Rough draft prepared for my Lunch Talk at SNU on May 21, 2024.

This is not a proper paper, but a tentative and exploratory line of reasoning, which stands at the (very) beginning of an interdisciplinary research initiative that I am co-founding at this very moment. My apologies.

Clashes on Human Being in the post-digital Anthropocene: What do they mean for law?

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I. Introduction

I use the post-digital Anthropocene as a chiffre for a (speculative, but not implausible) age characterized by clashes on what it shall mean to be human,[1] and uncertainty of how to settle for a dominant imaginary of the human condition. For law to play a justifiable role, it must be reinstated or reimagined within this age. To do so with good reasons, it must first rise to its complicity in bringing about the post-digital Anthropocene. This is "hard stuff", so I start with an illustrative case study (I.) to only then present a sketch of my conceptual framework (II.). I will conclude by looking into three examples to query the aforementioned complicity of law in the post-digital Anthropocene (III.).

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Instead of offering a proper introduction, let me start with a case-study:[2] The Volkswagen Emission Scandal, also known as "Dieselgate"; or rather: how it did in fact play out before German criminal courts, and how it could have played out given some deep, but far from implausible reconfigurations.

The scandal involved Volkswagen (VW) using defeat devices in their diesel vehicles to manipulate emissions tests. These defeat devices made the vehicles appear more environmentally friendly than they actually were during testing, while they emitted pollutants at levels far exceeding legal standards in real-world driving conditions. In relation to this scandal, Rupert Stadler, the former CEO of Audi (a subsidiary of VW), faced prosecution before the District Court Munich. He was charged with fraud, intermediate false certification, and criminal advertising, for his alleged role in allowing diesel vehicles with manipulative defeat devices to be sold after becoming aware of their existence. Based on a "plea

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[1] In traditional terms: clashes on the future of human being(s) between nature and technology.

[2] A case-study that those who already had dealings with, and maybe even subscribe to, posthumanist legal theory in general, and Rights of Nature (RoN) in particular, will likely consider too easy and superficial, while those who have not engaged with such strands of thought will find it difficult to digest. Hence a case-study that epitomizes the communicative difficulties of this talk.

deal", Stadler was eventually convicted of defrauding (by omission) the buyers of manipulated diesel vehicles. He received a suspended sentence of 21 months and was fined €1.1 million.[3]

Both the proceedings and the eventual verdict are highly telling. For they focused on the remedial protection of consumer rights and the integrity of market transactions; that is on the protection of individual property rights and their structural embedding. The broader environmental impact of the scandal was of no substantive concern. "Nature" merely served as a backdrop against the affairs of human beings. In turn, these inter-human affairs were reduced to the pecuniary interests of individual buyers. Neither the bodily integrity of present (and even less so: future) generations who had/have to endure the negative effects on the environment nor additional public health costs for dealing with said negative effects were of (if any) major concern. Such externalities were/are likely not trivial. One study estimates that in Europe alone, "1,200 people … will die early, each losing as much as a decade of their life, as a result of excess emissions generated between 2008 and 2015 by affected cars sold in Germany."[4] It goes without saying that the study had to compensate for the uncertainty in input variable (such as vehicle activity and emissions factors). As a consequence, its simulations would not have met established evidentiary standards (especially as regards causation, but possibly also as regards criminal intent) in German criminal courts. All of this may explain (mind: not justify) the relative leniency of the verdict against Rupert Stadler.

Now bear with me and let us imagine a criminal law that protects RoN. Be it post-humanistically to protect the intrinsic virtue of nature as such; or be it, from a "neo-modern" perspective, to protect the life conditions of present and possibly also future generations of human beings. Seen this way, the cumulative wrong propagated by the Volkswagen Emission Scandal appears to be particularly grave. Further, a criminal law adapted to redress this grave wrong would likely resort to harsher penalty ranges as well as to regulatory techniques that undo untoward evidentiary hurdles (like abstract endangerment or even strict liability offenses[5]). In the case of Rupert Stadler, it is hence safe to speculate that an alternative criminal law I just sketched would have given rise to much harsher as well as summary judgment. (Note that I am not affirming this result!)

The criminal law I just imagined is far from implausible, and its expansionist drift stirs especially from progressive forces that push for more climate justice by means of climate litigation to redress global warming. Suffice it to mention:

- RoN have already been accepted in several legal orders (including several countries in Latin America as well as India and New Zealand).
- The European Court of Human Rights (ECtHR) has very recently (on April 9, 2024) recognized that state inaction on climate change can violate the human rights of living human beings. In a case brought by a group representing over 2,500 female Swiss elders, who argued that their government's inadequate action on climate change posed significant risks to their health and life, the Strasbourg Court found that Switzerland had indeed violated Article 8 ECHR (right to respect private and family life) by not taking adequate measures to combat global warming.
- And in its so called *Neubauer et al.* verdict (as of March 24, 2021), the German Federal Constitutional Court emphasized the principle of inter-generational justice, highlighting that current laws must not impose unfair burdens on future generations. The ruling struck down existing legislation for setting emission reduction targets only up to 2030 without adequate

[3] This sentence is still pending given an appeal filed by Stadler.

[4] As aptly summarized by *Chu*, MIT News Office, March 3, 2017. The study is available online at: https://iopscience.iop.org/article/10.1088/1748-9326/aa5987 (last visited May 10, 2024).

[5] Pushes to allow for strict liability offenses to capture "major carbon criminals" come, inter alia, from the camp of Green Criminology.

planning for subsequent years, potentially leaving a disproportionate burden on younger and future generations.

These developments are hardly unidirectional. They face severe external opposition as well as internal critique[6] (both on post-critical as well as on traditional critical accounts[7]).

- As to external opposition, suffice it to mention that the inclusion of RoN into the constitutions of Latin-American countries has been ridiculed as "constitutional lyrics"; and that the ruling by the ECtHR was not only praised, but even more so met with striking hostility in Switzerland (namely in conservative[8] and populist[9] media outlets, and by right wing parties[10]).
- As to internal critique, suffice it to recall that RoN (similar to extensionist Animal Rights and Robot Rights approaches) have been criticized with some merits for clandestinely perpetuating that which they seek to overcome: the anthropocentrism of law by re-centering humans within a given (ecological or technical) milieu (this amounts to the internal post-critical critique),[11] thereby losing sight of the power asymmetries inherent to relationships based on (subjective) rights (this is traditional stance of critical theory, and its critique of post-critical approaches).

It is therefore safe to speculate that "my" alternative criminal law – one that would impose harsh and summary penalties for the grave wrongs committed in the Volkswagen Emission Scandal – would receive mixed reactions, too, to say the least.

II. Conceptual Framework

My moving from how Dieselgate did in fact play out in German courts, to how it could have played out under an imagined, but far from implausible criminal law that would have redressed the scandal's environmental impacts, and on to the foundational conflicts spurred by the conflictual foundations of this imagination is illustrative for the more general analyses I pursue. To frame them conceptually, I will briefly sketch my approaches to transformations in the post-digital Anthropocene (A.) concerning law's ideas and practices of human being (B.).

A. Transformations in the post-digital Anthropocene

Human societies – and by implication: their legal constellations[12] – are facing deep transformations considering the normalization of digital technologies (including the datafication of lifeworlds and the rise of AI) as well as the (recognition of the) advent of human-made planetary poly-crises (especially global warming, biodiversity loss, and severe pollution). I call this the post-digital Anthropocene.

The post-digital Anthropocene is a double irritation, if not provocation. For present purposes, suffice it to define "*post-digitality*" in a positivist way (mind: not normatively, especially not affirmatively) as a

[6] External opposition comes from standpoint outside the framework it is critiquing. Internal critique, on the other hand, evaluates a system based on its own standards and principles.

[7] Post-critical theories suggest that the traditional mode of critique, which aims to expose hidden truths or underlying power structures, might sometimes reinforce the structures it intends to challenge. Instead, post-critical approaches often emphasize constructing alternatives or understanding the complexities of how knowledge is produced and used.

[8] The *Neue Zürcher Zeitung* (NZZ) spoke of an "absurd verdict".

[9] The *Blick*, somewhat more balanced than the NZZ, spoke of a "disconcerting and possibly even counterproductive" verdict.

[10] The SVP party issued a press release titles: "The Strasbourg ruling is unacceptable - Switzerland must leave the Council of Europe".

[11] *Schweitzer*, Nature and Culture 2021, p. 28.

[12] As in configurations or arrangements of legal and judicial ideas, practices, and events that mutually interact (shape and are shaped by) within broader social (political, cultural, economic, religious etc.) constellations.

state of being where the distinction between digital and non-digital becomes increasingly blurred, not because we have moved beyond the digital, but because digital technology has become so integrated into all aspects of life that it is no longer considered a separate or novel entity. Post-digitality marks a shift in attitude and approach towards digital technology – from its once-celebrated novelty to a ubiquitous, often invisible presence that is woven into the fabric of daily living. I am not suggesting that we are there yet, especially in the realm of (German) law, law enforcement, and regulation. But I am suggesting that we should start speculating about a post-digital era. As digital technology continues to permeate more aspects of life, understanding and navigating the complexities of post-digital life-worlds become crucial for addressing contemporary challenges, shaping future developments, and addressing emerging phenomena that cannot be controlled (possibly including the uncontrollability of Big Tech). In turn, the *Anthropocene* has become a much contested "buzzword", not only in natural sciences, but even more so in social sciences and the humanities. For the time being, suffice it to *initially* (there will be two more iterations) define it as an era marked by significant impacts of human activity on Earth's geology and ecosystems, or simply a poly-crisis of the Earth system.[13] This is yet again a positivist definition.[14] It must neither be taken as reinforcing an anthropocentric worldview nor as homogenizing human impact[15] or the impacts of the Anthropocene on humans and non-humans (there is in effect not *the* Anthropocene, must countless ones).

My analysis of the post-digital Anthropocene spans four levels:

- The *first level* pertains to the positivist phenomena of the post-digital Anthropocene.[16] Here, the aforementioned definitions apply as first level definitions.
- A *discursive second level* encapsulates how the post-digital Anthropocene does (not) transform normative (in my case legal) discourses, and how these discursive (non)alterations do in turn (not) alter our life-worlds[17] (like when the German Federal Constitutional Court in *Neubauer* et al. drew on the Reports of the Intergovernmental Panel on Climate Change to invent the principle of inter-generational justice).
- This is but the point of departure to get hold of *third-level (ideological) clashes* that ensue around discursive (re)configurations in the post-digital Anthropocene (remember the extreme conservative/right-wing opposition to the ruling of the ECtHR).[18]

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[13] See *Burdon/Martel* (eds.), The Routledge Handbook of Law and the Anthropocene 2023.

[14] This is why Latour rightly decried a definitional victory of natural sciences.

[15] Simplistic definitions of the Anthropocene homogenize human impact and fail to account for the disparities in environmental footprint among different societies and within populations. This must not lead to policies and discourses that overlook the complexities of socio-economic and political factors driving environmental change. Nor must the definition mask inequalities and divert attention from the specific actors and systems (such as industrial capitalism) most responsible for ecological disruptions. The inhumane is not only part, but a critical driver of the Anthropocene. – The "global" dimension of these issues necessitates a discussion on inequalities, as the impacts of digital advancements and environmental degradation are disproportionately borne by the Global South. Addressing these inequalities requires a reevaluation of international laws and policies to foster more equitable technological access and environmental responsibility."

[16] I do give credence to the abundant scientific evidence that human-made global warming, biodiversity loss and pollution jeopardizes Earth's life support systems. However, these markings do only point to other – factual and normative – drivers and reasons of these phenomena.

[17] Consider, for example, discourse on the autonomy of AI systems. Once accepted in law, they have the potential to re-align our conceptions of human autonomy and collective human agency, which in turn has the potential to transform (for good or bad) our normative and political orders.

[18] With ideology, I refer to the set of underlying beliefs, values, and principles that shape individuals' or groups' interpretations and reactions to the changes and challenges presented by the post-digital Anthropocene. These ideologies determine how different stakeholders perceive the integration of digital technologies into daily life, the human impact on the environment, and the appropriate legal and social responses to these issues.

- This, in turn, points to my fourth-level desideratum: the lack of theories and practices that confront the ensuing clashes about how to (not) come to terms with the risks, challenges, and chances within the post-digital Anthropocene.[19]

The post-digital Anthropocene hence emerges as a chiffre for a (speculative, but not implausible) age of ideological conflicts about the discursive (non)inclusion of the phenomena of the post-digital Anthropocene and deep uncertainty of how to settle them.[20]

B. Law's ideas and practices of human being

This brings me to my second main point. It contains a methodological suggestion of where (not so much: how) to approach the post-digital Anthropocene. That is: where to look for the law's complicity in the rise of this era as well as corresponding discursive transformations and ensuing ideological clashes. The "dig-site" I suggest are *law's ideas and practices of human being* as they shape and as they are being shaped by other social milieus. "Human being" hence points to a complex constellation of values, symbols, and assumptions through which law imagines, expresses, and practices human being in all manner (cultural, social, biological, ecological, technological etc.) of terms.[21]

Setting Western Modernity as my (optional, but given its widespread influence, not so arbitrary) starting point, law's ideas and practices of what it means to be human gravitate – very, very summarily speaking – towards *normative*[22] Eurocentric anthropocentrism, which distinguishes humans from both nature and technology. Accordingly, the centrality or the superiority of the Anthropos[23] is either implicitly or explicitly considered a normal or just point of reference for legal concepts, practices, and frameworks that both shape and are shaped by other social (cultural, political, economic, religious etc.) forces. Considering the dualism between humans and nature, we (as humans) are cast as agents of control and mastery over natural processes. Nature is something external and exploitable, rather than something connected to human well-being or charged with intrinsic cosmic virtue. (Again think of the *Stadler* case.) Technology, in turn, is separated from humans, too. It is seen as a mere extension of human capabilities, an instrument through which humans exercise their will over the human and non-human world.

In the post-digital Anthropocene, these anthropocentric dualisms become factually and discursively instable, if not untenable.[24] The "future of human nature" (to borrow from *Habermas*) and superiority is called into question by planetary poly-crises (the planetary claustrophobically imperils human survival on "starship Earth"), the development of Artificial General Intelligence (AGI; the rise of machines that are smarter than humans, and that imperil our superior agency), and transhumanist

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[19] On this fourth level, lacunae prevail, and one easily gets entrapped in the pitfalls of (Western) Modernity with both its bifurcated orientations (which strikes the path to either condemn innovation, or to execute it naturally) and its covert inner contradictions (both of which make Western law susceptible to conceal these contradictions for the sake of upholding a clear-cut system of orientations. See generally *Auer*, Zum Erkenntnisziel der Rechtstheorie, p. 58.

[20] This is neither a normative, even affirmative definition nor am I suggesting that we are there yet. But again, I am suggesting that we start speculating about such an era.

[21] Defined accordingly, "law and anthropology" is by far *not* the only approach to clashes on what is means to be human the post-digital Anthropocene.

[22] Of course, I cannot undo my own epistemic anthropo- and eurocentrism, that is my way of seeing the world as a human being socialized in Europe. But I hope to be challenged on the latter front by your input and experiences. On the distinction between perceptual, descriptive, and normative anthropocentrism, see *Chapaux*, in: The Routledge Handbook of International Law and Anthropocentrism, p. 295 et seq.

[23] It is telling that I am alluding to ancient Greek as the cradle of Western philosophy and power here.

[24] This is why I suggest coupling Post-Digitality and the Anthropocene (although this may indeed be yet another extension of Eurocentrism).

(bio- etc.) technological enhancement (possibly bringing about superior no-longer-humans, which break with the idealized principle of categorical equality of human beings[25]). At the same time, the (in Western culture often romanticized) idealization of nature as a pristine, untouched wilderness, existing independently of human influences can no longer be widely upheld. We now observe extensive environmental alterations and degradations, exemplified by industrialization's reshaping of landscapes and ecosystems to fit human needs, often without regard to ecological balance or long-term sustainability. Nature and culture have "merged".

Likewise, at least from a Science and Technology Studies (STS) perspective, technology's role extends beyond being merely instrumental or auxiliary; it becomes a constitutive part of human identity and social order. Technologies shape and are shaped by societal values and power structures, blurring the lines between creators and creations. The co-evolution of humans and machines challenges traditional ontologies, suggesting a hybridized future where boundaries between human and machine, natural and artificial, are increasingly indistinct.[26] It comes as no surprise, then, that moves to grant/accept agency and subject status to non-human actants, from AI systems to animals (Animal Rights) and on to eco"systems" (RoN), or to move beyond the anthropocentric subject/object dualism (e.g. with subjectless rights[27] or with a cosmology of networked relationships) gain increasing traction and challenge traditional notions of Western anthropocentrism in the post-digital Anthropocene. Since these challenges pertain to socially and psychologically (and possibly even biologically and technologically) deeply ingrained ideas and practices of human being, they do cause clashes on what it means to be human.

This, then, is where my *working definition of the post-digital Anthropocene* finally emerges. I use it as a chiffre for a (speculative, but not implausible) era of clashes on what it *shall* mean to be human (in traditional terms: clashes on the future of human being between nature and technology), and deep uncertainty about how to settle, both substantively and procedurally, clashing imaginaries about the human condition.[28]

The clashes mentioned in the aforementioned working definition essentially point to contestations as well as perpetuations of hegemonic anthropocentric "epistemes of human being." That is: deep structures of historically sedimented knowledge and experience that inform and constrain our concepts and discourses (to loosely draw on *Foucault*). Coming to terms with the post-digital Anthropocene is hence so demanding because it requires a reevaluation of modes of thinking and communicating that are deeply embedded within the current episteme while simultaneously attempting to question and transcend it. This makes the task of articulating a new vision of human relations with nature and technology inherently complex and fraught with potential conceptual misalignments. However, this process is not only necessary but vital for fostering dialogue and exploration that could lead to a new understanding or even the emergence of a new episteme. Such transitions are crucial in times of profound transformation, as they enable us to reimagine our futures and the potential reconfigurations of normative orders. Furthermore, this analysis emphasizes the critical importance of historical consciousness in understanding the present challenges. As we grapple

[25] An idealization that has given rise, as evidenced by critical theories, especially from the feminist, post-colonial and "Global South" vein, to covertly inhumane practices (power asymmetries and distributional inequalities).

[26] This also compels us to question and debate the extent to which technology drives social change (technological determinism) versus the extent to which societal forces shape technological development (social constructivism). By dissecting these perspectives, we can better understand the reciprocal relationship between society and technology, avoiding overly deterministic narratives while recognizing the powerful role of technology in societal transformation.

[27] *Fischer-Lescano*, Kritische Justiz 2017, p. 475.

[28] This is neither a normative, even affirmative definition nor am I suggesting that we are there yet. But again, I am suggesting that we start speculating about such an era.

with the ideologies and technologies of the post-digital Anthropocene, recognizing the historical epistemic constraints on one's thinking is crucial. This recognition provides a clearer framework for action. It helps in either identifying and pushing against these boundaries or upholding or adapting them anew under novel contexts. Proper justifications are essential for this process. This is, of course, where my "rational", justification-seeking socialization kicks in.

III. Rising to law's complicity in the post-digital Anthropocene

For law to play a justifiable role in adequately and productively confronting (as in, depending on the eye of the beholder: managing, negotiating, reconciling, deciding) clashes on human being in the post-digital Anthropocene, it must rise to its modern anthropocentricity and its possible complicity in bringing about this age. This of course falls short of a positive – humanist, trans- or post-humanist etc.; affirmative, critical, or post-critical etc. – legal theory of/for/[29] with/within etc. the post-digital Anthropocene. But before venturing there, coming to terms with law's role in sustaining this era proves critical so as to not carry forth past "mistakes" (especially to not carry forth the inhumane into future human/non-human/no-longer-human constellations). To reimagine law in the post-digital Anthropocene, one must hence not succumb to the traditional bifurcation of Western modernity, where innovation is often either met with positivist technological (in the case of law: regulatory) optimism (see A.) or "retrotopian" skepticism (cultural pessimism, see B.).

A. Questioning regulatory optimism: Climate Criminal Law

Horst has recently, and rightly so, diagnosed a strong affirmative stream in legal advocacy that considers law as a tenable solution to ecological crises.[30] One somewhat prominent example is Earth System Law, which "retains a high degree of faith in law as a force of transformation."[31] While the proponents of Earth System Law uphold law as "a useful and relevant social regulatory institution precisely also *because of* the deeply pervasive global socio-ecological crisis explicated by the Anthropocene," they also acknowledge that "[l]aw as a social regulatory institution has been complicit in creating the Anthropocene epoch and is unable in its present incarnation to create sustainable solutions to navigate the Anthropocene" so that it must be rethought and reformed.[32]

Another example, which gets increasing attention in Germany, is what *Satzger et al.* have ingeniously labeled "climate criminal law".[33] While arguing in favor of the development of a specialized branch of criminal law that directly addresses the prevention of climate change, *Satzger et al.* "only" decry how current legal frameworks are not adequately addressing the prevention or mitigation of climate change through criminal laws. This is striking as – different from Earth System Law – there is no acknowledgment that the focal points of traditional (German) criminal law were indeed complicit in the propagation of climate change. Consequently, there is little will – again different from Earth System Law – to seriously rethink and reform criminal law(s) in the Anthropocene. Pointedly, there is no discussion of the (likely protective) inclusion of non-human actants; no mentioning of how to redress the inhumane (local and global power asymmetries and distributive injustices between humans and human societies) in anthropocenic constellations; and no debate about whether criminal law's modern concentration on duties (to *not* harm the climate by illegally emitting greenhouse gases or degrading

[29] On a critical reading of these prepositions see *Grear*, Law and Critique 2020, p. 351.
[30] *Horst*, Journal of Human Rights and the Environment 2024, p. 85 et seq.
[31] *Horst*, Journal of Human Rights and the Environment 2024, p. 87.
[32] *Kotzé/Kim*, Earth System Governance 2019, 1000003.
[33] *Satzger/v. Maltitz*, Zeitschrift für die Gesamte Strafrechtswissenschaft (ZStW) 2021, p 1.

natural carbon sinks) must be replaced by responsibilities (e.g. to improve natural or artificial carbon sinks, or to care for non-human actants).

My critique here is *not* that the post-digital Anthropocene warrants such radical reconfigurations of criminal law's doctrines and frameworks (this is for another debate). Nor am I criticizing the regulatory optimism of the Climate Criminal Law project per se (although I am deeply skeptical in that respect). My point is that Climate Criminal Law's regulatory optimism is inadequate and unproductive as long as it neither confronts criminal law's complicity in the Anthropocene nor discards clashing anthropocenic imaginaries by explicitly justifying its implicit euro- and anthropocentric bias/basis.

B. Questioning cultural pessimism: Data-driven predictability and the end of human autonomy

I now switch from (a critique of) regulatory optimism concerning the Anthropocene to (a critique of) cultural pessimism concerning Post-Digitality. As observed by *Auer*:

> "On a deeper level, digital transformation is not only changing individual legal institutions but rather the entire structure of human normativity and – even more significantly – the self-definition of human beings in modern society and thus also their self-representation in law. Legal theory will have to deal in the future with the question of whether state law can still meaningfully be enacted as general law when the digital economy has long since moved on and offers as well as prices are tailored individually based on data trails left behind. […] Legal theory would be well advised to already prepare answers to the by no means distant question of where a structurally digitized and personalized legal order is heading, in which the individual becomes increasingly obsolete not despite, but precisely because of her complete data-driven predictability."[34]

One answer is given by legal theorist Klaus *Günther.* He laments the end of norms in what he calls smart orders, i.e. political orders that are run on predictions of personal behavior in order to avert deviant behavior before it can occur (loosely think about a technological version of Minority Report, both the Hollywood blockbuster and even more so the short story). Smart orders, *in extremo*, hence run on algorithmic impossibility structures, which uphold compliance with societal expectations by factual means. Smart orders are different from normative (norm driven) order, where a predictable future is upheld by an a-, even counter-factual program; we know that norms can and will be broken, after all. In this vein, norms are considered impossible in smart orders, for norms allow for both deviation as well as obedience.[35] Or to quote *Günther*: norms are "only possible under the condition that an addressee has the factual freedom to not follow them."[36] This is not the case in smart orders.

The inherent cultural pessimism of this legal theoretical analysis pertains not so much to the end of norms per se, but to the end of the human freedom to deliberately commit to or break from normative ordering. Linking this to the normalization (as in the internalization of subjectivation) of predictive technologies under the auspices of Post-Digitality, the deeper concern goes to the objective *and* subjective loss of human freedom (which in modern categories entails the freedom – not the right! – to break the law). Or to frame it in *Auers* terms: the concern goes to how the self-definition of human being is transforming in post-digital societies and how this alters the self-representation of human beings in techniques of post-digital social control (which no longer rests on law in the modern sense). In other words, any factual possibility of acting differently than expected is overridden by the self-

[34] *Auer*, Zum Erkenntnisziel der Rechtstheorie, p. 61.
[35] *Möllers*, Die Möglichkeit der Normen, pp. 125, 131, 455.
[36] *Günther*, in: Forst/Günther (eds.), Normative Ordnungen, p. 543 et seq. I made a parallel argument in that volume, too.

attribution of smart social control, according to which one can only act in this or no other way. Predictive social control thus becomes second nature. From this perspective, the concern does not go to the emergence of constellations of predictive impossibility structures in the lifeworld. It rather goes to how subjective realities change in post-digital times; subjective realities that seek to accommodate these smart orders in anticipatory obedience because human being(s) take them for granted.

This line of critique is well within the vein of cultural pessimism about the post-digital Anthropocene. It remains on the second level of my analytical framework, since it concerns the (possible) transformation of our normative[37] discourses and accompanying reconfigurations of our lifeworlds. In order to rise to the task of reinstating or reimagining law in the post-digital Anthropocene, legal theory must – or so I have suggested – dig deeper and reflect on law's complicity in bringing this era about. To cut a longer argument very short,[38] suffice it to say:

Algorithmic impossibility structures conducive for predictive social control in smart orders very much build on the ideas and practices of human being inherent to traditional concepts of criminal law. Criminal law regularly treats norms as unconditional commands. The a- or counter-factual nature of the norms remains latent, and at best a necessary evil (one that predictive prevention exercises). That criminal law as a normative program is not only about preventing but also about enabling the freedom to commit crime is rarely seen, let alone positively defended. The "ability to act otherwise" may serve as the epicenter of German and Continental criminal law doctrine as it allows for the attribution of criminal responsibility, since the perpetrator enjoyed the free will to act in accordance with normative commands, but did not in fact do so. Yet this "ability to act otherwise" is not cherished as the "freedom to break norms" in order to uphold human autonomy and freedom as such. Rather, this freedom to break norms is branded as annoying and even dangerous in traditional criminal law theory.

Hence, to counter untoward post-digital processes that may well thwart human autonomy and freedom (key elements of the modern imaginary of the human condition), a (criminal) law theory not only critical of the phenomena of the post-digital Anthropocene but fit to be situated within (possibly even to shape) this ear, first needs to ask a different set of questions. Especially: What is, if any, the intrinsic or functional value of a realizable human freedom to deviate from societal expectations? For present purposes, I can stop here. For my aim here was to illustrate that the post-digital Anthropocene cannot be accommodated, let alone shaped, by hasty legal theoretical cultural pessimism (or, for that matter, hasty regulatory optimism).

C. Questioning legal reformations: *Neubauer et al.*

Reinstating or reimagining law within the post-digital Anthropocene will likely be a painful endeavor, since naturalized ideas and practices of human being are called into question. For this, *Neubauer et al.* (the case where the German Federal Constitutional Court (GFCC) innovated inter-generational justice as a matter of constitutional rank) is illustrative. The verdict was both celebrated and contested, reflecting broader societal debates about the urgency of climate action and the role of different branches of government in addressing environmental crises. It is widely seen as representing a significant moment in the legal recognition of climate change as a matter that intersects with human rights and governmental responsibilities.

Yet this is where things get painful. Mirroring my critique of the Climate Criminal Law project, the GFCC failed to go beyond the established confines of its modern constitution by neither confronting

[37] Suffice it to say that digital technologies, too, are normative in my opinion. I will not delve into this here.
[38] For a more elaborate, but methodologically more basic line of reasoning see *Burchard*, ZStW 2023, XXX.

(explicitly reinstating or reimagining) the human/non-human nor the inner/outer[39] (Germany and the rest of the world) divide. What is more, the Court did not address how Germany contributed – and exceptionally so – to the rise of the phenomena of the post-digital Anthropocene (which include ecological poly-crises and global distributive injustices in who has to carry the burdens and risks of theses crisis). This is of course explicable when casting the GFCC as a principal actor in the national and international politics of climate change (prevention and mitigation). But this makes the verdict a rather doubtful endpoint (and much of legal scholarship nowadays revolves around the exegesis of high court decisions) for the theorization and practice of law within the post-digital Anthropocene.

Even more painful is yet something else. For the focus on the inter-generational extension of fundamental rights to future generations was mostly, and ingeniously so, conducive for the preservation of democracy in its present (euro- and anthropocentric) form. This is often missed, especially in international debates. For the Court was, and factually rightly so, concerned that with climate change becoming worse and ecological crises getting more pressing, the German polity would lose the political – the possibility to choose, since policies would be driven by materially contained crisis management. The innovation to require that the present legislator take due account of the human rights of future generations was hence driven by the motive allow the future democratic legislator to shape its environment and not be shaped (driven towards mere adaptation and reaction) by it.

This is of course at the core of Western Modernity, and when calling it into question, the future of public democratic self-government is brought back to the table of possible transformation, too. The end of history has run its course, and clashes on what it means to be human (e.g. as a *zoon politikon*, i.e. as a social and political being in *Aristotle's* words) emerge as conflicts on how the post-digital Anthropocene shall be ordered politically.

[39] This is a key take-away from the verdict: "The fact that no state can resolve the problems of climate change on its own due to the global nature of the climate and global warming does not invalidate the national obligation to take climate action. Under this obligation, the state is compelled to engage in internationally oriented activities to tackle climate change at the global level and is required to promote climate action within the international framework. The state cannot evade its responsibility by pointing to greenhouse gas emissions in other states." (The Court's own translation; see https://tinyurl.com/5hmsmp4v).