitutions of Bolivia (2009), China (1982), Croatia (1990), East Timor (2002), Myanmar (2008), and Vietnam (1992).

⁶³ Günter Frankenberg, *The Return of the Contract: Problems and Pitfalls of European Constitutionalism*, 6(3) EUR. L.J. 257 (2000), and Günter Frankenberg, *Constitutions as Commodities. Notes on a Theory of Transfer*, in *ORDER FROM TRANSFER*, *supra* note 28, 1.

independent, and have certain inherent rights” (1776 Virginia),⁶⁴ that “public calamities and . . . the corruption of governments” are caused by “the ignorance, neglect, or contempt of rights of man” (1789 French Déclaration).

Having formally established their legitimate authority as “Representatives of the United States of America,” the framers of the US Declaration of Independence, underscored their legitimate entitlement to “declare the causes which impel them to the separation” with (a) an elaborated story, listing the abuses by the tyrannical British monarch, (b) necessity (“when it becomes *necessary* for one people to dissolve the political bands”), (c) “the laws of nature and of nature’s God,”⁶⁵ and, most importantly, (d) the truth as the basis of the legitimacy of their narrative: “We hold these truths to be self-evident, that all men are created equal . . .” The Declaration not only legitimized secession but also, by its remarkable silence over the existence of Native Americans, the colonists’ right to colonize America. So, at one of their prominent beginnings and one of their first colonial encounters, human rights had a colonial bias legitimizing predators’ raids.

A different narrative technique is brought into play when validity claims are derived from presumably superior knowledge provided, for example, by an authoritative theory (of history, society, revolution, etc.) transcending the horizontal plane of society and justifying violence in the name of science, politics, culture, or religion.⁶⁶ A case in point are the socialist cadres imagining in (and convincing themselves of) their privileged insight into the “laws of socialism” as laid down in Marx’s historical materialism and Lenin’s theory of revolution and, in China, also Mao Zedong’s Thought and the “Three Represents.”⁶⁷ Their narratives justify the exclusion, suppression, at times even the physical extinction, of large parts of the population for the sake of what is claimed to be a valid purpose, such as progress, social peace, or proletarian internationalism.⁶⁸

Structurally speaking, in a similar vein as socialism’s “red engineers”⁶⁹ and *cadres*, capitalism’s white experts and political technicians,⁷⁰ because they modify or sidestep

⁶⁴ In a similar tone and rhetoric, the authors of the LIBERIAN DECLARATION OF INDEPENDENCE (1847) presented their narrative of liberation and, incidentally, a different version of the “the country which gave them no protection”—a story usually not told by the US Founding Fathers. See CHARLES H. HUBERICH, *THE POLITICAL AND LEGISLATIVE HISTORY OF LIBERIA* (1947).

⁶⁵ A Declaration by the Representatives of the United States of America in General Congress Assembled, July 4, 1779—emphasis added.

⁶⁶ See, e.g., the justification of violence, brutality and subjugation in the name of a “superior race” (ROBERTO ESPOSITO, *BIOPOLITICS AND PHILOSOPHY* (2008)) or religion (R. SCOTT APPLEBY, *THE AMBIVALENCE OF THE SACRED: RELIGION, VIOLENCE, AND RECONCILIATION* (2000)) or ROBERT PAPE, *DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM* (2006)).

⁶⁷ This trinity is generally credited to General Secretary Jiang Zemin’s concept of the Communist Party (2002) representing the developmental needs of China’s advanced productive capacity, the progressive direction of its advanced culture, and the fundamental interests of the broad majority of the people of all nationalities in China.

⁶⁸ For an overview of such narratives, see the contributions to *INTERNATIONALIST DOCTRINES DURING THE YEARS OF REAL COMMUNISM IN EUROPE* (Emmanuelle Jouannet & Iulia Motoc eds., 2012).

⁶⁹ I borrow this term from JOEL ANDREAS, *THE RISE OF THE RED ENGINEERS. THE CULTURAL REVOLUTION AND THE ORIGINS OF CHINA’S NEW CLASS* (2009).

⁷⁰ FRANKENBERG, *supra* note 37, at ch. I; David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY J. INT’L L. 5 (2005).

the rule of the people through their agency and expertise, have to *adjust* technocracy or expert rule to the standards of democracy. The authority and superior legitimacy of knowledge, in the context of expert rule, reappears under the guise of the metaphysics of “inherent necessities and practical constraints,” which in non-socialist democracies become the functional equivalent to the “laws of socialism.”

As distinct from ruling elites, protest movements may take their claims to the streets and resort to narratives that invoke the traditional right to resistance, but will more frequently underscore the validity of their programs and projects with references to a shared experience of discrimination or oppression that violates written or unwritten norms of humanity—in particular, human rights laid down in constitutions and international pacts. Their legitimate entitlement, though related to their experience and interests, may also be based on authoritative texts, like UN conventions on rights or national constitutions.

3.3. Political-educational agenda

Legal narratives of justification share with certain myths a *political-educational agenda*. By interpreting and suggesting *how to cope with* a problematic situation, these stories—a rather heterogeneous body of writings consisting of documents, historical and theoretical treatises, pamphlets, constitutional texts and commentaries, and international pacts—produce knowledge through narration in order to instruct their readers, thus introducing a political and pedagogical register.⁷¹

In correspondence with the educational register, the authors of the US Declaration of Independence addressed “the candid world.” Then, in a brilliant moment of justificatory political pedagogy, they reiterated “the history of repeated injuries and usurpations” on the part of the King of Great Britain (conspicuously and with an eye to the future bypassing the not all that innocent Westminster Parliament) and “the barbarous acts” committed by the monarch, described in a legal turn as “disregard and contempt for human rights.” So instructed, the colonialists were expected to mobilize for and join the war of secession. And the “candid world” abroad was called on to empathize with and possibly support this venture.

The educational agenda of the French revolutionaries implied awareness of rights and duties and the “maintenance of the constitution” so as to enable and motivate the people to compare the acts of the legislative and executive power “at any moment with the objects and purposes of all political institutions.” This combination of rights optimism and political pedagogy provided a pattern numerous drafters of constitutions and rights declarations later reiterated. The Universal Declaration of Human Rights followed the pedagogical register insofar as it propagates “teaching and education to

⁷¹ In so far as human rights stories combine their legal message with a political project, they are vulnerable to legal and political demands that may be addressed to a regime to redeem a given promise. Consequently, a justificatory story of rights work in the context of the way things are may come into conflict with new justificatory claims of how they should work. Such conflict may build up considerable tension, lead to disillusionment and delegitimation of an old normative regime and set in motion a dynamics, which, in the course of events, may create a new or change an old one.

promote respect for these rights and freedoms.” It also offered a matrix for legal narratives by reimagining the cold brutality and mass murders of Fascism and Stalinism as “disregard and contempt for human rights [that] have resulted in barbarous acts” and stating its normative project “that human rights should be protected by the rule of law.” In the end, the Universal Declaration proclaims a vague benchmark for progress: “a common standard of achievement for all peoples and nations.” The underlying and somewhat surprising political purpose is relegated to a subordinate clause, namely to prevent “recourse . . . to rebellion against tyranny and oppression.”

In the same vein, albeit in a different style and written with different motives, the authors of past and present socialist constitutions have adopted the vocabulary and followed the grammar of narratives of justification, idealizing in lengthy preambles, first and foremost, history and the leading role of the party. In this vein, the preamble of the Chinese Constitution instructs “the people of all nationalities in China” about the “glorious revolutionary tradition” and the “successes . . . in economic development.” Then it goes on to interpret the way things are in China today as achievements credited to the theoretical authorities and the Communist Party. Finally, the text of the preamble shifts from imagining the past to projecting the future by formulating the “task of the nation . . . to concentrate its efforts on socialist modernization along the road of Chinese-Style socialism.” Interestingly enough, no mention is made of the “Great Leap Forward” (1958–1963) or of the “Cultural Revolution” (1966–1976).⁷²

In short, after human rights narratives moved from naturalism (natural rights and evidence) to positivism (constitutional/legal rights and consent), they have come to share properties of a *modern* mythology, replacing the ancient gods and heroes by more up-to-date, secular authorities. Depending on the historical-political context either the vanguard Party, an authoritative Theory, Expertise, the Constitution or Human Rights are expected to control the latter-day furies, turn chaos into order, and guarantee redemption from the world’s misery.

3.4. Narratives of justification as ideology

If ideology merely connotes the way its addressees (are made to) see reality, little else other than its affinity to theory distinguishes it from myth. Yet, ideology comes with a long conceptual history and a package of meanings. For all intents and purposes I focus here on ideology as a theory of systems justification and a set of ideas and beliefs—true or false—characteristic for an individual or group as it captures the “belief” in a just world, which “must have at least enough cognitive content to help organize the practical lives of human beings.”⁷³ Narratives of justification

⁷² One may safely assume that any mention of the fate of the Native Americans in the Declaration of Independence or the slightest hint at past economic disasters, the red terror, and their many millions of victims in China would have defeated any educational purpose the authors of the Declaration and the Chinese preamble may have had in mind.

⁷³ For an overview over the complex discourse on ideology and the possible meanings of ideology, see EAGLETON, *supra* note 3, at 27.

qualify as ideologies insofar as they contain “prepackaged units of interpretation,”⁷⁴ comprising aims, ideas, and claims which, in political contexts, are offered either by a dominant class or elite or by the non-dominant side as a project designed to persuade or force their addressees to look at things and understand reality in a certain way.

As far as rights-stories contain or imply a developmental scheme or program of action, they correspond to the style of a positive (political) ideology, reflected, in particular but not only, by socialist and some postcolonial constitutions which outline and project how society should work and the goals to be achieved in order to mobilize the addressees.⁷⁵ However, as their descriptions of society and justification of a system or regime diverge from the experienced reality and are “accomplished with false consciousness” (Friedrich Engels),⁷⁶ they become negative ideology—ignoble lies to deceive those who “excel at what they wish to believe.”⁷⁷

Since human rights law has replaced the exhausted natural rights tradition, it was linked to some political agenda or another—Western anti-communism and Eastern anti-imperialism first, then foreign aid/development and the promotion of democracy, and most recently humanitarian interventions. Accordingly, “the holy trinity” of liberalism, democracy, and human rights⁷⁸ has been said to serve as the “West’s ideology, the credo of a new world order.”⁷⁹ What is more, human rights became a “bargaining chip in trade, aid, and diplomatic relations” and a platform for world-wide “involvement in domestic affairs,” and was “hijacked by governments for a moral-sounding policy.”⁸⁰ Putting human rights into commission for foreign and other policy lets their fragrance of transcendence—transcending first and foremost national interests, that is—evaporate.

In combining dramatic, mythical, and ideological rhetorical elements, narratives of justification intervene in the obstinate world of facts as apologetic or utopian imaginations of the real.⁸¹ They oscillate “between a language of imagination and one of decision”⁸² to form thereby a more or less determinate sense of justice concerning the way things are and should be. In the final section, I now turn to what one may consider the narrative proper of human rights—their juridical construction of the factual world.

⁷⁴ See John T. T. Jost, Alison Ledgerwood & Curtis D. Hardin, *Shared Reality, System Justification and the Relational Basis of Ideological Beliefs*, 2(1) SOCIAL & PERSONALITY PSYCH. COMPASS 171, 171–172 (2008).

⁷⁵ For a thoughtful analysis and classification, see Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT’L L. 589 (1996).

⁷⁶ Ron Eyerman, *False Consciousness and Ideology in Marxist Thought*, 24 ACTA SOCIOLOGICA 43 (1981).

⁷⁷ Jost et al., *supra* note 74, at 171.

⁷⁸ wa Mutua, *supra* note 75, at 601.

⁷⁹ COSTAS DOUZINAS, *HUMAN RIGHTS AND EMPIRE* 32 *et seq.* (2007).

⁸⁰ *Id.*

⁸¹ Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in CLIFFORD GEERTZ, *LOCAL KNOWLEDGE. FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 173 (3d ed. 2000).

⁸² *Id.* at 174.

4. Narratives of justification as loss and normalization

“Whatever it is that the law is after, it is not the whole story.”⁸³ Human rights law, one would have to add to Clifford Geertz’s statement, *cannot* possibly be after the whole story. Its narratives of justification contain mechanisms that, as was shown above, represent, reconstruct, and change reality:

The discourse of universal human rights thus presents a fantasy scenario in which society and the individual are perceived as whole, as non-split. In this fantasy, society is understood as something that can be rationally organized, as a community that can become non-conflictual if only it respects “human rights.”⁸⁴

As human rights intervene in the way things are, and translate conflicts into the world of rights-entitlements and legal duties, they not only reflect “practical attitudes toward the management of controversy”⁸⁵ but also select the legally relevant aspects and information and transform reality.⁸⁶ Therefore the mechanisms at work have to be discussed: how legal methods and argumentative techniques are deployed to filter, reduce, and recycle what initially appeared to be “the whole story.”

4.1. Displacement and deferral

The more individuals, groups, and even government officials realized that resorting to rights claims—including the limitations of and exceptions to rights—might be the best way to buttress their interests and dress up their stakes in a conflict, the more human rights became a global currency or lingua franca. While modernist and romantic narratives stress the emancipatory, empowering and liberating effects this language may have, one may want to add that the bright side of human rights comes at a price.

To begin with, human rights law, not surprisingly, within modern regimes of law-rule has no other way of handling controversies than to frame—and *normalize*—them as *rights conflicts*. Consequently, human rights narratives take for granted or to be unproblematic the requirement that individuals have to translate their grievance into law and to recode their suffering as illegal or violating a right; that they have to act the role and obey the script of a claimant, to say “that’s my right”—rather than: “that’s my interest, need, or suffering”; that they must direct any rights claim to the legal apparatus and staff, and follow the rules of the established rituals, hoping their complaint will be then and there properly dealt with. Not only systems theory⁸⁷ takes all this for granted.

A recent German constitutional case⁸⁸ nicely illustrates how the legal transformation and normalization of conflicts implies and reduces semantic and strategic⁸⁹

⁸³ *Id.* at 173.

⁸⁴ RENATA SALECL, *THE SPOILS OF FREEDOM. PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM* 127 (1994).

⁸⁵ Geertz, *supra* note 81, at 173.

⁸⁶ For a different, yet related approach accentuating strategic choices, see Outi Korhonen, *On Strategizing Justiciability in International Law*, 10 FINNISH Y.B. INT’L L. 91 (1999).

⁸⁷ See NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* (1985).

⁸⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 22, 2011, 1 BvR 699/06 (128 BVerfGE 226/256—Frankfurt Airport).

⁸⁹ In the theoretical register introduced by Korhonen, *supra* note 86.

choices. The controversy started when a small group of activists protested against the deportation of asylum seekers in the terminal hall of the Frankfurt Airport, where the deportation actually happened. The airport security service immediately ordered the protesters to leave the premises. Later, the executive board of the company operating the airport prohibited the protesters from trespassing upon private property. Once the conflict had turned into a “case,” it focused on and affirmed the *right* of the airport company to keep out demonstrators as trespassers. After all legal remedies had been exhausted without success, one of the protesters filed a constitutional complaint with the Constitutional Court claiming her *right to demonstrate* had been violated. In its decision affirming, within limits, the *right* to free speech and assembly in a terminal hall, the Federal Constitutional Court did not discuss the human tragedy of asylum seekers; it only but significantly mentioned, in an *obiter dictum*, that “a cast of mind undisturbed by the world’s misery” is no legitimate concern to limit constitutional rights.⁹⁰

Translating a problem, concern, or issue into the legal vocabulary and submitting to legal procedures implies a double movement of displacement and deferral. Conflicts are displaced from the everyday locations where they arise—home, street, school, workplace or, for that matter, terminal hall—and transferred to official institutions and professional bodies specialized in dealing with rights conflicts. And there, in law firms, court rooms, and hearings of human rights commissions, they are invariably deferred according to institutional capacity, priority schedules, workload, etc., and handled by the legal staff bringing to bear their professional expertise.

Clearly, conflicts may be cooled down and, thus, civilized. Civilizing conflicts, however, means not only reducing the conflict to the format of a case, recasting whatever the issue may be as a violation of rights or duties, and convert the need, desires and interests, emotions and expectations into legal entitlements, but also putting off satisfaction. For rights beget rights:

But rights always agitate for more rights: they create ever new areas of claim and entitlement that again prove insufficient. We keep demanding and inventing new rights in an endless attempt to fill the lack, but desire is endlessly deferred.⁹¹

While discourse turns everything into a legal claim, the political-social dimension of a conflict tends to get lost or obscured in translation, or cannot be adequately introduced in the legal form and process of negotiating individual entitlements.

A conflict, thus dislocated and deferred, can hardly be expected to be solved quickly and always to the claimant’s satisfaction. Therefore, the fairly long wait for justice and the experience of injustice need to be justified or camouflaged. Narratives of justification book these limitations and failures of the administration of justice as the inevitable price to be paid for a civil(ized) conflict management and argue that, on balance, the benefits of the professional and institutional application of human rights under the terms and procedures of law regularly, at least in most cases, outweigh the costs. So, the justificatory tale becomes one of necessity and economy.

⁹⁰ 128 BVerfGE 226/256—Frankfurt Airport.

⁹¹ DOUZINAS, *supra* note 79, at 49.

4.2. Selectivity

Part of the brightness of human rights law, complementing the story of its civilizing mission, stems from the promise that the rights vocabulary covers all relevant factors, i.e., normative aspects, of a conflict more adequately than any other vocabulary. Comprehensiveness is suggested by philosophical and jurisprudential stories perfecting the method of application and elaborating a “system” of rights on the basis of actual rights catalogues or stressing their universal nature which usually comes with the claim that human rights law covers all situations and relevant problems. The universal reach and claim come at a cost, though. The particularity of the individual complaint is never completely exhausted but taken as an *instance*—technically: a concrete controversy—to be fitted and dealt with in the all-encompassing universal scheme. And this way, many aspects an individual may find crucial get lost in translation.

Tales of law’s and, in particular, the human rights system’s comprehensive grasp of the complexity of life and, in the process of application, of “all the relevant factors” of a case are vulnerable to two charges: They miss the specificity of each conflict—the singularity of the individual with her identity, needs and life situation—and the structural and strategic⁹² selectivity of human rights law—its legislation as well as its application. Legislators have demonstrated a preference for *ad hoc* decisions, limiting rights (quite often for the sake of national security) rather than extending them—anything but comprehensive grasp of the world of rights.⁹³ Likewise, courts adjudicate under considerable constraints in terms of time and institutional resources, fine-tuned by a network of mechanisms of selectivity that undermine the chances of human rights claims to be heard thoroughly, if at all, and judged in all relevant respects. Mechanisms of selectivity are, to name only a few, the distinction between questions of fact and questions of law, admissibility thresholds, deals and plea-bargaining in criminal trials, the politics of granting or denying *certiorari*, and the subsidiary character of constitutional review and its specific criteria of “relevance.”⁹⁴

These procedural and substantive restrictions suggest that human rights law not only promises more than it can *possibly* deliver, but by dint of its selectivity and deferral also has disempowering side-effects, usually overlooked, *adjusted*, or “explained away.” Again, there are jurisprudential and sociological narratives on offer legitimizing the negative side-effects as inherent necessities, like the reduction of complexity.⁹⁵

Normative theories with a romantic twist will prefer to uphold the story of human rights’ comprehensive and universal reach by either downplaying selectivity as a singular bad practice not compromising the universal ideal as being, theoretically at least,

⁹² Korhonen, *supra* note 86.

⁹³ For critiques of parliamentarism, see *DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE US AND ABROAD* (Bert A. Rockman & R. Kent Weaver eds., 1993); HARTMUT WASSER, *PARLAMENTARISMUSKRITIK VOM KAISERREICH ZUR BUNDESREPUBLIK* (1974); *PLURALISMUS UND PARLAMENTARISMUS IN THEORIE UND PRAXIS* (Jürgen Hartmann & Uwe Thaysen eds., 1992).

⁹⁴ It may be interesting to note that less than 2% of all constitutional complaints reaching the Federal Constitutional Court of Germany turned out to be successful.

⁹⁵ One of the central concepts of systems theory: see NIKLAS LUHMANN, *VERTRAUEN. EIN MECHANISMUS DER REDUKTION SOZIALER KOMPLEXITÄT* (2000).

in the interest of everyone. Other authors base their defense of comprehensiveness on the claim that restrictions in one case are complemented in another one, which then represents the deficient case or has a radiating effect.

4.3. Reducing the imaginative space of emancipation

Once people realize that to dress their interest in, or to demand, whatever they need, such as a “right” to free speech, a safe work place, or equal pay is to give their agenda the strongest possible setting, they will translate their experience of what they deem unjust, arbitrary, or degrading into legal claims of right. They will denounce the status quo and seek legal redress of their grievances. Consequently, the focus on the grammar and vocabulary of rights narrows the imaginative space of emancipation to the world of law and rights and marginalizes or negates other vocabularies and strategies, say the vocabulary of duties and responsibilities, of basic needs or interests, or, in particular, strategies relying on collective commitment⁹⁶ and tends to de-politicize the conflict at hand.

To illustrate this drawback of human rights law, David Kennedy refers to the right to development. He focuses on the consequences once concerns about global poverty are mainly raised in terms of a human right:

[E]nergy and resources are drawn to developing a literature and an institutional practice at the international level of a particular sort. Efforts that cannot be articulated in these terms seem less legitimate, less practical, less worth the effort.⁹⁷

Narratives justifying a “right” to development systematically overlook or play down that activists concerned about poverty are increasingly drawn into (a) endless debates about a series of legal quandaries: whose right, against whom, remedying poverty how, to be implemented in what way and by what institutions, and so forth; and (b) into institutional projects of codification, monitoring, and reporting that are quite familiar from other human rights efforts. Meanwhile, human rights narratives neither cover nor criticize other endeavors because they insulate the economy and politics from law. In the end “[i]nternational economic policy . . . is taken over by neo-liberal players who do not see development as a special problem” affecting or causing global poverty. One may infer that human rights law requires a narrative of justification in so far as it narrows the imaginative space of emancipation.

4.4. Alienation

Human rights have a positive—indeed, a humane—ring. To argue that they alienate appears to be counterintuitive. And yet, alienation,⁹⁸ at least the aspects of estrangement and separation, appear to apply to the rights discourse and the rights practice. First, the notion of the rights-holder introduces—on the dark side of

⁹⁶ Kennedy, *supra* note 15, at 108–109.

⁹⁷ *Id.*

⁹⁸ See *only* RICHARD SCHACHT, ALIENATION (1970); ISTVÁN MÉSZÁROS, MARX’S THEORY OF ALIENATION (1970); RAHEL JAEGGLI, ALIENATION (forthcoming 2014).

empowerment—a “thin” personality: estranged from her desires and emotions, isolated and separated from her community, and reduced to a point of reference where abstract rights and entitlements intersect, and concrete traits and needs fade into the background.⁹⁹

Poverty offers a good example of the underlying problem. Lack of assets in the midst of a society of riches based on property rights makes the poor feel “excluded, shunned, scorned, by everyone.”¹⁰⁰ The recognition offered by the abstract right to property, by the potential to hold property, is clearly inadequate.¹⁰¹

The alienating effect can be seen more clearly if one takes into consideration the aspects of deferral and displacement of human rights law: Rights-holders and claimants watch, mystified and intimidated, rather like fairly ignorant bystanders, the automatic functioning of a well-oiled, complex legal machinery:¹⁰² how the conflict is being removed from the everyday of experience, dissected by the legal professionals whose language becomes less and less understandable, and processed in court, on ever higher and less transparent institutional levels, with ever lesser concern about the “facts” of the case.¹⁰³ Unless they’re able to command a modicum of legal training or a pathologically robust psyche or both, claimants will hardly be able to avoid feeling dispossessed of what had once been their conflict—a feeling that may very well be described as alienation. Bereft of the possibility of identifying themselves with the language, form, and mechanisms of human rights law’s technical dispute resolution, they experience juridification as a separation from their original plea and plight; they see themselves placed in a relation of unrelatedness and restricted in their “positive freedom.”¹⁰⁴

The alienating effects human rights law may have are illustrated, for example, by the way asylum-seekers were judicially processed in Germany (which is not to say they received a better treatment elsewhere). Evolving from the duty to hospitality,¹⁰⁵ granting asylum had traditionally been justified as a reciprocal concession states agreed upon so as to prevent citizens seeking refuge abroad from burdening their neighborly relations. This legal concept was consciously and for political reasons alienated from the asylum seeker’s plight. Against the background of totalitarian practices, asylum was in the twentieth century elaborated in philosophy as the ultimate “right to have

⁹⁹ In the normative discourse, human rights are defined as “weapons” or “trumps” in the hands of the individual rights holder. They are said to override any competing political, economic or other concerns. Such definitions accept as normal the circumstance that the personal is faded out and treated as an incidence of the universal. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

¹⁰⁰ GEORG F. HEGEL, *VORLESUNG ÜBER DIE PHILOSOPHIE DES RECHTS* 194–195 (1983 [1819–1820]).

¹⁰¹ DOUZINAS, *supra* note 79, at 40.

¹⁰² NIKLAS LUHMANN analysed this dark side as “legitimation by procedure” in *LEGITIMATION DURCH VERFAHREN* (6th ed. 2001).

¹⁰³ In the *Frankfurt Airport* case (128 BVerfGE 226/256), the complainant found it hard to understand that her concern to prevent the deportation of asylum seekers was of no import during the hearing of her case before and in the decision of the Federal Constitutional Court.

¹⁰⁴ JAEGLI, *supra* note 98, at 53 with reference to Isaiah Berlin’s concept.

¹⁰⁵ JACQUES DERRIDA & ANNE DUFOURMANTELLE, *OF HOSPITALITY: CULTURAL MEMORY IN THE PRESENT* (Rachel Bowlby trans., 2000).

rights” and the only *genuine* human right.¹⁰⁶ It received its programmatic, somewhat enigmatic, juristic wording in article 14 of the Universal Declaration: “Everyone has the right to seek and [here one would have to add: *if granted*] to enjoy in other countries asylum from persecution.” One year later and for the first time in constitutional history, the German Basic Law, in its original version of 1949, resuscitated the “belief” in a just world and elevated asylum to a human right—a “trump” one might say—entitling those who are politically persecuted. In the course of its further career on the path of law, gold was, in a perverse sort of alchemy, turned into lead.¹⁰⁷ The human right to asylum was sustained (actually it was not needed), as long as refugees came from the East: they were considered by law either as German nationals or as ethnic Germans. The fall of the asylum seekers’ human right began, and their legal recognition became more hesitant and selective, when socialists and communists persecuted by the Pinochet regime knocked on the door. Some courts then required a “no violence”-test, others restricted asylum, in a turn to the nineteenth century, to “democratic protesters” or “politically engaged citizens.”¹⁰⁸ In addition, courts changed the burden of proof, shifting the right one more notch from the reality of refugees. Asylum seekers, including torture victims, now had to prove a “political motivation to persecute” on the part of their persecutors. The Federal Administrative Court argued:

A persecution for political reasons crucially depends on the motives underlying the infringements by the state . . . and . . . requires in each case clarification of the question which purpose a police measure or criminal prosecution serves. [Consequently, the right to asylum] offers protection neither against any excess of state power nor any disregard of human dignity [such as torture, but requires in addition that] political motives of the state abusing its power (be shown).¹⁰⁹

Once the number of refugees increased dramatically to over 100,000 per year, and their appearance differed considerably in terms of color, customs, and religion from “We the people” (and we the judges), German courts and administrative agencies adapted their reading of the right to asylum to the debates on the global plane,¹¹⁰ separated their decisions even more from the facts presented by the asylum seekers, and privileged blatantly political, social and economic considerations (social costs, limits of integration, harmonization of asylum laws within the European Union). Thus, the human right to asylum was devalued from a “trump card” in the hands of refugees to a vocabulary that had to compete with others (security, fiscal policy, demography, European integration). In the end, refugees stood a scant chance to obtain asylum.¹¹¹

¹⁰⁶ Hannah Arendt, *The Perplexities of the Rights of Man*, in HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 295 (3d ed. 1966); see also SEYLA BENHABIB, *THE RIGHTS OF OTHERS* 56 *et seq.* (2004).

¹⁰⁷ I take the metaphor from Geertz, *supra* note 81, at 182.

¹⁰⁸ Decisions of the Federal Administrative Court—BVerwGE 67, 195, 202.

¹⁰⁹ BVerfGE 67, 184/189 and 193. For a critique of the “subjective concept” of political persecution, see INGO VON POLLERN, *DAS MODERNE ASYLRECHT* 268 *et seq.* (1980), and REINHARD MARX, *ZEITSCHRIFT FÜR AUSLÄNDERRECHT* 42 (1981).

¹¹⁰ For a critical analysis of the global debates, see PHENG CHEAH, *INHUMAN CONDITIONS: ON COSMOPOLITANISM AND HUMAN RIGHTS* (2006).

¹¹¹ The number of applicants seeking asylum has since then dropped from 130,000 in 1995 to about 20,000 per annum (2005–2008), the rate of recognition oscillating between 5 and 1%. See Bundesamt für Migration und Flüchtlinge [Federal Office for Migration and Refugees], *Infothek/Statistiken/Asylzahlen* (Feb. 24, 2012).

4.5. Masking political power

The intervention of human rights in conflicts obeys the rules of a grammar and applies an idealizing vocabulary which, in general, neutralizes the underlying socio-economic, cultural, and political conditions. On the one hand, the claim of human rights law to neutrality underscores its legitimacy. On the other hand, this very neutrality—based on legal formalization in abstract and universal terms, recognized in court as entitlements, and implemented, and their violations remedied depending on the inherent command—masks the political power at play in legislation and application.

As a rule, narratives of human rights—with their dominant message that legal formalization warrants the neutrality of procedures and outcomes—appear to privilege legislation over application. This message implies that political concerns can only be introduced into the legislative process where they are deliberated with all due respect and then either filtered out or transposed to the level of a “right.” Such transformation establishes a human right in its general and abstract legal existence and purges it from its underlying political or other rationales.

The second part of the story focuses on the application of a right, from a normative point of view described as reasoned elaboration in a particular case as guided by legal method. According to this story judicial decisions are generally believed to merely translate, by way of syllogism or interpretation—*lege artis*—a legislative (or contractual) rights program. This narrative has been challenged by numerous realist, sociological, critical, and political theories of law.¹¹² To these theories and critiques I want to add only one aspect: Privileging the legislative production of human rights over their judicial application is prone to miss the power strategies masked by conflicting definitions of rights.

Again, the fall of the German asylum guarantee can be instructive. Another case in point is the prohibition of torture. The 1948 Universal Declaration on Human Rights, like the 1950 European Convention on Human Rights, strictly and absolutely, albeit programmatically, commands in article 5: “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.” The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹¹³ attempted to move beyond the generalized vocabulary of “the language of Eden”¹¹⁴ by offering a fairly detailed definition:

[T]he term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting

¹¹² For an overview, see Günter Frankenberg, *Down by Law: Irony, Seriousness, and Reason*, 83 *Nw. U. L. Rev.* 360 (1988/1989); DOUZINAS, *supra* note 79, at ch. 8.

¹¹³ Adopted by the General Assembly Resolution 39/46 of Dec. 10, 1984.

¹¹⁴ EDWARD PETERS, *TORTURE* (1985).

in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The document anticipated that readers might look for loop-holes:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.¹¹⁵

No sooner had this definition been laid down than an endless series of semantic battles began, motivated by unabashedly political concerns. Early on, the US Government, Congress, as well as the Administration, submitted a number of provisos to the Convention's definition and, in the process, reduced the rather strictly defined interdiction to a flexible standard. These definitional moves appear to be designed to cover past and ongoing CIA and military interrogation methods.¹¹⁶

Political battles over the semantics of torture, facilitated by its polysemy, came to a head during the Bush/Cheney Administration. A new narrative of justification was introduced: the responsibility to protect a society from terrorist attacks, derived from an always available, extended security apparatus:

"National security" has been the privileged term giving the state discretion to override policies and human rights when it feels threatened by real or imaginary enemies. But Western states have not replaced national with "human" security as the basis for engagement in world politics, "a conception more attentive to the concerns and insecurities of persons and people."¹¹⁷

The duty to provide security, i.e., to protect, served as a vehicle for putting the former adversary of human rights, the state, alongside the rights holders, and shifted from a vertical to a horizontal understanding of human rights. In the name of security, the commanders and practitioners of torture methods, before and more so after 9/11, claimed authority to conduct more aggressive interrogation methods than were legally permitted.¹¹⁸ Thus, the US Assistant Attorney-General, Jay Bybee, defined torture down as:

extreme acts . . . of an intensity akin to that which accompanies serious physical injury such as death or organ failure . . . because the acts inflicting torture are extreme, there is [a] significant range of acts that, though they might constitute cruel, inhuman, or degrading treatment or punishment, fail to rise to the level of torture.¹¹⁹

Members of the administration and the military were instructed by government memoranda that torturing terrorists in captivity abroad "may be justified," and international laws against torture "may be unconstitutional if applied to interrogations."¹²⁰ A memo from 2002 issued by the Justice Department held, among others, that (a)

¹¹⁵ Convention Against Torture, arts. 1 and 2.

¹¹⁶ See *only* PHILIPPE SANDS, TORTURE TEAM, DECEPTION, CRUELTY AND THE COMPROMISE OF LAW (2008) and TORTURE: A COLLECTION (Sanford Levinson ed., 2004).

¹¹⁷ DOUZINAS, *supra* note 79, at 184 referring to RICHARD FALK, THE DECLINING WORLD ORDER 11 and 16 (2004). See also Orford, RESPONSIBILITY TO PROTECT, *supra* note 36.

¹¹⁸ For a detailed analysis, see SANDS, *supra* note 116, and FRANKENBERG, *supra* note 37, at ch. VII.

¹¹⁹ Quoted in Elizabeth Eaves, *Defining Deviancy Down*, HARPER'S (Sept. 2004), at 6.

¹²⁰ Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST (June 8, 2004) at A01.

the President's inherent authority must be construed as overriding the prohibition against torture; (b) "it is difficult to take a specific act out of context and conclude that the act in isolation would constitute torture"; (c) "[f]or purely mental pain or suffering to amount to torture, it must result in significant psychological harm of significant duration, e.g. lasting for months or even years"; and (d) that "harm[ing] an enemy combatant during an interrogation in a manner that might arguably violate criminal prohibition" would be justified if done "in order to prevent further attacks on the United States by the al Qaeda terrorist network."¹²¹

In addition to these definitional battles, the US Government intensely exploited the polysemy of torture further by resorting to euphemism and cynicism, dodging the "t-word" by officially talking about "extreme prison conditions," "disadvantageous" or "full coercive treatment," "torture lite," or "extra encouragement" in interrogation situations. What is more, the government outflanked the formalized human right by informal security practices well-known today as "torture by proxy" and "offshore torture." In keeping with the logic of outsourcing,¹²² political office-holders, military commanders, and secret service agents sought to sidestep the charge of human rights violations: They delegated the application of violence to proxyholders—countries and subcontracted private agencies—well-known for brutal interrogation techniques.

From these semantic battles and strategies to camouflage torture practices, one may infer that a definition of torture, however strict, does not put to rest the politics of organized cruelty. On the contrary, the stricter the prohibition, the more it will provoke governmental opposition, because an absolute prohibition escapes "the familiar dynamic of rights and state power, in which the recognition of a right is also, and arguably more importantly, an acknowledgment of state power."¹²³

5. Epilogs

5.1. Epilog 1

Human rights narratives, this much can be learned from the recent discourse on "rescue torture," whether they employ reality as tragedy or romance, or justify or lean toward myth or ideology, cannot but normalize whatever they deal with as legal phenomena. Normalization is a *matter of language* and implies definition: It even turns a taboo—torture—into an object of law, places it as a human right interdict in the familiar narrative context of law and rights and sets off the search for exceptions.¹²⁴

¹²¹ *Id.* See also SANDS, *supra* note 116, and MARNIA LAZREG, *TORTURE AND THE TWILIGHT OF EMPIRE* (2008).

¹²² Jane Mayer, *Outsourcing Torture*, 81 *THE NEW YORKER* 106 (2005). See also Günter Frankenberg, *Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty*, 56 *AM. J. COMP. L.* 403 (2008), with further references.

¹²³ John Parry, *The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees*, 6 *MELBOURNE J. INT'L L.* 516, 520 (2005).

¹²⁴ "[C]reating a law of torture will almost inevitably lead to exceptions" and any attempt to resolve "this tension by prohibiting exceptions does no more than make definition rather than exception the central legal issue" (*id.* at 520).

Normalization is also a *matter of method*. It affects the application of human rights and includes them in the interplay of syllogisms and balancing.

Moreover, normalization is a *matter of politics*. It forces human rights—dignity, asylum, free speech, and as was shown above the prohibition of torture—into a competition with other vocabularies.

5.2. Epilog 2

Human rights law contains many stories that may be told as an antidote to romantic hyperbole. Torture is only one case in point but an important one. It radically and irrevocably marks the moment when the belief in a just world is shattered. Then and there all justifying, mythologizing, ideologizing and normalizing ends, because torture destroys the very humanity and thereby bares the core of *any* human rights narrative—the individual’s authorship of her life history.

This internal connection between human rights and biographical authorship needs to be cast as tragedy and defended against all odds and mobilized against all attempts to defend, define “down,” vindicate, justify or cover up organized brutality. Once this connection has been recognized as constituting the narrativity of human rights law, it can be reimagined as a point of departure for the resistance against normalization, because it sustains whatever is not delusive about the belief in a just world.