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The Legal Case File as Border Object: On Self-reference and Other-reference in Criminal Law

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What do case files do? With help of an ethnographic study on the care, maintenance, and use of legal case files in a Dutch, inquisitorial context, we work through Latour's and Luhmann's conceptualizations of law. We understand these case files as enacting and performing both self-reference and other-reference. We coin the term border object to denote the way the legal case file becomes the nexus between two worlds it itself performatively produces: the world of 'law itself' on the one hand, and the 'world out there' on the other. As such, our discussion offers clues for a partial reconciliation of Latour's and Luhmann's conceptualizations of law: while Luhmann's insistence on other-referential operations assist in showing how law forges an 'epistemic relationship' with the realities it seeks to judge, Latour's concentration on the materialities of epistemic practices assists in situating these other-referential and self-referential operations.

INTRODUCTION: CASE FILES MATTER

To start with a truism: there is no legal case to be made, won, or be decided, without a case file. In other words, the legal case file is nothing short of one material-semiotic precondition for law to perpetuate itself. Other objects and actors need to be in place for law to maintain itself: documents, persons, buildings, law books, archives, judges, prosecutors, defendants, litigating parties, courthouses, and so on. But they can only be mobilized once something has inserted itself into law's ambit; that is, once a folder starts growing, compiling and coordinating documentation, travelling between

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offices, all the while allowing its users epistemic access to the persons and events in question. This observation is true both conceptually and empirically. Conceptually, this observation rings true in particular in those jurisdictions where the public prosecutor is in charge of collecting and documenting all relevant evidence in criminal cases. Unlike common law settings, continental jurisdictions tend to be less 'phonocentric'[1] in their reliance on a shared, official *dossier* that guides the oral proceedings in court.[2] These dossiers allow all parties access to the event and person in question; in a very real sense, case files *constitute* these persons and events. A 'defendant', for instance, does not exist as such before a legal case file starts to build up legal references to a person outside the law that thereby becomes, with*in* law, a person of that very particular type called 'defendant'.

Empirically, too, case files *matter*: court workers, including administrative personnel, clerks, and judges are acutely aware that an incomplete, or worse, missing file may have quite far-reaching consequences. Witness this distraught-looking judge, storming into the administrative offices of a Dutch criminal court, inquiring where for heaven's sake her files are. Her entry initiates a flurry of activity: one administrative worker searches the file-room; another calls the public prosecutor and requests copies, and yet another checks the court's digital registration system for digital copies of the documents in the file. The judge is now afraid she will have prepared her cases for nothing: not only has she spent half a day making summaries and preparing her line of questioning for the defendant in court, she also fears these case may have to be adjourned and anticipates savvy lawyers insisting on those pesky statutes of limitations . . . What is there to decide on without a case file?

In the actor-network theoretical sense of the word, then, legal case files have all the qualities of an actor: they 'modify a state of affairs by making a difference'.[3] But *how* does the file acquire that 'agency', *what kind* of agency does it exercise in the mobilization and effectuation of law, and *how* does it perform its 'truth-function'?[4]

In this article, we move away from both media-historical accounts of legal documents and artifacts, as well as accounts of the case file's role in situated work practices, and ask the more general question *how* exactly the legal case file mediates a 'state of affairs' and constitutes a variety of objects and persons it references as 'legal' objects and persons. Specifically, we look at

1 J. Derrida, *De la Grammatologie* (1967).

2 See the wonderfully detailed comparative studies by, for instance, M. Damaka, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986).

3 B. Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (2005) 71.

4 See, for the notion of 'truth-function', C. Vismann, *Files: Law and Media Technology* (2008).

the ways in which the case file enrolls actors and objects from *outside* of, or *before* the law. That means we aim to be attentive to the ways in which the problem of *reference* is dealt with in law, as mediated through the case file. That is, we are interested in law as an 'epistemic subject',[5] and the mediating role of the case file in allowing epistemic access to the persons and events in question. The accomplishment of such external reference is possible, we argue, only on the basis of a work of internal reference and translation – work that is directly and materially expressed in the case file through markings and inscriptions such as stamps, autographs, folders, Xeroxes, and seals.

In this contribution, we use the work of both Bruno Latour and Niklas Luhmann to shape such a conception of law and its epistemic relationship with those persons and events it seeks to judge. After briefly commenting on previous work on case files in legal settings, we move on to an elaboration of their work which treats, respectively, law as a 'mode of existence' – according to Latour – and law as a system – in Luhmann's sociological systems theory. From Latour's treatment of law, we draw on his 'passage of law' as a notion that captures the quintessentially legal 'mode of existence'. However, his treatment of law, emphasizing its autonomy and self-contained nature, raises questions about how law manages to refer to a world outside of itself. That is, it fails to understand law as an epistemic subject.[6] The legal case file and the work of reference it performs, we suggest, offers a way to study the everyday operations in which law produces both itself and its environment. Drawing on Luhmann's notions of self-reference and other-reference, we briefly outline our conceptual approach to the legal case file. Elaborating on our fieldwork, we then turn to our empirical discussion of the *work of reference* the legal case file performs. We show that the case file authorizes and authenticates, ascribes actions to actors and thereby enrolls them in the legal case, and it references events and persons in such a way as to attribute legal-factual status to them so that they, too, are enrolled in the workings of the legal case. In the concluding discussion, we propose that legal case files – and perhaps other objects like it – can hence be understood as *border objects*: objects that, in their materiality and discursive techniques, enact a border between different worlds they themselves (co)produce. Approached as such, the legal case file can further understanding of how 'law' establishes itself in relation to a world it references as 'outside' but that it, by so referencing, can only deal with as a world enrolled in law, that is, as a legally domesticated world.

5 G. Teubner, 'How the Law Thinks: Towards a Constructivist Epistemology of Law' (1989) 23 *Law & Society Rev.* 727.

6 id.

While we started our discussion of the legal case file with an insistence on its absolute centrality in the exercise of law, particularly in inquisitorial settings, the legal case file has not received much attention (let alone praise) for fulfilling such a central task. While Max Weber pointed to the centrality of the desk where files can be compiled, checked, ordered, and decided on in his notion of *bureau-cracy*, and while the study of bureaucratic documents has quite a pedigree,[7] the sociological study of law in action remains strikingly neglectful of the role of the legal case file in mobilizing and effectuating the exercise of law. Perhaps the legal case file is too mundane and such a taken-for-granted part of the infrastructure of legal practice that it has become transparent not only to those used to working with it, but to observers as well.[8] Differences between common law and continental law jurisdictions, too, make the study of case files particularly complex. Here we touch upon several noteworthy exceptions, namely, Cornelia Vismann's work on files, and Thomas Scheffer's ethnographic approach, in order to situate our own intervention.

In her media-historical account of legal artifacts, Vismann, for instance, notes that files and associated artefacts like codes, documents, and records remain 'a blind spot of legal history', as it has a tendency to focus 'attention on the transmitted law, not on the transmission itself'.[9] Her contribution should read against Goody's concentration on the distinction between oral traditions and written modes of transmission, which gives rise to the suggestion that the medium of the legal case file – a historically quite 'new channel of discourse'[10] – has deeply affected the very way we conceive of the law and legality. For instance, the use of written testimony in court, as well as the keeping of case records, 'emerges as a driving force towards a more formal concept of evidence, and in a certain sense of truth itself.'[11] Vismann, however, moving away from the oral/written binary that undergirds Goody's discussion, presents a fine-grained historical account of the media through which law is effectuated, and concentrates in particular on the relationship between various media of transmission – papyrus, wax tablets, the codex – and their implication in the formation of the state, the subject,

7 See, for some examples, H. Garfinkel and E. Bittner, 'Good Organizational Reasons for "Bad" Organizational Records' in *Studies in Ethnomethodology*, ed. H. Garfinkel (1967) 186; L. Gitelman, *Paper Knowledge: Toward a Media History of Documents* (2014); D.E. Smith, 'The Social Construction of Documentary Reality' (1974) 44 *Sociological Inquiry* 257; P. Blau, *Dynamics of Bureaucracy* (1955).

8 See, for the typical 'transparency' of infrastructures of work, S.L. Star and K. Ruhleder, 'Steps Toward an Ecology of Infrastructure: Design and Access for Large Information Spaces' (1996) 7 *Information Systems Research* 111.

9 Vismann, op. cit., n. 4, p. 75.

10 J. Goody, *The Logic of Writing and the Organization of Society* (1986) 153.

11 id., p. 154.

and truth. Her account, concentrating on the functionality of legal artefacts (including files) is tremendously valuable as it shatters various 'origin myths' which associate law too closely with written law and neglect administrative forms, hence showing how 'the functional logic of various incarnations and alterations in the documentary apparatus of the law has been formative on the trajectory of the western legal tradition.'[12] Arriving in the modern age of bureaucracy, then, Vismann suggests that bureaucratic principles are always also technological ones: 'it was the technological superiority of files and their ordering systems that inaugurated and secured the reign of the office.'[13] Her approach can be credited with putting files and documentary forms firmly on the agenda of law and society scholarship, and our intervention, taking seriously administrative forms and the case file, that 'most despised of ethnographic objects',[14] is clearly indebted to her work. In this intervention, we zoom in on the ways case files enact truths, and the particular administrative techniques and forms that make such truths factual and consequential to this site of law.

Thomas Scheffer's work, in contrast, is more concerned with the case file's implication in lawyers' case-making practices.[15] In his ethnography of Crown Court procedure, he moves away from accounts that situate the activity of case making in the orally mediated, 'front stage' proceedings in court and instead approaches case making as a spatially and temporally distributed practice. Highlighting the 'face-to-file' interaction, the role of 'spoken writing and written speech', and the becomings and microformations of defence pleas, he situates the case file at the heart of legal proceedings. His work is particularly helpful, too, in that it concentrates on case files in the British adversarial procedure.

In this piece, however, we wish to draw attention to the *referential* work case files do in a *continental* jurisdiction. We inquire less into case files' functionality or their implication in work practices and more into their performativity, focused as we are on the way case files mediate epistemic access to the persons and events in question. Not only does such an approach

12 L.C. Young, 'Files, Lists, and the Material History of the Law' (2013) 30 *Theory, Culture & Society* 160.

13 Vismann, op. cit., n. 4, p. 129.

14 B. Latour, 'Visualization and Cognition: Drawing Things Together' in *Knowledge and Society: Studies in the Sociology of Culture Past and Present*, ed. H. Kuklick (1988) 26.

15 See, for instance, the following by T. Scheffer: *Adversarial Case-Making: An Ethnography of English Crown Court Procedure* (2010); 'File Work, Legal Care, and Professional Habitus: An Ethnographic Reflection on Different Styles of Advocacy' (2007) 14 *International J. of the Legal Profession* 57; 'The Microformation of Criminal Defense: On the Lawyer's Notes, Speech Production, and the Field of Presence' (2006) 39 *Research on Language and Social Interaction* 303; 'Materialities of Legal Proceedings' (2004) 17 *International J. for Semiotics of Law* 156; 'The Duality of Mobilization: Following the Rise and Fall of an Alibi-Story on its Way to Court' (2003) 33 *J. for the Theory of Social Behaviour* 313.

help to situate case files within continental jurisdictions, it also helps to complicate Latour's sociology of law which treats law as a 'mode of existence'.[16]

CASE FILES, LEGAL PASSAGES, AND THE QUESTION OF REFERENCE: LATOUR AND LUHMANN

1. *Latour on science and law, [REF], and [LAW]*

In our concentration on objects in referential practices we turn, instead, to actor-network theory, and Latour in particular. Since the 1970s, scholars have paid increasing attention to the every-day, mundane activities that characterize scientific 'epistemic practices'.[17] Denoted by the (rather misleading) term 'actor-network theory', this sensibility has included an attention to objects and instruments in and for knowledge making, as well as a concentration on the everyday practices within which these become implicated. Haraway's admonition to epistemologists that they take seriously how 'vision' – a Western, privileged metaphor for knowing – is acquired only with help of many 'optical devices', of which our own 'eyes' are only one,[18] coupled with the meticulous attention paid to the everyday work of scientists,[19] has led scholars to turn to understanding representation not as a given, but as a both materially and semiotically mediated *accomplishment.* It is within these referential practices that objects and instruments for knowledge making make important differences, so that cognition and knowledge cannot be understood as human capacities only. Instead, reference to a world out there travels through and along heterogeneous 'chains of reference' which connect, for instance, soil in the Amazon forest with an article testifying to its composition in a peer-reviewed journal.[20] Representation is hence impossible without transportation and hence, *transformation* by the things that mediate between the world 'out there' and their representation. According to Latour, it is this 'circulating reference' that characterizes the scientific mode of existence. In his later *Inquiry into Modes of Existence*, Latour refers to this type of passage or circulation as [REF].[21]

How different, then, is Latour's treatment of the mode of existence defining legal practices, that of [LAW].[22] Objects, and particularly files, *do*

16 B. Latour, *An Inquiry into Modes of Existence* (2013).
17 The term is derived from M. Lynch, *Scientific Practice and Ordinary Action: Ethnomethodology and Social Studies of Science* (1993).
18 D. Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 *Feminist Studies* 575.
19 A classic example of such a concentration is B. Latour and S. Woolgar, *Laboratory Life: The Social Construction of Scientific Facts* (1979).
20 B. Latour, *Pandora's Hope* (1999).
21 Latour, op. cit., n. 16.
22 id.

feature in his portrait of this legal mode of existence, but in a radically different way. Based on an ethnography of the French Conseil d'Etat, the highest appellate court of administrative justice, Latour argues that the legal 'mode of existence' [LAW] is characterized by a different kind of movement or circulation than those characterizing scientific practices. The *passage* at stake in his portrayal of these legal practices is the movement between the text of the file and the text of the law. Latour traces this passage as the work of the members of the Conseil d'Etat unfolds around the hefty case files accompanying the cases the Conseil d'Etat seeks to judge. This work consists of series of sequentially distributed note-taking operations, through which the members will try to extract, 'like diamonds [...] from the ore',[23] the precise legal issue at stake. They have to 'extract the means from the confused pile which constitutes the file',[24] the means here being his translation of the French *moyen*, in legal practice meaning both legal ground and argument or the precise legal issue at stake in this or that case. This *moyen* is:

>]the] connection, the coming-and-going between *two types of writing*: on the one hand, the ad hoc documents of both parties which are produced for and through the occasion, such as statements and various productions, and, on the other hand, the printed, authorized, voted upon and connected texts which are carefully arranged on the shelves of the library [written law].[25]

This is a particular bridge that has to span a hiatus, a gap, between two kinds of texts; and this movement is what Latour calls the 'passage of law' which characterizes mode of existence [LAW].

While Latour's work on *scientific* practices is hence characterized by a focus on how precisely reference to a world 'out there' is produced and allowed to circulate, his treatment of law provides precious little room to even *ask* this question. Although Latour does suggest that case files must both 'give confidence' as well as 'refer to states of affairs exterior to the file [itself]',[26] one is left wondering how – if representation is never a given! – case files manage to refer to 'states of affairs exterior' to them, let alone how they manage to do so in ways that inspire trust and 'give confidence'. And Latour recognizes that judges, like scientists, are sometimes concerned with the question of reference, for instance, when they are 'superimposing layer upon layer of documents and tracings, which are very different in terms of their materiality (photographs, graphs, documents and plans).'[27] Yet this activity, according to Latour, is *nothing legal*:

23 B. Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (2010) 102.
24 id., p. 86.
25 id.
26 id., p. 75.
27 id., p. 226.

> to be sure, it is possible to retrieve numerous traces of this very particular kind of activity that one finds in laboratories in judicial files, but far from defining the nature of judicial activity, *it merely organizes a few of its segments, the remainder being characterized by activities that are more properly legal*.[28]

This is the movement – circulation – of *reference,* that is, [REF], and is as such radically distinct from the legal passage. While recognizing, then, that the case file organizes access to the 'world out there', Latour locates the specificity of the legal passage in the kind of connection made between the text of the file and the text of the law. Latour's approach to law essentially treats it as a 'process of enunciation',[29] as intertextuality-in-action, and *nothing more*. 'The making of law' is fundamentally unlike – and independent of – the production of facts and (referential) truths.

This Latourian approach to law has two interrelated effects. First, where his previous work on science was concerned with the question as to how precisely reference to a 'world out there' was organized, law – or at least the quintessentially legal passage – emerges as fundamentally autonomous from, even indifferent to, the world exterior to it. Pottage points out that it is hence unclear 'by what means a regime of enunciation that construes itself as autonomous actually (re)engages with what systems theorists would call its ''environment''.'[30] This question assumes additional importance when we situate Latour's sociology of law in his field site: the highest appellate administrative court in France, in which events and persons are arguably quite removed (in space and time) from the proceedings within the court, and where procedural, rather than truth-seeking, concerns dominate. However, what are we then to make of those sites and settings sharing a more substantive concern with 'reality' and the 'truth of the matter'? Of course, we are thinking here of not administrative law, but criminal law, and inquisitorial criminal law jurisdictions in particular. While judges may not be primarily 'truth-finders', criminal law *does* require of actors to assume the burden of proving that something did, indeed, *factually* happen. Latour's sociology provides little clues as to how the required epistemic access to reality is produced.

Secondly, where Latour's earlier work offered a focus on materialities – microscopes, pipettes, graphs and charts, maps – as an answer to this question of reference, his association of law with *enunciation* rather than these kinds of material-semiotic mediations raises the question whether law 'is not a material world in the same sense as science or technology'.[31] In sum, while Latour warned us earlier that 'in our cultures, ''paper shuffling'' is the source of an essential power, that currently constantly escapes attention since its materiality is ignored'[32] and urged ethnographers of state

28 id.
29 A. Pottage, 'The Materiality of What?' (2012) 39 *J. of Law and Society* 167.
30 id., p. 170.
31 id., p. 170.
32 Latour, op. cit., n. 14, p. 26.

practices to take into account the 'connective quality of written traces',[33] a concerted emphasis on the *referential* work files does seems slightly underdeveloped in his sociology of law. We argue that the legal case file – mentioned as an object that renders the world 'judgment-compatible' but, in its *referential operations*, largely left unpacked in Latour's work – is the most likely candidate to shed light on both questions. We suggest that Latour's focus on the purely 'legal passage' risks glossing over the active and constitutive work of the legal case file in producing, for the law's benefit, a 'judgment-compatible' world.[34]

2. *Luhmann's approach to law*

An invocation of Luhmann's systems-theoretical perspective is helpful here. Latour's approach to law and Luhmann's are not as dissimilar as Latour would suggest,[35] and both are grounded in an effort to complicate, in particular, the self-evidence of 'society' or 'the social' in accounting for legal (as well as scientific, artistic, economic, political) practices. In particular, they treat as problematic sociologists' and observers' implicit tendencies to draw a priori *boundaries* around the 'social' or, for that matter, the 'legal'. However, where Latour's approach ends up emphasizing the autonomy of the 'legal passage' from any kind of referential work at all, Luhmann's conceptualization of other-reference and self-reference help complicate Latour's sociology of law. Indeed, Luhmann's work can contribute to an understanding of sense making and referential processes that have been considered underdeveloped in actor-network theory approaches.[36] Luhmann's insistence on the production, *within* law, of both law and its environment is helpful here, particularly his notions of 'self-reference' and 'other-reference'. Self-reference involves the *normative closure* of the system of law.[37] Other-reference concerns communicative references to the environment of the system of law, which, it is important to emphasize, are still system-internally produced. Whereas self-reference ensures the normative closure of the system, other-reference ensures its *cognitive openness* towards its environment.[38] While Luhmann restricts self-reference to the normative aspects of law, we argue that it is through what Luhmann also calls 'basal self-reference' that this is possible.

Throughout his work, Luhmann discerns several forms of self-reference. Basal self-reference involves the basic form of self-reference involved in all

33 id., p. 26.
34 Latour's phrasing: see Latour, op. cit., n. 23, p. 65.
35 Pottage, op. cit., n. 29, p. 176.
36 See for instance, I. Farias, 'Virtual attractors, actual assemblages: how Luhmann's theory of communication complements actor-network theory' (2013) 17 *European J. of Social Theory* 24.
37 N. Luhmann, *Das Recht der Gesellschaft* (1993) 77–83.
38 id.

communicative operations that refer to previous, themselves also temporalized, operations.[39] It may also refer to forms of what Luhmann calls 'self-description' or (in the case of written communication such as a case file) 'reflection', in which explicit communication about communication occurs within systems.[40] Here, we focus on 'basal self-reference', and in order to study it empirically, we argue that the material substrate of communication is important.

Crucially, in Luhmann's conception, communication is not a property of human actors; communication is what communicates. In order for that to happen, however, carrier media are needed, and Luhmann pays significant attention to the evolution of carrier media and to the systemic possibilities such evolution entails. Speech, printing, and electronic media vastly expand the scope of communication processes.[41] Specifically in the case of law, Luhmann discusses the role of writing in the formation of systemic memory. Writing and text, he contends, have had the effect of describing the unity of the system by means of distinctions.[42] While Luhmann considers the carrier media of communications to remain external to the communication systems he describes, he nonetheless sees an important role for them: 'The material substrate of the system's memory therefore has recognizable consequences for the development of law itself.'[43] He specifies that this is only the case insofar as legal norms have already been specified, and he equates the 'normative aspects' of law to that which actually keeps the autopoiesis of law in motion.[44] However, we suggest such normative aspects necessarily also involve material media on which they leave traces, if only in the form of 'basal self-reference'. Law is not only an exercise in connecting enunciations that are already legal, but equally consists of the effort to qualify 'events or enunciations as legal in the first place'.[45] We argue, therefore, that the case file is the material substrate on the basis of which the autopoiesis of law operates. Luhmann holds that the system of law needs to ensure 'sufficient consistency of its decisions',[46] and we seek to show that the case file is the material substrate through which that consistency, which Luhmann also designates as the 'unity' of the system, is organized. We thereby place significantly more emphasis than Luhmann generally does on the material aspects of law.

Yet there is ample cause to argue for the relevance of the material within Luhmann's conception as well. When discussing the evolution of law into a

39 N. Luhmann, *Soziale Systeme. Grundriss einer allgemeinen Theorie* (1984) 67, 199.
40 Luhmann, op. cit., n. 37, pp. 53–4, compare with A. Pottage, 'Law after Anthropology: Object and Technique in Roman Law' (2014) 31 *Theory, Culture & Society* 147.
41 Luhmann, op. cit., n. 39, p. 221.
42 Luhmann, op. cit., n. 37, p. 120.
43 id. p. 120–1.
44 id. p. 121.
45 Pottage, op. cit., n. 29, p. 177.
46 Luhmann, op. cit., n. 37, p. 78.

differentiated system able to reproduce itself vis-à-vis pork-barrelling, common sense or ad hoc and ad hominem argumentation, he states:

> the differentiation of legal method is but one condition of possibility; the specification of the ways in which the legal system deals argumentatively with the materials of law, is the true carrier of the evolution of the system of law.[47]

We propose that it is crucial to recognize the literally material dimension of what Luhmann here calls the 'materials of law'. The relevance of materiality in communication can also be argued from the perspective of 'basal self-reference', since communications, for Luhmann, consist of a threefold selection (of message, information, and understanding).[48] Even though Luhmann argues that communication is not 'space-bound',[49] the communicative element of the 'message' (*Mitteilung*) in law is to a significant degree mediated, if not embodied, by the case file. The spatial and material character of notions such as system and environment is thus not to be forgotten: 'these are concrete topological operations', as Philippopoulos-Mihalopoulos calls them.[50] As he argues, materiality is left out of consideration in the autopoiesis of law precisely in order to reproduce the material operations through which legal communication occurs. Reference, according to Philippopoulos-Mihalopoulos, helps to produce 'matter dissimulated as environment in order for the materiality of autopoietic operations to emerge.'[51] We thus seek to illustrate how the legal case file is both carrier and performer of communications that reference both law and its environment, and how it is crucial to law precisely by assuming this double role. It enrolls actors and events considered 'external' in law and records their enrolment in self-referential inscriptions. As such, our discussion can further help to situate empirically both law's epistemic operations as well as its boundaries. First, however, we elaborate on our case study, briefly introducing the legal case files upon which the claims here are based.

STUDYING FILES-IN-ACTION: AN ETHNOGRAPHIC APPROACH

In the following, we focus our discussion on Dutch legal case files as they are assembled and deployed in the exercise of criminal law in a Dutch court. Moreover, the focus is here on those files used by what in Dutch is called the 'police judge' (*politierechter*) – a somewhat awkward designation, as these judges are firmly entrenched in the judiciary and not at all tied to the police.

47 id., p. 263.
48 Luhmann, op. cit., n. 39, pp. 193–201.
49 id., p. 200.
50 A. Philippopoulos-Mihalopoulos, 'Critical Autopoiesis and the Materiality of Law' (2014) 27 *International J. for the Semiotics of Law* 394.
51 id., p. 396.

Figure 1. Examples of legal case files

'Police judges' adjudicate those cases that are punishable with up to one year of detention, which is effectively around 85 per cent of all cases reaching criminal courts.[52] Not quite as immense as the case files that reach the members of the multiple chamber (*meervoudige kamer*), comprising three judges, the relatively thinner files police judges work with nevertheless represent not just the large majority of all criminal cases, but, in their simplicity and structural affinity to these much bigger files, also facilitate the study of case files more generally (see Figure 1).

These files are the result of activities on the part of police officials, public prosecutors, and expert witnesses, who are typically asked to write reports (rather than physically appear in court). Case files originate in the police's attempts to gather evidence (for example, witness statements, a typed report on the interrogation(s) of the defendant, filed criminal complaints) which, once a 'case' can be made against the defendant, is sent to the public prosecutor's office. The public prosecutor decides on the offence the defendant will be charged with, sends out the summons to the defendant, and schedules for the case to appear. As Dutch procedural (criminal) law allows for *de auditu* (hearsay) evidence, the case file assumes additional importance in collecting reports written by witnesses, including expert witnesses (like

52 W.M. de Jongste and R.J. Decae, *De Competentie van Enkelvoudige Kamers in Strafzaken Verruimd: Cijfermatige Gegevens en Ervaringen in de Rechtspraktijk* (2010).

forensic experts, parole service officers, or psychiatrists). Then, the case file is sent to the court so that the judge may 'prepare' the case before the hearing. By this time, the legal case file will also include a copy of the defendant's criminal record, possibly a pre-sentencing report or a psychiatric evaluation, as well as copies of letters and faxes sent between the prosecutor, the defendant and the defendant's lawyer, and the Court itself. As such, a legal case file is something of a testament to its own success in coordinating and mobilizing the various actors in the legal-bureaucratic network.[53]

The case files studied here are close to completing their journey through the criminal justice bureaucracy. Nonetheless, the case files themselves are hardly ever 'complete': throughout their travel, various documents may be added to them, like parole service reports, psychiatric evaluations or expert testimony regarding the evidence gathered (for instance, blood samples). Filed in the 'file-room' in the court building, these files remain, in the words of a judge, 'alive': they continue to gather documents, sometimes up until the court hearing itself. Moreover, they become implicated in various work practices: they will be 'prepared' by assisting clerks, after which judges will 'prepare' the cases for themselves. This preparation, consisting of highlighting, summarizing, coding and ordering work, is instrumental in the (co-)production of what elsewhere is called the 'story-before-the-trial'.[54]

The first author of this contribution has studied around 250 individual case files from April 2013 onwards. This study is part of a broader ethnography of the criminal court, focused in particular on the socio-material mediation of adjudication and sentencing. Not only has she spent time reading case files, she has also 'followed cases' through the court, observing clerks' and judges' preparation practices and court hearings. Speaking with administrative personnel, clerks, and judges, she has also gathered data on what, in this community of practice, constitutes a more or less 'normal' or 'typical' case file, taking care also to trace and track the 'misfits' among the files. As such, the empirical material allows for reflection on the materiality of legal proceedings, and the particular role played by the case file in judicial, truth-finding practices.

53 For documents and their work of coordination and mobilization, see, also, M. Berg and G.C. Bowker, 'The Multiple Bodies of the Medical Record: Towards a Sociology of an Artifact' (1997) 38 *Sociological Q.* 513; M.S. Hull, 'The file: agency, authority, and autography in an Islamabad bureaucracy' (2003) 23 *Language & Communication* 287.

54 The first author of this piece has developed this argument further in I. van Oorschot, 'Seeing the Case Clearly: File Work, Material Mediation, and Visualizing Practices in a Dutch Criminal Court' (2014) 37 *Symbolic Interaction* 439, paying attention in particular to the material recalcitrance of paper and digital case files in judges' taken-for-granted routines of pre-trial sense making.

As discussed above, legal case files in the Dutch inquisitorial system have a 'truth-function',[55] but they must simultaneously 'give confidence'[56] in the truths they tell. For this, self-referential processes are crucial. As noted, Luhmann understands self-reference primarily as normative closure. Here, we seek to specify how self-reference is materially mediated, although we immediately underscore that the self-reference we deal with is not an exhaustive account of law's self-referential normative closure. According to Luhmann, the 'condensation' of norms occurs in practice:

> the norm is given through previous and future praxis, through operative sequences in which it condensates as self-similar (regardless of the extent of the interpretative clearance).[57]

Such 'praxis', we argue, consists of three important self-referential techniques to 'give confidence' that are operative in the documents in the legal case file. These consist of: (i) forms of authorization; (ii) forms of authentication; and (iii) forms of tracing communications. Together, these make up a self-referential logic of *attachment*, which defines the specifically *legal* status of all actors and events enrolled in the case.

1. *Authorization*

Although the case file itself has no (single) author,[58] its component parts are meticulously authorized through *autographs* allowing decisions and reports to be traced back to those legally accountable for them. Autographs – made by police officers, prosecutors, parole service employees, forensic experts – enable sheets of papers to become documents, that is, 'evidence in support of a fact'.[59] Here, assignable individual authorship is the precondition of the document's agency: only those documents properly signed manage to 'give confidence', and become able to act in the future. Only when they can be traced back to their human 'author' (or rather: 'authorizer') can they be used as evidence; that is, only when signed can they start to *make differences*. A missing autograph *matters*, as is brought home by lawyers' frequent appeals

55 Vismann, op. cit., n. 4.
56 Latour, op. cit., n. 23, p. 75.
57 Luhmann, op. cit., n. 37, pp. 80–1.
58 See Vismann, op. cit., n. 4.
59 'Evidence in support of a fact' is Briet's formulation of what constitutes a document. Note that the definition is not tied to a specific medium, and that it defines 'document' not in terms of certain inherent properties but, rather, through the evidential *use* to which it is put: see S. Briet, *Qu'est-ce que la Documentation?* (1951). Her definition, in short, raises the question how some things or utterances become documents – a question to which our insistence on formal forms of authorization is a partial answer.

to the judge to consider emails or letters from psychiatric experts or defendants' employers in court. Copies of signed labour contracts stand a chance of being 'included in the file', and this way becoming part of the official record. Printed emails are not accorded the same privilege: for instance, dismissing a lawyer's insistence that an email of a psychiatric counsellor familiar with the defendant's psychological health should be included in the file, a weary judge corrects the lawyer, stating that without an autograph, 'it is unclear what expertise is attached to this email'.

But not all autographs are made equal. In Dutch procedural law, individual police officers' autographs may authorize in quite different ways: they can authorize a report of the police officer's own observations, but they can also authorize a report or a transcription of witness statements or interrogations with the defendant. In the first case, this report has enough evidentiary weight to convict a defendant (it 'counts for two' pieces of evidence needed in Dutch criminal law); in the second case, an additional piece of evidence is needed to find the defendant guilty. As police officers do not lie – a legal fiction – their autographs play a different role in these two instances; they may attribute the same (co)author to the document, yet authorize different courses of action to be taken. In all instances, however, the autograph can be considered a self-referential technique: it communicates that the communication is a *legal* communication.

2. *Authentication*

Self-reference also exists in the form of the authentication of the legal case file. The legal case file sheds copies wherever it goes, as public prosecutor, judge, and lawyers require their own copies to work with. As their work is never a mere 'reading' of the file but consist in the active highlighting, summarization, and coding of the documents within the file, judges in particular may require copies of the original file. After all, these originals become un-transferrable and hence 'uncopy-able' as soon as files come to bear the marks of clerks' and judges' highlighting, coding, and summarizing practices. Having made a request for a copy of the original file to work with, a judge explains: 'these notes and summaries are for my eyes only; if the defendant's lawyer for some reason requires another copy of the file, at least he won't have a copy of my scribbles and notes.'

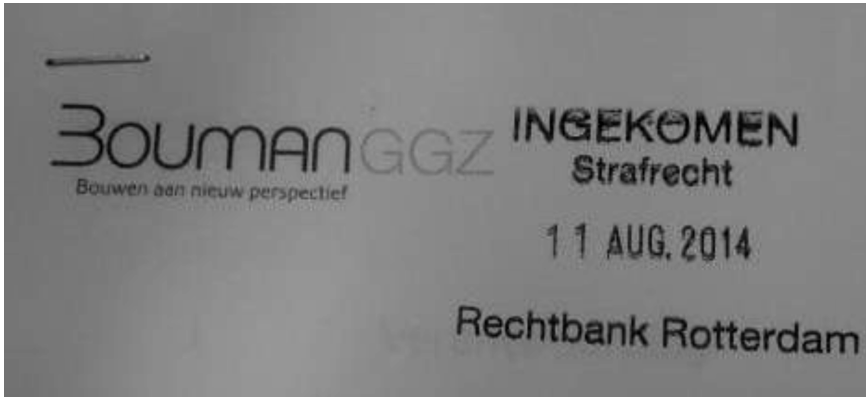
But the file's multiplication leads to a problem of identity: are the copies indeed the same as their originals? The technique of *authentication* is installed to make sure these copies are able to 'give confidence' like their originals. The identity of these copied files is effectuated with help of stamps, marking copies as 'copy conform original' (*kopie conform origineel*). Interestingly, if police officials make copies of their reports, this authentication itself needs to be authorized. The police official making the copy and authenticating it as identical has to insert his/her name and function on the copy. Indeed, without this authentication, reports by police officials

lose their privileged position as evidentiary materials as described in the above; they cease to 'count for two'.

3. *Tracing communications*

Meanwhile, through coordinating and compiling these authored documents the legal case file starts to acquire agential capacities of its own, but only for as long as it carefully traces its own actions. Importantly, the legal case file increases in size in part because it collects not just documentation referring to the events and the defendant in question; it also collects documentation testifying to the communications that have taken place between various actors, for example, the public prosecution's offices, the Dutch forensic institute, parole services, the defendant's lawyer, the defendant, and the various subsectors of the court itself (see Figure 2). The tracing of its own communications, then, is a third form in which self-referential operations are performed in, and through, and by the legal case file. For instance, the case file collects not only forensic test results; it also includes the formal letter accompanying the samples sent to the laboratory. It does not only include the judicial summons (a copy of the original, which is handed over to the defendant), but also a document testifying that it has indeed been handed over. Here, 'signs of its history are continuously and deliberately inscribed upon the artefact itself' so that the file 'is a chronicle of its own production, a sedimentation of its own history'.[60]

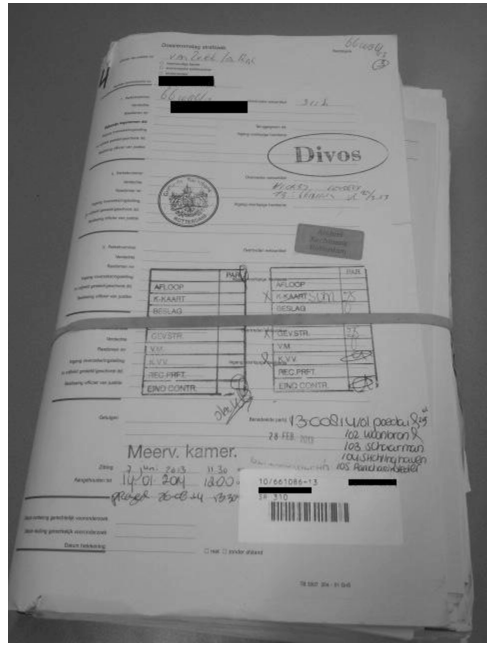
Figure 2. Example of stamp tracing the date of delivery of a document (pertaining to a psycho-social evaluation of the defendant) to the court's administrative offices on 11 August 2014



60 Hull, op. cit., n. 53, p. 296.

These traces again serve legal purposes; they allow decisions to be traced back in space and time, allowing for answers to the questions who exactly authorized what decision at what specific moment in the production of the case. The court's administrative personnel, clerks, and judges are particularly concerned with these kind of self-referential operations. In checking, preparing, and reading the file, all court workers are concerned with tracing communications between the court and its various 'chain partners' (*ketenpartners*) upstream as it allows them to observe various legal temporalities, for example, that of reasonable time limitations but also, for instance, more strictly binding time limitations on time spent in custody. Again there is a direct connection between these types of tracing and the file's agency: the case file needs to continually *trace* in order to *act in the future*; to make sure the case file can pass from office to office, from phase to phase in the proceedings, allowing for cases to proceed through legal-bureaucratic space-time. The trace is, in a crucial way, part of the action, just as the self-referential element of communications that refer back to previous communications is, according to Luhmann, what keeps a social system going. Even when archived, the case file continues to bear the mark of its travel along procedural paths (see Figure 3), even though it is significantly thinned out as evidentiary materials are taken out of the file. Archived, these files resemble the 'undead' in that they may still be called into action. For

Figure 3. An archived file (names of defendant and judge have been redacted)



instance, they may be taken out of the archive when a convict re-offends and a decision needs to be made on the execution of a suspended sentence. Traces inscribed on its surface then allow the file to be called into action again: here, the etymological connection between the German for files (*Akten*) and for act (*Akt*) is no coincidence.[61]

4. *Legal-bureaucratic worlds in the making: the self-referential logic of attachment*

If the bureaucratic 'problem' is one of translating the agency of individuals into action at a collective level, the case file is what effectuates this transfer of capabilities. Legal-bureaucratic action is here at once 'individualized through autographic writing and ritually collectivized'.[62] The self-referential operations of the file, more precisely, suggest that material actors mediate this transfer of capacities. The autograph, the stamp, and the self-referential tracing of its communications make the legal case file an object capable of actions that surpasses the agential powers of its human contributors. It is important, however, to realize that these techniques simultaneously limit the way the world 'exterior to the file' is put together. In Luhmann's terms, in a 'cognitive' sense anything can become part of law to the extent that normative expectations are involved. In practice, however, the material mediation of the work of reference imposes limitations on when, and the conditions under which, things can become part of the file and can thereby start to circulate within law. An autograph that is curiously lacking, a misplaced or unauthorized stamp, a missing pre-sentencing report sheet, a wrongly-dated document, or a simple, printed email without expertise 'attached' to it – all present moments where documents fail to become included in the case file. And unable to be part of the case file, they fail to make differences in court at all.

This legal logic of attachment does not exist in disembodied form. Instead, it is actualized again and again by the law's most mundane artefact. The legal case file is an object putting this legal logic into practice, and in doing so it *enacts* law itself.[63] It provides a self-referential web of ascriptions and attributions that defines the legal statuses of all actors and events enrolled in the case. The case file thereby mediates, in Luhmann's terms, 'the continuous transformation of information in other information for other operations'.[64] But it does not turn anything into something legal without materially ordering conditions of entry. The case file is a tangible, material

61 Vismann, op. cit., n. 4, p. 49.
62 Hull, op. cit., n. 53, p. 288.
63 For the notion of enactment, see A. Mol, *The Body Multiple* (2002), or J. Law, 'Actor-network theory and material semiotics' in *The New Blackwell Companion to Social Theory*, ed. B.S. Turner (2009, 3rd edn.) 141.
64 Luhmann, op. cit., n. 37, p. 354.

border between what can and cannot become part of legal operations. The legal case file does this by constructing a world of communicative redundancies, multiplying self-referential approvals and affirmations by means of officially formatted authorizations and authentications, through which communications are reflexively traced by other communications.

It is here that Luhmann's insistence on self-referential processes quite clearly overlaps with Latour's conceptualization of law as a practice of connecting and attaching enunciations. Understood as the 'ascription of actions to actors in an operation that define[s] both the properties of the action and the agency of the actor'[65] these practices are central to law's operating strategies and consist of:

> linking an individual to a text through the process of qualification; attaching a statement to its enunciator by following the sequences of signatures; authenticating an act of writing; imputing a crime to the name of a human being; linking up texts and documents; tracing the course of statements: all law can be grasped as an obsessive effort to make enunciation assignable.[66]

Of course, the paradox here is that the legal case file enacts this logic of attaching statements to authors, *yet it has no single author itself*. That, however, configures the legal case file as a 'neutral site' from which it is possible to attribute legal agency to a variety of persons, objects, and events; a quite literal 'border zone'. Indeed, perhaps its lack of authorship, tied in Western thought to conceptions of agency more generally, may explain some of the neglect of its agency – again, its capacity to make differences that matter – in analyses of legal practice.

Having touched upon the self-referential operations performed by the case file – and outlined the commonalities between Luhmann's approach to law and that of Latour – we now turn to the case file's other-referential operations. These provide cues as to how this particular criminal law jurisdiction forges an epistemic relationship with those realities it seeks to judge.

OTHER-REFERENCE IN THE LEGAL CASE FILE: DOUBLING

The three forms of self-reference that make up the logic of attachment of the legal case-file are all intricately connected to, and sometimes quite simply overlap with various forms of other-reference, that is, forms of explicit reference to events and actors considered to reside in the environment of law, in a world 'out there'. Information about this world has to be transported so that it allows prosecution officials, judges, and lawyers with the materials to get answers to the questions 'what is the case?'; 'and who is behind it?' The preceding pages have focused on the question as to how information is made compatible with the logic of law through self-referential operations per-

65 Pottage, op. cit., n. 40, p. 155.
66 Latour, op. cit., n. 23, p. 274.

formed by the legal case file; now, we concentrate on what precisely this judgment-compatible world looks like by describing two forms of other-reference:

(i) reference to events considered legally relevant yet external to law; and
(ii) reference to actors, specifically to defendants, considered legally relevant yet external to law.

These forms of other-reference constitute what we discuss as a *documentary doubling* of events and actors.

1. *Bringing events into law*

There is no case without something potentially punishable having happened and having been registered somewhere (through direct observation of the police, through the filing of a criminal complaint, or through retroactive reasoning engaged in by police officers). This event, found both potentially illegal and, in theory, 'investigable', starts to be recounted and narrated by different actors: victims, witnesses, defendants, police officers. Police reports – *process-verbals* – translate the messiness of a bar fight, the stretched-out nature of a fraudulent scheme, the (verbal) fighting taking place before, during, and after someone hitting his wife, into temporal sequences unfolding over time, causal sequences of actions and reactions, and, importantly, different roles like victim, defendant, and witness.

Crucially, the gist of the case file is that all these utterances do in fact pertain to the same event; they become linked with each other through being incorporated into a physical case file – a folder – with a unique, identifying code (the '*parketnummer*'). These codes are instrumental not only in ensuring a file can be tracked and identified, but also in ensuring an epistemic 'object constancy',[67] that is, an 'answer to the question how separate moments of perception can be experienced as being related to an identical object or constant field, despite variations in perspective and appearance.' Assembling these narratives and subsuming them under a unique number and in a unique folder creates the reassurance that all pieces marked with this number are, indeed, 'about' the same event, that they all refer to the same event external to law, even if they differ in 'perspective'. It suggests that there is an underlying other-referential singularity that one can get to by comparing and contrasting various statements.

Process-verbals here represent a particular genre of institutional writing. They cater to the dual and sometimes contradictory demands that they be veracious reflections of what a person said to the police officers, while they at the same time anticipate their future use as evidence in court.[68] The

67 M. Lynch et al., *Truth Machine: The Contentious History of DNA Fingerprinting* (2008) 139.

68 How police officials' writing and documenting are activities oriented towards a (court) future is amply demonstrated in, for instance, M. Komter, 'From Talk to Text:

following excerpt from a witness statement, taken from a woman who testifies that her ex-boyfriend had hit her, illustrates both requirements:

> John asked me if it was really over. I answered him that it had been for a while. I then heard that John said that then it was really over. Subsequently I saw and heard that John hit me, with a flat hand, on the right side of my face. I felt pain in my face. Then everything went dark and I fell to the ground.

Clearly, this is not how regular people talk, but it is how police officials write. While written in the first person, phrases like 'subsequently I saw and heard' and the specification of the 'flat hand' and 'right side of the face' are routinely used by police officials in their translation from talk to text. Techniques like these make these statements compatible with legal definitions, in this instance, the definition of inflicting grievous bodily harm. The victim's descriptions centres on three aspects: one, seeing that it was *John* who hit her, and not someone else; second, feeling it on the *right side* of her face, so that photographic evidence of harm can be checked with her statements; and then experiencing pain, so that harm was indeed done. In this sense, police reports like these do not simply 'represent' either the actual event in question, nor the exact words of either defendant, witness or victim; rather, they fold the event into law in a way that makes these narratives compatible with its specific (Latourian) 'passage'.[69] Court clerks are similarly engaged in the production of process-verbals – the official record – of the court session, as this 'inquiry in court' (*onderzoek ter terechtzitting,* or *OTT*) will become part of the file; they, too, are instructed to produce process-verbals that are if not an 'exact representation,' at least a veracious 'reflection of what was said' in court.[70]

The written charges, furthermore, isolate this singular event from the file, and connect it with the letter of the law. Given the information in the police's 'process file', the public prosecutor decides with what the defendant will be charged. These charges, typically added to a stack of files once they are ready to be prepared by clerks and judges, connect the specific events in question to the letter of the law. In bold, one finds the specifics of the event; in normal print, the formulation as found in the Dutch criminal code, like the following example, again taken from a file:

The Interactional Construction of a Police Record' (2006) 39 *Research on Language and Social Interaction* 201; M. Komter, 'The Interactional Dynamics of Eliciting a Confession in a Dutch Police Interrogation' (2003) 36 *Research on Language and Social Interaction* 433; M. Komter, 'The Power of Legal Language: The Significance of Small Activities for Large Problems' (2000) 131 *Semiotica* 415. See, for the temporal 'fold' that is the case file, I. van Oorschot, 'Het Dossier-in-actie: Vouw- en Ontvouwpraktijken in Juridische Waarheidsvinding' (2014) 10 *Sociologie* 301.

69 See, also, van Oorschot, id.

70 Komter, op. cit. (2006), n. 68, p. 222.

> The aforementioned person is charged
> That he in **Rotterdam**, on or about **the 16th of October 2013**, together and in association with another or others, or alone, intentionally and maliciously set on fire property with the intent to cause damage **in a carpark**, as the defendant and/or his accomplice **poured gasoline, or any other flammable fluid, over a parked car (brand Audi) and subsequently brought the flame of a lighter to the car**, in any case brought (open) fire to **the car (brand Audi).**

The summons then forms a tentative bridge between these narratives about the event on the one hand, and the abstract law on the other. Whether this bridge can be crossed – if a series of events can be translated into a violation of a specific law – depends not only on the quality of the evidence put forward by the prosecution and the question whether this evidence is indeed admissible in court but, crucially, also on the kind of routine, legal-bureaucratic ways of accounting and relating the events in question. The routine work that goes into producing these judgment-compatible accounts is lost on Latour, whose study of files is limited to files in the highest appellate administrative court of France. As suggested previously, there are important differences between lower courts and appellate courts, as well as between criminal law and administrative law practices, in their concern with 'reality' as composed of events and persons. The work of case files within this particular jurisdiction is both self-referential and other-referential, and its other-reference pertains to the production of a *singular* event, through the binding of statements together in a physical folder and by identifying them under a unique code, which is furthermore rendered judgment-compatible by distributed, ritualized, and routine modes of interrogating and reporting.

2. *Performing defendants*

The defendant – his/her motivations, subjectivity, biography, and environment – has two guises in criminal justice. On the one hand, modern criminal justice assumes a criminal subject that is 'answerable for its acts in the world'.[71] In doing so, it presumes agency on the part of the defendant, and crucially also an 'authorial psychology'.[72] This authorial psychology appears as part of adjudication when questions about criminal intent (*mens rea*) are at stake; did the person indeed *intend* to do to X or attain Y? In such cases, this authorial psychology is presumed in the formulation of the charges. At the same time, this psychology comes into play, too, once guilt has been established and sentencing options need to be weighed. After all, many modern jurisdictions also require judges to craft verdicts that not only hold the defendant answerable for the crime itself, but are also responsive to the unique 'person of the defendant' and his or her 'personal circumstances'.

71 Pottage, op. cit., n. 40, p. 153.
72 id.

In this sense the case file is instrumental in producing the deviant subject in quite specific ways. Of course, the case file itself produces the defendant as a subject of rights and obligations, for example, specifying when and on what grounds the person was arrested and/or taken into police custody, whether the defendant has consulted with his/her lawyer; whether the person was informed of his/her rights. Furthermore, in and through the evidentiary materials gathered by the police, the defendant surfaces as a possibly culpable subject; as someone who may or may not have done what he/she is accused of and who may be punishable for his/her actions. However, the defendant multiplies some more, as it is not simply the facts of the case that have to be taken into account when a sentence has to be decided on, but the 'person of the defendant' as well. This legal category – what Foucault coins criminal law's interest in the 'soul' of the deviant subject[73] – subsumes a diverse set of productions, which proceed along the lines of morality, of riskiness, and of sickness and health. In the reports of the police interrogation, for instance, defendants are commonly asked to relate themselves *morally* to their actions, that is, answer the question *why* they did what they did, and whether they are sorry. Here, the defendant is performed as a potentially *moral subject*, meaning a subject who does or does not understand the severity of his or her crime, does or does not take responsibility for it, and does or does not show repentance, which, although of course not legally necessary to adjudication does allow for evaluations of the defendant's deservingness of leniency (even mercy) at the sentencing stage.[74] The defendant is also made known as a more or less *risky subject*. The criminal record present in the case file – empty, short, or long – is where the defendant is produced as a person with a more or less criminal past. It sketches the outlines of a criminal career in the form of an accumulation of offences; as such, it is used to interpolate the risk of recidivism in the future. Pre-sentencing reports, too, assist in producing the defendant in this specific, risk-oriented sense. Widely used, in criminal justice practices, as a way to give substance to notions of individualized sentencing,[75] they are increasingly structured along standardized risk-assessment tools. These risk-assessment tools distinguish between several fields, for instance, defendants' social and cognitive abilities, their educational level and labour-market participation, or family situation. In the risk assessment procedures used in

73 M. Foucault, *Discipline and Punish* (1977).

74 See, for these kinds of evaluations on the part of sentencers, J. Tombs and A. Jagger, 'Denying Responsibility: Sentencers' Accounts of their Decisions to Imprison' (2006) 46 *Brit. J. of Criminology* 803.

75 See, for an indictment of individualized sentencing as a 'myth', J. Rosecrance, 'Maintaining the Myth of Individualized Justice: Probation Pre-sentence Reports' (1988) 5 *Justice Q.* 235; and, for an example of the empirical enactment of such notions in practice, the study of the production of pre-sentencing reports by C. Tata et al., 'Assisting and Advising in the Sentencing Process: The Pursuit of "Quality" in Pre-sentence Reports' (2008) 48 *Brit. J. of Criminology* 835.

this particular jurisdiction, these fields then receive separate scores. Codes probation officials can choose between are 'not present' (the specific risk factor is not present), 'present', or even 'very present' [*sic*]. Here, the defendant is first located at the intersection of various fields (work, health, social environment, and so on); these 'fields' are then assigned separate risk factors, allowing conclusions about the *overall* riskiness of the defendant. At the same time, these scores are motivated in brief narratives about the defendant; as such, these risk-assessments awkwardly combine both narrative evaluation and what Franko Aas calls the analytics of a 'computer ontology', in which the scores (that is, data points) of the subjects on various 'fields' can be neatly separated, scored, and added up.[76] As these pre-sentencing reports conclude with rather concrete sentencing recommendations, they also produce the defendant as a *rehabilitative* subject: the locus of interventions that might or might not mitigate his or her 'riskiness' in the future. Of course, psycho-medical evaluations – less common in the relatively minor cases studied here – offer yet another refraction of the deviant subject: narratively structured and drafted by forensic psychiatrists, they put forth a DSM-approved label and treatment recommendations.

3. *Referencing the world in the legal case file: the other-referential logic of documentary doubling*

Taken together, the case file features as a specific technique to produce a singular event, and bring into being a hybrid subject, located at the intersection of rights and legal obligations, of morality, and the sphere of (calculable) risks and rehabilitation. The forms of other-reference discussed here constitute forms of *documentary doubling* in that the events and actors referenced are *translated* into legal communications and are thereby 'doubled'. In order to constitute what Latour calls the passage of law, law needs to hook up to events and actors external to it, and then process these connections as internal 'doubles' that, in turn, and most notably after a verdict has been reached, have to be translated back to external actors. That does not mean they are 'represented' in the legal case file. Rather, the self-referential features of the case file ensure that all references to events and actors external to law are provided with a legal double upon which legal operations can be performed. Its operation is akin to what Haggerty and Ericson describe as 'data doubling', in which events and person are 'broken down by being abstracted from [. . .] territorial setting[s],' and 'reassembled in different settings through a series of data flows'.[77] Like data doubles,

76 K. Franko Aas, 'From Narrative to Database: Technological Change and Penal Culture' (2004) 6 *Punishment & Society* 370, at 386; see, also, W. Schinkel, 'Prepression: the Actuarial Archive and New Technologies of Security' (2011) 15 *Theoretical Criminology* 365.

77 K.D. Haggerty and R.V. Ericson, 'The Surveillant Assemblage' (2000) 51 *Brit. J. of Sociology* 504, at 611.

these documentary doubles of the event and person in question have been reconfigured in relation to legal, as well as moral, rehabilitative, and risk-oriented categories and kinds, resulting in a 'pure virtuality'[78] upon which legal operations can now be performed. Bringing home this point is the fact that within Dutch criminal procedures, cases may be treated in court even when the defendant does not attend the court session. In the absence of the defendant, the case file then serves as a placeholder (*lieu-tenant*) for the defendant.

It is precisely this operation that is at the core of what sociologists of law have described as the alienation those non-jurists experience once introduced into the legal operations. Here, we insist this is not merely a function of the technical nature of courtroom talk – of standards for cross-examination, for instance – but of the very way the legal file *produces* an event and person and *introduces* it into law, where, in court, these productions are 'folded back' onto the defendant. Not only does law 'make persons and things',[79] in the jurisprudential sense; the legal case file must fabricate these in its everyday operations for law to be exercised at all. Indeed, while the defendant may show up in court, law no longer *needs* that person to go about its business. Of course, the operations performed on documentary doubles such as the 'defendants' in and of the legal case file have performative effects on the bodies enrolled as 'defendants', as these are free to go, forced to work, or held in place.

CONCLUDING DISCUSSION: BORDER OBJECTS

In the preceding sections, we have given an account of how the legal case file mediates criminal law's access to the world in the Dutch inquisitorial context. The legal case file is key to understanding how law organizes reference to the world 'out there', and what 'highly specific visual possibilities' it affords, 'each with a wonderfully detailed, active, partial way of organizing worlds'.[80] We argue that the legal case file is the nexus between two worlds it performatively enacts: the world of the law on the one hand, and the 'world out there' on the other. As such, it is the material location of operations characterized by what Luhmann calls self- and other-referentiality, and thereby it constitutes a location, too, of law's epistemic relationship with the 'world out there'.

Here, we suggest the case file can be thought of as a *border object*. This notion seems a close semantic relative of the notion of a 'boundary object' as

78 id., p. 612.

79 A. Pottage and M. Mundy (eds.), *Law, Anthropology, and the Constitution of the Social* (2004).

80 The phrasing is Haraway's; see Haraway, op. cit., n. 18, p. 583.

developed by Star and Griesemer.[81] But where the notion of the boundary object presumes the a priori existence of different 'communities of practice' between which it travels, the *border object* is intended to emphasize the (co)production of entire worlds which it simultaneously connects, plugging them into one another. This is similar to the way Georg Simmel argued that spatial borders enable territorial coexistence in spaces not separate prior to the (social) construction of the border.[82] Like national borders, these objects produce difference (that which is the nation and that which is outside of the nation) while they are simultaneously where worlds connect. Borders, however, remain guarded; not everyone receives an entry visa. Borders connect and allow for communication; they also exclude. Like a national border, the legal case file enacts a *physical and material* border, as it cannot include unauthorized reports, as not everyone can keep 'adding to' the file, as its 'life' is simply limited; but it also enacts a *discursive* one, when it connects to utterances the qualification that they are 'legal' by means of authorization, authentication, and through the tracing of previous communications. In this sense, border objects like these are material-semiotic actors; and the borders these enact are operations, never simply given.

This focus on the simultaneous production and connection of different 'worlds' is particularly helpful to the study of law and society. It offers a vantage point to study empirically the bifurcation of law and its environment, and as such complicates the foundational premise, within law and society scholarship, that distinguishes between law and its social context. This distinction has given rise to a division of labour between jurists and social scientists: the first, drawing on an 'insider's perspective', then become concerned with law's 'technicalities'[83] and tend to emphasize law's autonomy and self-sufficiency; the latter attempt to place law in a 'social context', portraying law as a reflection or legitimization of power-relationships.[84] Of course, while those in the second camp propose the use of sociological tools in the study of law, such as appeals to 'power', 'structure', or 'society', the first camp rely on law itself in their accounts: perhaps '[t]here is no stronger metalanguage to explain law than the language of law itself. Or, more precisely, law is itself its own metalanguage.'[85] The first camp, of course, tends to draw on a 'socioeconomic real' that cannot account

81 S.L. Star and J.R. Griesemer, 'Institutional Ecology, "Translations", and Boundary Objects: Amateurs and Professionals in Berkeley's Museum of Vertebrate Zoology, 1907–39' (1989) 19 *Social Studies of Science* 387.

82 G. Simmel, 'Soziologie des Raumes' in *Aufsaetze und Abhandlungen 1901–1908, Band I* , eds. R. Kramme, A. Rammstedt, and O. Rammstedt (1995) 140–3.

83 A. Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 *Buffalo Law Rev.* 973.

84 For instance, P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *Hastings Law Rev.* 805; see, also, Latour, op. cit., n. 23, pp. 258–9 for a critique of 'critical' or Bourdieusian approaches to law.

85 Latour, id., p. 260.

for 'law's agency' in making and remaking both itself and its 'environment', while the second camp is at a loss to describe the networked, hybrid, and creative linkages between legal and non-legal things.

Both the Luhmannian and the Latourian approach complicate this foundational premise by showing that law produces itself as well as its environments in its operations (Luhmann), or showing that law does not need a 'social context' to explain its workings (Latour). Both are deeply suspicious of the drawing of borders around either the 'legal' or the 'social', at least when it concerns sociological modes of boundary drawing rather than tracing immanent modes of border making. At the same time, the Latourian approach has difficulties accounting for the relationship law forges with things 'before the law' – quite literally, before their inclusion in law[86] – while Luhmann's approach may raise the question as to where, how, and when precisely the difference between system and environment are enacted or brought into being. Farias, otherwise appreciative of Luhmann's efforts, insists, for instance, that Luhmann's sociology suffers from its 'extreme disregard for the socio-material practices and arrangements that enable communication.' As such, it does not 'take into account the empirical formation of the actual assemblages through and in which communication occurs.'[87]

The case file, we have argued, is one such arrangement: it is the site of pivotal material-semiotic mediation between what becomes a 'legal world' and what is actualized as an 'outside world', that is, as 'world of reference'. Those interested in the materialities and performativities of law[88] may be assisted by this exploration of the legal case file. Approached as a *border object*, it contributes to an empirically grounded understanding of law and its outside as enacted by law itself in its material-semiotic operations.

Approached this way, the legal case file also raises further questions, in particular in relation to contemporary thinking on knowledges, information, and 'penal cultures'. Our analysis, concentrating here on only its most basic operations – self-reference and other-reference – suggests that the case file diffracts reality in highly specific ways. As the operation of the 'doubling' of persons and events ensures law's cognitive openness, it is precisely this operation that is at stake in contemporary debates regarding the relationship between technologies of knowledge making and information gathering on the one hand, and the exercise of criminal justice on the other. Foucaultian approaches, concerned with law's relationship with scientific, forensic, and, in particular, medical knowledges spring to mind, for instance. Or, those approaches seeking to understand penal cultures as increasingly moving

86 See, also, Pottage, op. cit., n. 29.

87 Farias, op. cit., n. 36, p. 12.

88 See, for instance, the scholars gathered together in the special issue of *Journal of Law and Society* entitled *Material Worlds: Intersections of Law, Science, Technology, and Society*, eds. A. Faulkner and C. Lawless (2012).

from a narrative-oriented site of practice to one governed by a logic of the database.[89] Such a move has consequences for the very way government-at-a-distance[90] takes place, as it makes narrative repertoires unavailable to decision makers, while it promotes the decontextualization and reassembling of information according to a 'computer ontology'.[91]

Our analysis, however, has suggested that the historical discontinuities between the legal case file and other (legal or penal) techniques of knowledge making revolving, for instance, around the database, should not be overestimated. Our analysis shows that (criminal) law always already assumes and produces a 'virtual event' upon which legal operations can take place. This virtuality is in this sense not only an artefact of the logic of the database, but also that of *law itself*. Law has always been instrumental in the constitution of persons and things, and it has always been forced to do so at a distance that can only be bridged by documents upon documents. The legal case file, the object that provides access to the persons and things law operates on, is as much a technology for making knowledge as are databases and surveillance apparatuses.

At the same time, our localization of law's 'cognitive openness' in the case file offers these scholars new avenues to explore empirically. For instance, it raises the question how informal and formal standards and routines in the production of written materials shape and structure law in action.[92] This question would focus less on the incorporation of scientific knowledges into law, but rather on bureaucratic, non-scientific forms of knowing, acting, and writing that structure the exercise of criminal justice.[93] For instance, how do standards and record-taking procedures differ across jurisdictions? What are the ambiguities to which these standardized and vernacular practices give rise? Secondly, our analysis of the defendant's 'documentary double' has illustrated that this doubling proceeds along various kinds of axes: of course, in terms of his/her culpability, but also in terms of his/her morality, sanity, and 'riskiness'. These multiple productions testify to the incoherence of penal knowledges, and defy simplistic portrayals of criminal justice as moving in any one direction across the board (for instance, from rehabilitation-oriented to risk-oriented). Moreover, the multiplicity of these documentary doubles raises the question of how *coherence* – the final story – is achieved. Of course, coherence is partially an effect of material ordering, as various productions of the defendant are

89 See Franko Aas, op. cit., n. 76., or Haggerty and Ericson, op. cit., n. 77.

90 N. Rose and P. Miller, 'Political Power beyond the State: Problematics of Government' (1992) 43 *Brit. J. of Sociology* 173.

91 Franko Aas, op. cit., n. 76.

92 Particularly helpful in thinking through these kinds of standards, routines, and vernacular classifications is the work of G.C. Bowker and S.L. Star, *Sorting Things Out: Classification and its Consequences* (1999).

93 See, for instance, M. Valverde, *Law's Dream of a Common Knowledge* (2008).

gathered together in a single dossier. But how is singularity achieved throughout the procedures in court, if at all? Or, considering that law is notoriously frank about its insistence on the *practical* and pragmatic value of truths, is such singularity necessary at all?

While the case file is arguably but *one* location of law's openness to its environment, it has proven nevertheless pivotal to understanding law's highly specific way of apprehending, and hence building, a world it may judge. An exploration of law in its world-making capacities, we have shown, is assisted by taking this mundane (and perhaps boring) object seriously.