DECIDING TO REPEAT DIFFERENTLY: ITERABILITY AND DECISION IN JUDICIAL DECISION-MAKING

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This article examines the extent to which judges have a responsibility to engage in subversive legal interpretations. It begins by showing that despite strong legal and political discourses, there remains space for the judge to resist the force of these discourses. To illustrate this point, the article discusses the strong and unified crisis discourse that was used to justify the shift in legal discourse from prosecution of terrorism to prevention of terrorism after 9/11. Subsequently, Jacques Derrida's concept of iterability is used to examine how space to resist crisis discourse was present and used by the court of first instance in the seminal post-9/11 terrorism case of Hamdi v. Rumsfeld. *The article proceeds to address the conditions under which the judge had the responsibility to resist this crisis discourse. Here Derrida's work on undecidability is brought into conversation with Ronald Dworkin's classic theory of judicial interpretation. In doing so, I push beyond Dworkin's recognition of the role of political morality in legal interpretation and show that the judge cannot engage in legal interpretation without becoming a participant in the struggle over meaning. This article provides judges guidance in responding to their inevitable implication in this struggle.*

Keywords: Derrida, Dworkin, iterability, judicial decision-making, terrorism, undecidability.

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I. INTRODUCTION

After the attacks on the World Trade Center in New York and on the Pentagon in Washington DC on September 11, 2001 scholars observed a shift in Western legal approaches to terrorism. Instead of the previously dominant criminal law approach, an administrative law and precautionary oriented approach to terrorism gained traction as the way to deal with terrorist threats both in government policy and judicial decisions.[1] Studies have shown how a crisis discourse was deployed to enable and justify this shift.[2] Crisis discourse was present in political and legal realms and worked to emphasize the (supposed) unique and existential threat posed by international terrorism to civilization. It posited that the threat posed by terrorism could only be avoided if the ways of dealing with it were fundamentally changed, specifically, from after-the-fact prosecution of terrorism as a crime to precautionary military or administrative action.

This article first shows that judges had opportunity to resist this crisis discourse. Secondly, it argues that judges had a responsibility to resist crisis discourse, to the extent it aimed to justify the permanent exclusion of a person from the political community. These claims are fleshed out by bringing Jacques Derrida's reading of iterability into conversation with

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[1] Rens van Munster, 'The War on Terrorism: When the Exception Becomes the Rule' (2004) 17 International Journal for the Semiotics of Law 141; Douglas Feith, 'Council on Foreign Relations: Progress in the Global War on Terrorism', Washington DC, 13 November 2003; Marieke de Goede and Beatrice de Graaf, 'Sentencing Risk: Temporality and Precaution in Terrorism Trials' (2013) 7 International Political Sociology 313, 328; and Filip Gelev, 'Checks and Balances of Risk Management: Precautionary Logic and the Judiciary' (2011) 37 Review of International Studies 2237.

[2] See Laura M. Henderson, 'Crisis in the Courtroom: The Discursive Conditions of Possibility for Ruptures in Legal Discourse' (2018) 47 Netherlands Journal of Legal Philosophy 49 and Laura M. Henderson, 'Crisis Discourse: A Catalyst for Legal Change?' (2014) 5 Queen Mary Law Journal 1.

Ronald Dworkin's classic work on legal interpretation. I explore Derrida's iterability in the first post-9/11 case, *Hamdi v. Rumsfeld*,[3] that evidenced the shift from a prosecutorial approach toward a precautionary approach. After analyzing the first instance court's subversive attitude to the crisis discourse in *Hamdi*, I proceed to a more general claim about the judge's role and responsibility in legal interpretation. In effect, I use the context of the War on Terror and the *Hamdi* case to reveal something about the law that was always there: its 'structured undecidability'.[4]

Let me set out the line of reasoning this article follows: my reading of Derrida shows that the interpretation of what the 'law' 'is' is an activity inescapably affected by chains of meaning, structured into discourses that shape legal meaning. I define 'discourse' here as ways of speaking or writing that both represent and create our shared understanding of a particular issue by defining what is and is not appropriate, 'what knowledge is considered useful, relevant, and "true" in that context; and what sorts of person or "subjects" embody its characteristics'.[5] Both legal and political discourses affect the interpretation of law, including the crisis discourse discussed above. At the same time, and crucially, despite the strong structuring force of dominant discourses on the field of (legal) meaning, this structure retains a residual undecidability. It is this residual undecidability that provides the interpreter with space, albeit limited, to subvert the dominant discourse. In this article, I refer to the dual nature of legal interpretation – its determination by discourse and its undecidability – as a 'structured undecidability'. In other words, law is structured by discourse; nevertheless it is never fully defined by the meaning given by this discourse.[6] The notion of structured undecidability highlights how the interpretation of law's meaning is both subject to the disciplining force of discourse that imposes meaning on us and to the unavoidable partial ambiguity of it. This ambiguity gives space for

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3 Supreme Court of the United States, *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), slip op.

4 Ernesto Laclau, 'Deconstruction, Pragmatism, Hegemony' in Chantal Mouffe (ed), *Deconstruction and Pragmatism* (London, Routledge 1996) 57.

5 Stuart Hall, 'Introduction', in Stuart Hall (ed), *Representation: Cultural Representations and Signifying Practices* (London, Sage 1997) 6.

6 Laclau 1996 (n 4) 57.

undermining the force of the discourse by allowing for a deferral of dominant meanings in favor of other possible readings.

In the face of this undecidability, however structured it may be, legal interpretation is a process that can only be resolved by a decision. I use Derrida to push Dworkin's view on legal interpretation to acknowledge the role power relations play in Dworkin's process of 'advancing the enterprise' of law.[7] While not denying the role Dworkin assigns to political morality in legal interpretation, I argue in favor of Derrida's emphasis on the essentially unstable nature of (legal) meaning. Moreover, I highlight the exertion of power necessary to achieve the fictitious stability that is a prerequisite for legal interpretation. By attending to the moment of decision in legal interpretation, it becomes clear that the rule of law is paradoxically *dependent* on the rule of man.[8] A general, underdetermined law is applied to a particular case by doing two contradictory things at the same time: enforcing 'the law in a non-arbitrary way' and respecting 'the ways in which each case is different'.[9] It is for this application of the general to the particular that the law depends on individual, (wo)man-made decisions.[10] The law thus *depends* on judicial decisions and 'forms of popular political action that engage in [...] struggle with legal structures and institutions' to enact the law in concrete situations.[11] Focusing on this necessary moment of decision in the face of undecidability pushes the discussion beyond the question of which legal interpretation is 'right'. In this way, this article aims to augment the traditional legal interest in the 'right answer' by instead providing guidance on how legal decision-makers can responsibly engage in the conflicts of interpretation they will inevitably encounter, conflicts that in the end must be resolved through decision.

Concretely, this article makes these arguments in the following three sections. After the introduction, section II centers on the Derridean concept

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7 Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass., Harvard University Press 1985) 159.

8 Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton, Princeton University Press 2009) 66.

9 William W. Sokoloff, 'Between Justice and Legality: Derrida and Decision' (2005) 58 Political Research Quarterly 341, 342.

10 Ibid.

11 Honig 2009 (n 8) 66.

of iterability. Iterability emphasizes the repeatability of language, while at the same time stressing that language always changes its meaning within each new context it is used. Iterability reveals the space of undecidability in legal interpretation, despite the strongly dominant crisis discourse that structured much legal interpretation after 9/11. This section starts with a brief introduction to the case *Hamdi v. Rumsfeld*, the case I use to highlight the iterable nature of law, and the crisis discourse used therein by the different levels of the judicial institution that ruled on this case. I subsequently engage in a close reading of *Hamdi v. Rumsfeld* to show how the judge in the court of first instance played with the terms of the crisis discourse already present in both the government's public speech and legal submissions. I argue that the judge made these terms mean something different, while at the same time repeating them.

Section III asks how judges should decide in this context of structured undecidability. Here, I compare my view on the iterable nature of law to Ronald Dworkin's famous call for judges to interpret based on the principles of fit and justification, and the political morality of a legal system. While Dworkin acknowledges the aspect of construction inherent in legal interpretation, he fails to fully recognize the power struggle involved in the construction of unity from the undecidable field of legal meaning. Instead of denying the role of power in constructing unity, legal scholars should ask the question how the judge can legitimately decide in conditions of undecidability. Section IV concludes the article.

II. Iterability in the Crisis Discourse of *Hamdi v. Rumsfeld*[12]

Hamdi v. Rumsfeld was the first case heard by the United States Supreme Court on post-9/11 anti-terrorism measures. It dealt with the issue of whether the detention of Mr. Hamdi, a US citizen captured in Afghanistan without any subsequent criminal charges (and initially without access to a lawyer), violated the due process clause of the US Constitution. The government argued that Mr. Hamdi was an enemy combatant and that interests of national security, the threat posed by terrorism, and the ongoing hostilities

[12] This section draws on Laura M. Henderson, 'Crisis Discourse: A Catalyst for Legal Change?' (2014) 5 Queen Mary Law Journal 1.

together justified the preventive detention of Mr. Hamdi without access to a lawyer. The government also argued that this preventive detention should only be subject to highly deferential judicial review.[13] The US Supreme Court ultimately held the detention to be unconstitutional in this case, but not because preventive detention was unconstitutional as such. The Supreme Court rejected the government's claim that the factual basis for Mr. Hamdi's detention was not subject to judicial review. However, and significantly, the Supreme Court accepted the government's argument that it was authorized to detain Mr. Hamdi preventively as an unlawful enemy combatant.

This decision was part of a general shift toward a precautionary approach to terrorism, that took place after 2001. As Hafetz has noted, in the years since the attacks on the World Trade Centers, an 'alternative, military-based approach [to terrorism], rooted in the language and logic of a global armed conflict against al Qaeda and associated terrorist organizations' has become an institutionalized part of legal discourse.[14] The 'starting point of post-9/11 security politics' became 'prevention rather than defense against actual threat'.[15] A 'discourse on eventualities' developed that called for a 'permanent military policing through the mechanisms of prevention and pre-emption'.[16] The judiciary has been intimately involved in this shift toward precaution, as Gelev has described. 'The judiciary adopts the logic of precaution in exactly the same way as the other two branches of government ... courts are central to the precautionary risk rationality of government.'[17] Here, too, in the *Hamdi* case we see this precautionary discourse being furthered by the Supreme Court's acceptance of a lower standard of review for preventive, administrative detention than that for detainees suspected of a criminal offense. The Supreme Court explained that this lower standard of review was necessary to 'alleviate ... [the] uncommon potential [of procedural guarantees] to burden the executive at a time of on-going military conflict'.[18]

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[13] Henderson 2014 (n 12) 10.

[14] Jonathan Hafetz, 'Military Detention in the "War on Terrorism": Normalizing the Exceptional after 9/11,' (2012) 112 Columbia Law Review Sidebar 31.

[15] Van Munster (n 1) 146.

[16] Ibid 142.

[17] Gelev (n 1) 2241, 2240.

[18] Supreme Court of the United States, Hamdi v. Rumsfeld, 542 U.S. 507 (2004), slip op., 26-27.

The Supreme Court upheld the precautionary approach to terrorism engaged in by the government, although it ensured that *some* judicial review of the government's factual assertions would be possible.

The decisions by the US Supreme Court and the Court of Appeals both used crisis discourse to justify their precautionary approach. I define 'crisis discourse' here as a discourse that links the (presumed) existential threat of terrorism to the (presumed) need for structural legal change. This discourse emphasized the existential and unique nature of the threat posed by international terrorism and used it to rhetorically justify a departure from normal (legal) rules and procedures. The Court of Appeals for the Fourth Circuit employed crisis discourse by highlighting the unique nature of the case under consideration and arguing that the normal way for such a case to proceed was not appropriate under the current circumstances:

> The [lower] court's order was not merely a garden-variety appointment of counsel in an ordinary criminal case. If it had been, the lower court's discretion would be almost plenary and hardly a subject for appeal, much less reversal. But the June 11 order was different in kind. In the face of on-going hostilities, the district court issued an order that failed to address the many serious questions raised by Hamdi's case.[19]

Further, this court saw a risk of 'saddling military decision-making with the panoply of encumbrances associated with civil litigation'[20] and decided 'the development of facts may pose special hazards of judicial involvement in military decision-making'.[21] In articulating these risks, the court adhered to the terms of crisis discourse, which portrayed the normal legal rules as posing too large a risk in such exceptional times. According to the crisis discourse, these normal legal rules must thus be changed.

The US Supreme Court's decision in *Hamdi* evidenced a similar use of crisis discourse. The Supreme Court reasoned that 'the exigencies of the

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[19] United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld*, Decision on Appeal before Judges Wilkinson, Wilkins and Traxler (12 July 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 24, internal citations omitted.

[20] United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld* (12 July 2002), 25.

[21] United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld* (12 July 2002), 26.

circumstances may demand that ... enemy combatant proceedings may be tailored to alleviate their *uncommon* potential to burden the Executive at a time of on-going military conflict'[22] and pointed out that 'the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy combatant setting...'.[23] Justice Thomas' dissent went even further than the majority opinion in its use of crisis discourse. According to Justice Thomas, the Supreme Court's failure to understand the new reality of the War on Terror posed a threat to security of the nation: 'the Government's factual allegations will probably require the Government to divulge highly classified information to the purported enemy combatant, who might then upon release return to the fight armed with our most closely held secrets'.[24] The Supreme Court and Court of Appeals' rulings in the *Hamdi* case exemplify how crisis discourse was used to justify a shift in legal discourse from prosecution toward precaution and prevention after 9/11.

Yet, while such an analysis of legal decision-making shows how crisis discourse can make possible shifts in legal discourse, it risks giving the (mistaken) impression that the decision in this case was *so fully determined* by the crisis discourse that the decision could not have been any different. Such a perspective ignores what Jacques Derrida has called the 'iterability of language'. On the one hand, discourse can have a highly disciplining effect; it can constitute the subjects who live within it and make certain outcomes thinkable and others not. On the other hand, it is impossible for a discourse to be reproduced without its meaning changing, however slightly.[25] This iterability is at the core of law's undecidability. The following part will introduce Derrida's iterability, after which I will use this concept to analyze a particular part of the *Hamdi v. Rumsfeld* case history to highlight the space that was available for the judge to resist crisis discourse. Subsequently,

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[22] Supreme Court of the United States, *Hamdi v. Rumsfeld*, 27, emphasis added.

[23] Supreme Court of the United States, *Hamdi v. Rumsfeld*, 28.

[24] Supreme Court of the United States, *Hamdi v. Rumsfeld*, 18.

[25] For more on the productive effects of discourse, see Stuart Hall, 'The Work of Representation' in Stuart Hall (ed), *Representation: Cultural Representations and Signifying Practices* (London, Sage 1997) 44.

section III of this article addresses the normative question of how the judge should deal with this available space.

1. Iterability in Language and Law

One of Jacques Derrida's main contributions to the theory of meaning is the idea that language's meaning is not stable but rather always ambiguous. This ambiguity is not merely a flaw or defect of language, but a fundamental feature of it.[26] Neither the author's intention nor the words of a text can limit meaning totally, but instead Derrida stresses the multiple ways in which meaning escapes and transcends language. Derrida explains that each time a word is used, its meaning results from a combination of past uses of the same word as well as from the unique context in which it is used. Words are thus situated within chains of meaning (the previous uses of words linked together with the meanings attributed to them in the past) that partially fix their meaning. However, each time a word is used, that chain is slightly changed. Each time a word is used it is thus both the same and different: it relies upon its sameness with past uses, while at the same time its meaning can never be identical to that of past uses due to the influence the present context has on its meaning. It is this ability of a word to be repeated, while being altered, that Derrida calls iterability.[27]

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[26] Here Derrida departs from the structuralists he critiques. While structuralists acknowledged as well that language could be ambiguous, they saw this as a flaw to be overcome. Derrida, on the other hand, argued that this ambiguity was ineradicable. See further David Aram Kaiser and Paul Lufkin, 'Deconstructing Davis v. United States: Intention and Meaning in Ambiguous Requests for Counsel,' (2005) 32 Hastings Constitutional Law Quarterly 737, 741.

[27] Jacques Derrida, 'Signature Event Context' in Jacques Derrida (ed), *Limited Inc* (Illinois, Northwestern University Press 1988) 9. It has been noted that Derrida's iterability is similar to hermeneutics as set out most prominently by Hans-Georg Gadamer, see Michael N. Forester, 'Hermeneutics,' in Brian Leiter and Michael Rosen (eds), *The Oxford Handbook of Continental Philosophy* (Oxford, Oxford University Press 2007) 66. While I do not deny this similarity, I choose here Derrida's perspective because of the emphasis Derrida placed on the importance of ambiguity and alterity. While Gadamer and other followers of hermeneutics certainly would not reject these notions, they view them as less central to language and meaning than Derrida did. Derrida's emphasis on ambiguity means that Derrida's approach to meaning aims to keep the process of interpretation as open

While Derrida's notion of iterability emphasizes the indeterminacy of meaning, we must be careful not to interpret Derrida to mean that language can gain radically new meaning without being affected by its previous uses. The previous contexts in which the word was used and known to the receiver will still always impact the word, even in its new context. By the very fact that it is intelligible, the word's identity must be recognized as something used before. Simultaneously, the word will always carry more richness of meaning than can be exhausted by one particular usage of it. I interpret Derrida's work to highlight the fluidity of meaning and to see meaning as a product of negotiation rather than rigid definition – while not denying that meaning can be stabilized.[28]

Judith Butler takes pains to show that this fluidity of meaning, while inescapable, does not mean it is *easy* to free oneself from the dominant meaning of a word. She gives the example of how using the word 'queer' creates a 'social bond among homophobic communities [...] The interpellation echoes past interpellations, and binds the speakers, as if they spoke in unison across time'.[29] In her words, 'discourse has a history' and each performative has a place in a 'chain of historicity' that constrains past and future use.[30] In this way, Butler points to the force exerted by past uses of discourse and to the limits of individual agency in simply changing the meaning of a word. In her example on the use of the word 'queer' she argues that attempts to renegotiate or reappropriate the word by LGBTI communities will always have to reckon with the force of past meanings. There is no blank slate upon which new meanings can be inscribed; instead

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and on-going as possible. As Pierre Legrand notes, citing Colin Davis, '[h]ermeneutics would like to bring interpretation to a close, at least provisionally, though it knows it may not be able to; deconstruction would like not to stop, though it knows it will have to.' Pierre Legrand, 'Derrida's Gadamer,' in Simone Glanert & Fabien Girard (eds), *Law's Hermeneutics: Other Investigations* (London, Routledge 2017) 160, citing Colin Davis, Critical Excess: Overreading in Derrida, Deleuze, Levinas, Žižek and Cavell (Stanford, CA, Stanford University Press 2010) 55.

[28] In this interpretation of Derrida I follow, among others, Judith Butler, *Bodies that Matter: On the Discursive Limits of 'Sex'* (New York, Routledge 2011 (1993)) 172; Kaiser and Lufkin (n 26) 741; Legrand (n 27) 152; Sokoloff (n 9) 343-344; and Henry Staten, Wittgenstein and Derrida (Oxford, Basil Blackwell 1985) 152.

[29] Butler 2001 (n 28) 172.

[30] Ibid 172, 174.

words have places in chains of historicity that impede attempts to break those chains and insert the word into a new chain. Discourse exerts power by 'echo[ing] prior actions, and *accumulat[ing] the force of authority through the repetition or citation of a prior, authoritative set of practices*'.[31]

Legal decision-making relies heavily upon the aspect of iterability that emphasizes the repeatability of meaning. The force of law depends upon chains of meaning. One only needs to glance at a judicial decision to see these chains appear as the judge refers to past decisions and legislative documents that link together to justify the decision the judge renders. These 'citational chains' are weaved into a legal decision and mean that the judge never speaks alone.[32] It is this reference back to past speakers that creates a 'citational force' that establishes the authority of the judge's speech act.[33] The force of the decision is not a product of the judge's intentionality; her own preferences or values are irrelevant to the formal or persuasive power of the decision. Even if she wished her decision to be purely a function of her intention, so long as she continues to use these citational chains, the terms and concepts she uses will always 'exceed and undo the intentions and aims of any particular speaker in time'.[34] It is these citational chains that produce the legal authority of the decision. It is because the decision is framed in terms of these chains and is bound to past speakers, past judges, 'as if they spoke in unison across time,'[35] that the decision has the force of law.

Such citational chains are, however, not present only in law. And the force these chains exert to (temporarily) fix meaning is not only a force exerted by legal discourses. Other discourses also exert this force. Moreover, no one citational chain exists in isolation; rather they interact to enrich and contaminate each other. This is how the crisis discourse that started in the realm of political discourse was able to be grafted onto and incorporated into legal discourse. While the aspect of repeatability that is present in iterability

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31 Butler 2001 (n 28) 172, emphasis in original.

32 See Butler 2001 (n 28) 214 note 5, '...every 'act' is an echo or citational chain, and it is its citationality that constitutes its performative force.'

33 Ibid.

34 Honig 2009 (n 8) 128.

35 Butler 2001 (n 28) 172.

can thus reinforce meaning over time, this meaning can be complicated by competing citational chains that can become just as strong.

Despite the constraining, disciplining force of discourse, perfect replication remains impossible. Next to the aspect of iterability that emphasizes the repeatability of language, there is the aspect of alterity of meaning. Contemporary thinkers like Judith Butler and Bonnie Honig have developed this aspect of iterability to show that while dominant discourses can produce and regulate meaning and subjectivities, these discourses and the meanings and subjects they create are always 'internally discontinuous'.[36] Even when a word is used to intend its dominant meaning, this dominant meaning is always supplemented by opposing or differing meanings. While these other meanings might temporarily defer to the dominant meaning, they remain present in the margins. It might thus seem as if permanence is possible – the permanence of meaning across texts and time for example – but language in fact makes such permanence impossible.[37]

While this aspect of iterability often receives less attention in judicial decision-making, the inevitable non-identical repetition of citational chains means that law cannot be applied in a machine-like way.[38] Even despite our best attempts to repeat identically, it is impossible for a repetition to ever be an exact copy of the 'original': '[e]ach case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely'.[39] And so, in law, even when a judge attempts to faithfully reconstruct the citational chain that leads back to some original intention or law (if such an original moment exists) she will never be able to do so without in some way *altering* that chain. By applying the law to a

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[36] Judith Butler, 'Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory' (1988) 40 Theatre Journal 519, 520.

[37] Bonnie Honig, *Political Theory and the Displacement of Politics* (Ithaca, Cornell University Press 1993) 123.

[38] Or perhaps more accurately, even a machine's behavior is not fully present to the machine itself as even machines can have parts that bend, break off and be melted (see Ludwig Wittgenstein, Philosophical Investigations, trs. G.E.M. Anscombe (Oxford, Basil Blackwell 1958) nos. 193-94, cited in Honig 2009 (n 8) 55.

[39] Jacques Derrida, 'Force of Law: The 'Mystical Foundation of Authority', in Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (New York, Routledge 1992) 23.

new situation, a new link is added to the citational chain that is discursively posited by the judge. In doing so, the chain itself changes. It is this aspect of discourse that gives one the possibility to repeat differently. In the next part, I use the concept of iterability with its aspect of repetition and alterity to take a second look at the force crisis discourse exerted on the decision-making in *Hamdi v. Rumsfeld* and to examine one particular judge's different repetitions.

2. *Repeating Differently in* Hamdi v. Rumsfeld

Derrida's concept of iterability highlights the failure of discourse to fully bind legal interpretation. In this part, I look at the judicial proceedings at the court of first instance in *Hamdi v. Rumsfeld* through the lens of iterability. I aim to show how, throughout the hearings at this level, the presiding judge was confronted by both aspects of iterability discussed above. I pay particular attention to the ways in which the aspect of alterity gave the presiding judge space to engage in the 'different sort of repeating' that Butler notes iterability makes possible.[40] By looking at *Hamdi* from a perspective that highlights the space available for repeating differently, instead of only attending to the determining effects of the dominant discourse, a different picture emerges of how crisis discourse affected legal discourse. The court of first instance's judgment was overturned on appeal, and thus not relevant for purposes of legal precedent (and therefore often ignored by legal scholarship). Yet, this lower-level decision shows that even in the context of a highly coherent, dominant discourse like the crisis discourse employed in the War on Terror, space for resistance is possible. It also shows, however, the repercussions of engaging in such resistance.

When *Hamdi* came before the District Court for the Eastern District of Virginia, the presiding Judge Doumar initially took a highly critical view of the government's use of crisis discourse to justify its actions. For example, Judge Doumar questioned the executive's claim that the US was under extreme threat and was in a state of war. Judge Doumar challenged this discourse by asking the government's lawyer whether there had been any actual declaration of war. After the lawyer answered that there had not been

[40] Butler 1988 (n 36) 520.

a formal declaration,[41] the judge explicitly voiced his uncertainty about the current state of affairs and his doubt as to whether to go along with the discourse of war: 'There have been a lot of people who say we have a war, but I don't know if this is really a war or what it is'.[42] The judge questioned the government's assertions regarding the exceptionality of the circumstances, probing what the government's position was on any foreseeable end to these circumstances. Judge Doumar asked the government to clarify 'when are these hostilities going to end? Is he [Hamdi] going to be held forever? Can he be held for life?'[43]

Judge Doumar's initial skepticism of the government's use of the crisis discourse was brought to a halt by the government's interlocutory appeal to the Court of Appeals for the Fourth Circuit.[44] In their ruling, the Court of Appeals instructed Judge Doumar to show more deference to the executive in considering the national security aspects of the case. Following this ruling, Judge Doumar began to emphasize the importance of national security, taking care in a subsequent ruling to note for example that 'the judiciary has traditionally shown 'great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs'.[45] Yet, while Judge Doumar complied with the Court of Appeals' instruction to show deference to the executive in matters of national security, Judge Doumar managed to give this concept of national security a somewhat different shape than the Court of Appeals did. He framed his ruling in terms of national security – thus conforming to the terms of crisis discourse – but did so in a way that emphasized a particular side of

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41 United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Transcript of Proceedings before the Honorable R. G. Doumar (29 May 2002) Joint Appendix I, 2004 WL 1120871 (U.S.), 34.

42 United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, (29 May 2002), 34.

43 United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, (29 May 2002), 36.

44 United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld*, Decision on Appeal from the United States District Court for the Eastern District of Virginia (12 July 2002), Joint Appendix II, 2004 WL 1123351 (U.S.), 21-26.

45 United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Order (16 August 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 5, citing the United States Court of Appeals' ruling *Hamdi v. Rumsfeld*, 2000 (sic) WL 1483908.

the national security concept: the national values deemed worthy of protection. By citing a case not cited by the Court of Appeals, and neglecting to cite those the Court of Appeals did cite, Judge Doumar acknowledged the national security interest but interpreted this concept differently than the Court of Appeals had done.[46] Whereas the Court of Appeals linked national security to times of active hostilities and military affairs, Judge Doumar expanded it to include the protection of individual liberty:

> The standard of judicial inquiry must also recognize that the 'concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which sets this Nation apart ... It would indeed by [sic] ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile.' *United States v. Robel*.[47]

Judge Doumar was thus able to follow the instruction of the higher court to rule within a discourse of crisis that highlighted the threats to national security while at the same time detaching 'national security' from the chain of meaning in which the Court of Appeals used it. Judge Doumar grafted this term onto a different chain, thus giving the words a different meaning.[48]

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[46] The United States Court of Appeals used a number of cases to ground its claims on national security (Dames & Moore v. Regan, United States v. The Three Friends, Stewart v. Kahn and The Prize Cases) that the District Court did not refer to. Instead, the District Court based its concept of national security on *United States v. Robel*, a case not mentioned by the Court of Appeals. For the Court of Appeals' references in this regard, see United States Court of Appeals for the Fourth Circuit, *Hamdi v. Rumsfeld*, Decision on Appeal from the United States District Court for the Eastern District of Virginia (12 July 2002), Joint Appendix II, 2004 WL 1123351 (U.S.), 23-34. For the citation used by the District Court, see United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Order (16 August 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 5.

[47] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, (16 August 2002), 6. Additions in brackets are Judge Doumar's.

[48] While there might be slight differences between 'national security' and 'national defense', Judge Doumar uses both terms interchangeably. This seems to reflect the definition given in by the US Department of Defense in both 2000 and 2018, which reads (in part): 'national security -- A collective term encompassing both national

In a similar vein, Judge Doumar included other elements of crisis discourse in his rulings, while at the same time warping their use to mean something different than how they had been used by the government in its legal arguments or in its public pronouncements on terrorism. One typical element of crisis discourse, as used by the government and the higher courts, was the emphasis on the unique nature of international terrorism. In court proceedings, the executive asserted that the 'forces responsible for the September 11 attack pose an '*unusual* and *extraordinary* threat to the national security and foreign policy of the United States'[49] and, according to the government, the wartime nature of the case meant that an entirely different paradigm should be applied to the case.[50] In the rulings from the higher courts, a similar conception of the unique nature of the case was echoed, as was shown above in the citation from the Court of Appeals.[51] Judge Doumar emphasized the novel elements of this case as well. Yet, instead of the singular threat posed by international terrorism, it was the unique nature of the government's action he focused his attention on. The judge asked the government's lawyer whether 'there [is] any case that you know of, any habeas corpus petition that you've ever heard of, prior to this case where counsel could not speak to the person being held?'.[52] The government could not provide the court with such a precedent, upon which the judge noted in his

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defense and foreign relations of the United States...' see Department of Defense Dictionary of Military and Associated Terms 2000, 305 available at http://www.bits.de/NRANEU/others/jp-doctrine/jp1_02(00).pdf and Department of Defense Dictionary of Military and Associated Terms 2018, 162 available at http://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf?ver=2018-08-27-122235-653.

[49] Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus, *Hamdi v. Rumsfeld*, 1120871 (U.S.) 56, citing congressional language from the Authorization for the Use of Military Force, among others, emphasis added.

[50] Brief for Respondents-Appellants (Secretary of Defense) on Appeal to the United States Court of Appeals, Fourth Circuit, *Hamdi v. Rumsfeld*, (4 October 2002), 12. The respondents speak here of 'The entirely different paradigm in which this case arises – wartime detention of combatants, rather than criminal punishment.'

[51] At supra footnote 19.

[52] United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld*, Transcript of Proceedings before the Honorable R. G. Doumar (13 August 2002) Joint Appendix I, 2004 WL 1120871 (U.S.), 85.

decision: 'this case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer'.[53]

By pointing out the unique nature of this case, Judge Doumar adopted the terms of crisis discourse but decoupled crisis discourse's emphasis on uniqueness from the threat posed by international terrorism. The government had emphasized the existential threat of terrorism[54] and the risk that judicial involvement in this case would diminish 'the prestige of our commanders; divert[...] their attention from the war effort and possibly require [...] them to return from abroad to be called to account in our courts; and risk [...] a conflict of military and judicial opinion'.[55] Judge Doumar, however, spoke of an existential threat to the identity of the United States, the values of the Constitution and the risk of chaos that comes with undermining that identity and those values. Judge Doumar detailed this risk elaborately:

> We must protect the freedoms of even those who hate us, and that we may find objectionable. If we fail in this task, we become victims of the precedents we create. We have prided ourselves on being a nation of laws applying equally to all and not a nation of men who have few or no standards. The warlords of Afghanistan may have been in the business of pillage and plunder. We cannot descend to their standards without debasing ourselves. We must preserve the rights afforded to us by our Constitution and laws for without it we return of the chaos of a rule of men and not of laws.[56]

Unlike in the dominant use of crisis discourse by the government, Judge Doumar did not interpret the novelty and severity of the threat to mean that completely new procedures were necessary. To the contrary, Judge Doumar seemed to be pointing out the uniqueness of the detention of Mr. Hamdi and

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53 United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld* (16 August 2002), 2.

54 Henderson 2014 (n 12) 6.

55 Brief for Respondents-Appellants at the United States Court of Appeals, Fourth Circuit, *Hamdi v. Rumsfeld* (June 19, 2002) 2002 WL 32728567 (C.A.4), 6.

56 United States District Court for the Eastern District of Virginia, *Hamdi v. Rumsfeld* (16 August 2002), 9.

the threat this posed to constitutional values in order to reject the government's crisis discourse.

By using the elements of crisis discourse in his ruling, but decoupling them from previous chains of meaning, Judge Doumar was able to repeat the dominant discourse while simultaneously shifting its meaning. As Judge Doumar's approach to this case shows, the shift toward precaution in post-9/11 counter-terrorism cases was a shift that was not dictated by the existence of the dominant crisis discourse alone, nor one that went uncontested. Whether intentionally or not, Judge Doumar used the space available to repeat differently and employed the terms of crisis discourse in a way that challenged and undermined that same discourse. But this resistance to the dominant crisis discourse was not successful in this instance. After Judge Doumar ruled that Mr. Hamdi should be allowed access to a lawyer, the government refused to comply with his order. This placed the court of first instance in a difficult and unusual position. The court's authority depends on its rulings being respected by the other branches of government, even when these other branches disagree. The only tool the court has in cases when a branch of government threatens non-compliance is to hold the representative in contempt of court, upon which the court can decide to detain the representative in jail. The government's refusal to comply threatened a clash between the judiciary and the executive, a clash Judge Doumar was wary to engage in, as shown by his explicit remark that he was 'not interested in throwing the Secretary of Defense in jail' for contempt of court.[57] Not complying with the terms of crisis discourse was thus met with a point-blank challenge to the authority of the judge, a challenge the executive won.

In the end, the Court of Appeals for the Fourth Circuit overruled the District Court's rulings on the case, holding that Mr. Hamdi had no right to a lawyer or to contest the facts presented by the government as to his enemy combatant status. According to the Court of Appeals, this was the appropriate attitude a court must show toward the executive in a time of war. After the decision of the Court of Appeals, the case was heard by the Supreme

[57] United States District Court for the Eastern District of Virginia, Hamdi v. Rumsfeld, Transcript of Telephonic Conference before the Honorable Robert G. Doumar (20 August 2002) Joint Appendix II, 2004 WL 1123351 (U.S.), 13-17.

Court. The Supreme Court affirmed many of the District Court's orders, but did so far more clearly within the precautionary framework of preventive, administrative law than the District Court did. The Supreme Court accepted the argument that the standard of review for Mr. Hamdi's detention should be lower than the standard of review for the detention of someone charged with a crime, because of the criminal law standards' 'uncommon potential to burden the executive at a time of on-going military conflict'.[58]

III. The Decision and Responsibility

The first section of this article discussed how iterability can be seen as present in judicial judgments: judgments are rendered in terms of citational chains that restrain and limit possible meanings of the law, while at the same time the judgment cannot help but have an aspect of alterity. I showed how Judge Doumar's use of this space for changing meanings made certain terms of the crisis discourse mean something different. In the present section, I consider how a judge should use this space for repeating differently. Should the judge maintain the fiction of the law as decidable and unified or rather intentionally engage with and take account of its undecidable aspects? This is a normative question and answering this question requires a shift in approach. Whereas section II of this article focused on describing crisis discourse and the possibility for repeating this discourse differently, the question addressed in section III requires a turn toward more fundamental matters of legal philosophy. This section proceeds as follows. To begin the enquiry into how judges should decide between the different possible meanings, I turn to Ronald Dworkin's views on how judges interpret the law. Dworkin was a legal scholar who, like Derrida, was strongly influenced by questions of meaning-making and helped to develop a hermeneutic theory of law. Dworkin acknowledges that law is not unified but argues that the judge, in her construction of the law *as if it were,* can come to an answer that she is convinced is the one right answer. I proceed to critique Dworkin's view of adjudication based on a reading of Derrida that highlights the role of power relations in attempting to unify law. At the end, I return to Derrida's

[58] Supreme Court of the United States, Hamdi v. Rumsfeld, 27.

understanding of undecidability in law to present the judge with a possible way forward.

1. Dworkin's Undecidable Chain of Meaning

Ronald Dworkin sets out a theory of legal meaning that sees law as an argumentative practice.[59] Instead of relying on the original intent of the author of the law, Dworkin proposes that the meaning of law is *constructed*; meaning is made – not found. This interpretive process is one that combines a responsibility to remain faithful to legal tradition with the recognition that, in order to do so, the judge must engage in some type of creative activity.[60] Approaching the issue from the perspective of the judge presented with a question of interpretation, Dworkin uses the metaphor of a 'chain novel' to show how this interpretive activity takes place. Dworkin explains:

> Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history in to the future through what he does on that day. He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.[61]

The first task of the judge is thus to construct a view of the law as if it were a 'coherent whole' and decide the case at hand in a way that best fits within this coherence.[62] As Dworkin explains it, still in terms of his chain novel metaphor, it is the judge's job to as much as possible write 'a single, unified novel rather than, for example, a series of independent short stories with characters bearing the same names'.[63] In Dworkin's comparison between interpretation of art and of law, he explains that in his view interpretation must attempt to show the text 'as the best work of art *it* can be', insisting that

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[59] Ronald Dworkin, 'Law and Interpretation' (1982) 9 Critical Inquiry 179.

[60] At least in the case of interpreting principles, see John McGarry, *Intention, Supremacy and the Theories of Judicial Review* (London, Routledge 2017), 21-22.

[61] Dworkin 1985 (n 7) 159, emphasis in original.

[62] McGarry (n 60) 19.

[63] Dworkin 1985 (n 7) 159.

the 'it' of the text must be respected, instead of 'changing it into a different one'.[64] The judge must decide which reading of the chain is the best one and continue that reading.[65]

Next to this faithfulness to the enterprise and the avoidance of taking 'some new direction of his own', Dworkin acknowledges the judge does more than simply *receive* the meaning of the law. Creativity is necessary to advance legal history into the future, to interpret what that history means for us today.[66] Crucially, Dworkin does not deny that in this process of construction, the judge will be affected by politics. Indeed, he remarks that 'interpretation in law is essentially political',[67] that law is 'deeply and thoroughly political'[68] and that legal interpretation will be linked to the interpreter's views on political morality, to 'beliefs other judges need not share'.[69] But, according to Dworkin, one can only speak of a judge making *new* law in a 'trivial sense'.[70] Instead of setting out to depart from the law as it stands, it is the judge's duty to – with the aid of political morality – construct a theory of law that best fits the legal practice as it currently is and that provides the best normative justification of this practice.[71] In effect, the judge is to endeavor to unify the diffuse nature of law, to '*construct* a unity from the disparate elements'[72] of legal history and practice and to 'impos[e] purpose' on the law to 'make of it the best possible example of the form or genre to which it is taken to belong'.[73] While Dworkin acknowledges that in fact 'the law may not be a seamless web', he entreats the judge to 'treat it as if it were'.[74] This shall subsequently provide the judge with the soundest theory of law, based on which she can interpret the law. The judge's soundest theory of law constrains

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64 Dworkin 1982 (n 59) 183.

65 Ibid 194.

66 Anne Barron, 'Ronald Dworkin and the Challenge of Postmodernism' in Alan Hunt (ed), *Reading Dworkin Critically* (Oxford, Berg Publishers 1992) 148.

67 Dworkin 1985 (n 7) 162.

68 Dworkin 1982 (n 59) 179.

69 Dworkin 1985 (n 7) 162.

70 Ronald Dworkin, *Law's Empire* (Oxford, Hart Publishing 1998) 6.

71 Dworkin 1985 (n 7) 160.

72 Barron (n 66) 149.

73 Dworkin 1998 (n 70) 52.

74 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass., Harvard University Press 1977) 116.

her in her interpretation of the particular law at hand: the answer she must give is that which best fits within the web of meaning she has constructed. The creativity necessary in legal interpretation is, for Dworkin, not the creativity of a judge faced with a blank slate upon which any interpretation can be projected.[75] The limit to this creativity is found in the judge's duty to remain faithful to advancing the enterprise at hand,[76] an enterprise characterized by the 'integrity and coherence of law as an institution'.[77] In every judge's political morality, there must be some sense of this integrity of law that subsequently acts as an 'overriding constraint' on the judge's decision.[78]

In many ways, Dworkin's 'chain novel' approach to law echoes Derrida's iterability. Dworkin's indebtedness to the larger hermeneutic tradition is an indebtedness Derrida shares.[79] This connection to hermeneutics allows both authors to see the dual nature of the determinedness *and* ambiguity of meaning in language and law. Yet, while Dworkin's hermeneutics remains focused on striving for unity, Derrida's 'radical hermeneutics' emphasizes the discord ever-present in this constructed fiction of unity.[80] As Derrida stresses, 'conventions, institutions and consensus are stabilizations (sometimes stabilizations of great duration, sometimes micro-stabilizations)' and 'this means that they are stabilizations of something *essentially* unstable and chaotic'.[81] The stabilization – the construction of the purpose and integrity of law – is necessary because of the very fact that 'stability is not natural'.[82]

How does one get from chaos to a non-natural stability? The construction of a unified version of law from an inherently non-unified field of meaning

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[75] Dworkin 1985 (n 7) 164.

[76] Barron (n 66) 149.

[77] Dworkin 1985 (n 7) 161.

[78] Dworkin 1982 (n 59) 195.

[79] Both particularly indebted to Gadamer's work on hermeneutics. Derrida, however, often fails to acknowledge this indebtedness, see footnote 111 in Forester (n 27) 66.

[80] John Caputo, *Radical Hermeneutics: Repetition, Deconstruction and the Hermeneutic Project* (Bloomington, Indiana University Press 1987).

[81] Jacques Derrida, 'Remarks on Deconstruction and Pragmatism' in Chantal Mouffe (ed), *Deconstruction and Pragmatism* (London, Routledge 1996) 83.

[82] Ibid.

requires an exercise of power, an imposition of will, that suppresses certain alternatives while favoring others. Derrida's work on deconstruction highlights the power play present in this striving for unity. Derrida acknowledges the possibility of constraint that discourse brings, but highlights that the stability and unity that interpreters might perceive are not neutral constructions. Instead, they are the result of contingent processes characterized by power relations. Even after an exertion of power has constructed one fiction of unity over another, the alternatives do not disappear. The simulated stability remains contaminated by the non-unity from which it is constructed.[83] As a number of contemporary scholars have emphasized, relying on Derrida, these possible alternatives remain present and continually challenge the boundary as drawn.[84] These 'remainders', while relegated to the margins in the attempt to construct a unified interpretation of law, cannot be expunged.[85] They continue to exist, continue to threaten the destabilization of the constructed unity in favor of other possible unities.

Dworkin does not deny that something external to law is necessary to make the step from the non-unified field of meaning to the coherent construction of law. He assumes the judge's access to a political morality will provide the steady ground necessary to bridge this gap. Dworkin, however, filters out all the conflictual, contradictory and power-related aspects of both (legal) interpretation and the political morality the judge needs for this interpretation. He fails to realize that this political morality is itself 'the contingent outcome of a perpetual and radically undecidable conflict of interpretations'.[86] Thus while the political morality that a judge uses might

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[83] Staten (n 28) 152.

[84] Aletta J. Norval, 'Hegemony after Deconstruction: The Consequences of Undecidability' (2004) 9 Journal of Political Ideologies 139, 142; E.E. Berns, 'Decision, Hegemony and Law: Derrida and Laclau' (1996) 22 Philosophy & Social Criticism 71, 74. Both Norval and Berns attribute this insight to Ernesto Laclau in, among others, Ernesto Laclau, 'The Impossibility of Society' (1983) 7 Canadian Journal of Political and Social Theory 21.

[85] Honig 1993 (n 37) 143-146.

[86] Barron (n 66) 150. Dworkin certainly mentions the role of politics in interpretation but the politics that is implicated in his process of constructing this soundest theory of the law is a form of politics purified of power relations. All actual conflictual aspects of politics seem to be given no meaningful role to play in Dworkin's theory of law. See Alan Hunt, 'Law's Empire or Legal Imperialism?' in Alan Hunt (ed),

constrain her interpretation, and in this sense provide some ground, it is itself a contingent, human-made product of power relations. The ground political morality provides, therefore, cannot be stable or final. To put this in other words, Dworkin seems to assume that the judge's political morality is the starting point in the interpretive process, instead of the *object* of political struggle. Instead of political morality providing the solid ground that Dworkin seeks in order to avoid arbitrariness, political morality is itself the product of contingent struggles over meaning that are never finally settled and are constantly characterized by relations of power. The political morality that the judge must use to solve the interpretive conflict entails choosing sides in the political conflict[87] and is itself not grounded on anything outside of the struggle the judge chooses sides in. If political morality is itself a contingent outcome, the judge's interpretation is not the end of an interpretive conflict but rather a step in the chain of political conflict that, while creating the fiction of unity, 'does not transcend the political fray' but is in fact at its center.[88]

We are left with the image of law as a partially structured, partially unstructured field; a field of 'structured undecidability'.[89] Interpretation of this field is indeed constrained by chains of meaning and discourses of political morality, but these constraints fail to ever fully eliminate the remainders that will continue to challenge the fictional unity. The construction of (legal) meaning is characterized by contestation and struggle over the type of fictional unity that is constructed, and the political morality that provides so much guidance to Dworkin's judge is itself nothing more than the product of such conflicts over meaning. We thus lose any ultimate ground with which to justify (legal) interpretation. This is not to say that

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Reading Dworkin Critically (Oxford, Berg Publishers 1992) 41; Andrew Altman, 'Legal Realism, Critical Legal Studies and Dworkin' (1986) 15 Philosophy & Public Affairs 205, 216; Barron (n 66) 150 and David Couzens Hoy, 'Interpreting the Law: Hermeneutical and Poststructuralist Perspectives' (1985) 58 Southern California Law Review 135, 174.

87 See for example Hoy's interpretation of Roberto Unger's critique of Dworkin in Hoy (n 86) 175.

88 Bonnie Honig, 'Between Decision and Deliberation: Political Paradox in Democratic Theory' (2007) 101 American Political Science Review 1, 6.

89 Laclau (n 4) 57.

there are no discourses that exert power to constrict possible meanings and enable others, but rather that the ground these discourses provide is in the end contingent and does no rest on any ultimate justification.[90]

2. Lucidly Plunging into the Night of Undecidability[91]

In the midst of this lack of final justification, the instant of decision is 'madness'.[92] The decision acts 'in the night of nonknowledge and nonrule'[93] – not because the judge has not prepared herself with 'knowledge, by information, by infinite analysis'[94] but because undecidability means that any interpretation is an imposition that cannot be grounded in final, ultimate knowledge or guarantees.[95] At the same time, the structured nature of this undecidability means that the decision is not an *absolute* beginning.[96] Instead, this decision is a *derivative* beginning and is influenced, shaped and determined to a large extent by the citational chains of dominant discourses. Discourse and the power it exerts on social meaning remains significant and inescapable. What Derrida's perspective highlights is that, despite the strength of these discourses, they ultimately remain *ungrounded.* These discourses retain a measure of disorder that can never be erased from the incomplete and unstable (dis)unity of meaning.

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[90] Judith Butler, 'Contingent Foundations: Feminism and the Question of "Postmodernism"' in Judith Butler and J.W. Scott (eds), *Feminists Theorize the Political* (New York, Routledge 1992) 3-21. See further Oliver Marchart, Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau (Edinburgh, Edinburgh University Press 2007) 14.

[91] Derrida speaks of the aporia of forgiveness and claims '[f]orgiveness is thus mad. It must plunge lucidly into the night of the unintelligible,' see Jacques Derrida, *On Cosmopolitanism and Forgiveness* (London, Routledge 2001) 49. I take his plea to combine the plunge necessary to act in conditions of madness with a lucid and well-prepared mind and apply it here to undecidability.

[92] Derrida 1992 (n 39) 26 (with reference to Kierkegaard).

[93] Ibid.

[94] Jacques Derrida, 'Hospitality, Justice and Responsibility: A Dialogue with Jacques Derrida' in R. Kearney and M. Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (London, Routledge 1999) 66.

[95] Derrida 1992 (n 39) 26-27.

[96] Butler 2001 (n 28) xxi.

Importantly, stabilizing meaning into a fictional unity is the result of power exercised in relations between those struggling over multiple different possible constructions of unity. This realization calls on those involved in decision-making to recognize two things at the same time, namely that their 'most basic commitments regarding self, other, and the beyond human are [...] both *fundamental* and *contestable*'.[97] Decision-makers have to recognize that despite their conviction in the rightness of their answer, their answer is in fact but one of many possibilities. In the end, 'I can never be completely satisfied that I have made a good choice since a decision in favour of one alternative is always to the detriment of another one'.[98]

Let me reassure the reader: recognizing the lack of ultimate ground for (legal) interpretation does not mean law should be abandoned nor that construction of unity should be avoided.[99] It does mean, however, that we are placed before the question how we are to act, given this lack of ultimate ground. More concretely, how is the judge to decide if she cannot ground her decision on the ultimate conviction that her answer is right? Derrida argues that to experience and acknowledge this impasse – this need to decide while not having final ground on which to ground the decision – is in fact to experience responsibility. In order to find one's way through this impasse, one must experience it not as a 'paralyzing structure, something that simply blocks the way', but instead we must acknowledge that 'we have to go through pain and [...] a situation in which I do not know what to do'. This 'aporia is what we have to go through in order to take responsibility and to act or decide'.[100]

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[97] Stephen K. White, *The Ethos of a Late-Modern Citizen* (Cambridge, Cambridge University Press 2009) 815, emphasis added.

[98] Chantal Mouffe, 'Deconstruction, Pragmatism and the Politics of Democracy' in Chantal Mouffe (ed), *Deconstruction and Pragmatism* (London, Routledge 1996) 9.

[99] According to Henry Staten, Derrida's work calls on us to deconstruct the unity of law, 'not in disrespect for truth and disobedience to the law, and certainly not in flight from the demands of a reality which is too stern and fatherly to be faced, but because it is the fantasized fulfillment of an infantile wish.' He admits that there is no 'purifying ourselves of this wish, but we can see it in its primitive intensity,' see Staten (n 28) 154.

[100] Richard Kearney, 'On Forgiveness: A Roundtable Discussion with Jacques Derrida' in John D. Caputo, Mark Dooley & Machael J. Scanlon (eds), *Questioning God* (Bloomington, Indiana University Press 2001) 62.

If the decision-maker acknowledges that 'I have not done enough',[101] that she can never do enough to find a final ground for her decision in a field of structured undecidability, she has to face the question of how she can take responsibility for the alternative answers she has excluded with her decision. For Derrida, the moment a decision-maker is confronted with undecidability is where responsibility comes in. Responsibility starts, Derrida says, 'when I *don't* know what to do'.[102] Now, it is likely true that the judge will feel the conviction Dworkin speaks of, that she has found the one right answer. But if she simultaneously recognizes that this conviction, while fundamental, is also contestable, the way to move forward with the decision is by showing responsibility for the other possibilities her decision has foreclosed.

Derrida tells us that the decision must ensure that 'the memory of the undecidability [...] keep[s] a living trace that forever marks a decision as such [...] the undecidable remains caught, lodged, as a ghost at least, but an essential ghost, in every decision, in every event of decision'.[103] While each judgment remains lacking an ultimate, non-contingent ground, this need not be a call to refrain from judgment. Instead, it is an appeal to the judge to ensure she acknowledges her judgment's groundlessness by keeping open the possibility that that which was excluded from the judge's interpretation of the law, can work to reverse its exclusion by continuing to participate in the struggle over meaning. If the judge takes account of the fact that she can never be sure her decision is the one right one, despite her deep conviction that it is, she is faced with a responsibility. This is the responsibility to form her decision in such a way that maintains the reversibility of the exclusion the decision effects.

Let me specify what or who I entreat the judge not to permanently exclude. My concern here is not for the particular chain of meaning of discourse. Structured undecidability means that it is impossible to ever completely, irreversibly exclude a particular alternative meaning from the discursive order. There will always be some space - however small - for that meaning to

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[101] Derrida 1996 (n 81) 87.

[102] Jacques Derrida, 'Following Theory: Interview with Nicholas Royle, Christopher Norris and Sarah Wood' in Michael Payne and John Shad (eds), *Life.after.Theory* (London, Continuum 2003) 31-32.

[103] Derrida 1992 (n 39) 253.

reappear to challenge the hegemonic discourse. My concern is for the carrier of that alternative meaning. While it is true that in a structural sense no alternative meaning can be permanently removed from the realm of possible future meanings, this is of course not the case for the agent needed to engage in the discursive struggle over meaning that is necessary to allow a non-dominant meaning to gain prominence. Alternative interpretations cannot fight for themselves, they cannot give voice to themselves. They need a human to convey them.[104] The problem is thus not that potential alternative meanings will be excluded permanently but that the human who conveys them will be. While the judge cannot help but take sides in the struggle over meaning, when she decides to construct one coherent meaning of the law over possible others, she can ensure that her intervention remains contestable by those individuals on the losing end of this struggle.

How must the judge ensure her decision does not permanently exclude the other? At a fundamental level, avoiding permanent exclusion means ensuring the judge's decision does not result in what has been termed 'legal invisibility', the situation in which the other is put in a position where he lacks the right to be recognized under the law.[105] Legal invisibility, as a type of civil death, excludes the other so fully that he loses his right of independent action and is treated as a passive object to be possessed or ruled over instead of a legal subject. He is, in fact, subjected to law without the corresponding rights of a legal subject.[106] In such instances, the other is left with no (legal) means to challenge the decision which excluded him and the discourse that supports that decision.

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[104] At least according to currently accepted insights. It remains possible that at some point non-human animals or robots might become similarly capable of such struggle over meaning.

[105] I borrow this term 'legal invisibility' from Bernadette Atuahene, 'From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility' (2007) 60 Southern Methodist University Law Review 1425 and Wouter Veraart's (Dutch) discussion of 'juridische onzichtbaarheid', see 'Het slavernijverleden van John Locke. Naar een minder wit curriculum?' in Britta van Beers and Iris van Domselaar (eds), *Homo Duplex: De dualiteit van de mens in recht, filosofie en sociologie* (The Hague, Boom juridisch 2017) 218.

[106] Marc de Wilde, 'Safeguarding the Constitution with and against Carl Schmitt' (2006) 34 Political Theory 510, 514.

Importantly, responsibility for the other does not need to imply that the judge in *Hamdi v. Rumsfeld* should have *necessarily* resisted the rupture in legal meaning crisis discourse precipitated, nor, conversely, that the judge should have *necessarily* comported herself with this newly dominant discourse. Taking responsibility in the face of structured undecidability is an activity that rises above arguments about the merits of the various legal or political arguments put forth within the struggle over meaning. Instead, I argue that in *Hamdi* this responsibility calls on the judge to take into account the possibility that the dominant discourse of crisis *might be wrong*. Concretely this means accepting that the threat presumed to justify the indefinite detention may not actually be present. Or, it might be the case that preventive detention might not adequately address the threat, even if one is in fact posed. It could be that the employed political morality is actually immoral. The judge cannot be sure. She should reckon with these possibilities by ensuring her decision does not permanently prevent future decisions from correcting such possible mistakes. Thus, while it may be impossible for the judge's interpretation to avoid being influenced by both legal and political discourses, and while it may be impossible for the judge's interpretation to avoid taking sides in the conflict over meaning, the task of the judge must be to decide in a way that does not shut down this conflict permanently.

To become even more concrete on the question of how the judge should ensure her decision does not exclude the other permanently, let me say something about the application of this idea to *Hamdi v. Rumsfeld*. In this particular case, I would call upon the judge to take account of the effects of her decision on Mr. Hamdi's ability to participate in the discursive struggle over his construction as another who is to be excluded. Such taking account could include asking whether the preventive detention of Mr. Hamdi called for by the government and discursively justified by the crisis discourse restricted his ability to participate in public and legal debate, denied him recognition under the law as a legal subject and whether his detention would in fact be indefinite, without a clear way to know when it must end. Such effects would shut down Mr. Hamdi's ability to challenge his exclusion and thus would deny the possibility that his exclusion might be mistaken. If the answer to these questions is affirmative, it is the judge's responsibility to engage in a 'subversive repetition' of the law to result in a decision with less

exclusionary effects.[107] In this way, the judge can take responsibility for the inevitably exclusionary nature of her decision, by ensuring that this exclusion is not permanently entrenched but instead remains contestable by those who are excluded. By doing so, the dilemma posed by the need for the judge's decision and the impossibility of grounding this decision can be temporarily mediated to such an extent that the groundless decision can be taken responsibly.

Judges will undoubtedly differ over how such 'taking account' will look in practice and will disagree on the interpretation of the exclusionary effects of their decisions. It is not my aim to provide a one-size-fits-all instruction that eliminates this disagreement. Indeed, it is this very possibility of disagreement that highlights the need for each judge to decide each individual case while acknowledging the ever-present possibility that she might be wrong. Yet, if the judge acknowledges undecidability, the judge can bring Dworkin's theory of interpretation to its logical conclusion: if political morality is necessary to interpret law, and if political morality is undecidable, then so are decisions based on that political morality. While, as Dworkin proposes, a decision that *constructs* the law is a necessary response to such undecidability in law, the decision must acknowledge the contingency of this construction by deciding in a way that shows responsibility toward the excluded other. In this way, recognizing the fundamental instability of meaning presents us with a chance[108] to put 'pressure on {law} to be something more than maintenance of the dominant power relations of the community'.[109]

IV. Conclusion

This article shows how attention to iterability reveals the unstable and internally discontinuous nature of dominant discourses, such as the crisis discourse that took hold after 9/11. The *Hamdi* case addressed above shows how judges can take different orientations in a case involving a strong dominant discourse and thus how even in such cases space remains for alterity. The ruling of Judge Doumar in *Hamdi v. Rumsfeld* shows how

[107] Honig 1993 (n 37) 124.

[108] As Derrida says, 'Chaos is at once a risk and a chance,' see Derrida 1996 (n 81) 83.

[109] Sokoloff (n 9) 347.

citational chains can be opened up and reconstructed, leading to new meanings and 'subversive repetitions'.[110] Yet, the intention of Judge Doumar, present to some extent in the instant of decision, is not fully determinate. He is bound by the language game of the law and, in order for his rulings to be intelligible as law, he must remain within this language game. What this case also shows is the institutional backlash that is often the consequence of failing to rule within the dominant discourse.

The conclusion is that law – like language – is characterized by structured undecidability. There is always an element of alterity in every repetition, which means that the law cannot simply be applied without changing the meaning of the law itself. Every decision rendered by a judge implies some sort of change. And, at the same time, the structure of intelligible language requires speakers to remain within the particular language game they are playing. Citational chains lend language its seemingly determinate quality. Within this undecidability between alterity and repetition, Dworkin and Derrida would agree, meaning must be constructed. But, importantly, my reading of Derrida shows that the construction of unity of meaning out of dissensus requires the exertion of power. The argument here thus goes beyond Dworkin's recognition of the role political morality plays in legal interpretation to show that the judge cannot engage in such a construction of unity without becoming a participant in the struggle over meaning. The last part of this article asked how the judge should respond to her inevitable implication in this struggle. I identified the main quality of a proper judicial decision in conditions of undecidability: whether the judge recognizes the contingency of her own decision. This recognition should lead to a decision that avoids the permanent exclusion of the other.

[110] Honig 1993 (n 37) 124.