

# Part 8: Structural Objectivity



# § 15 Metaphors Lawyers Live by: Cognitive Linguistics and the Challenge for Pursuing Objectivity in Legal Reasoning

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## *I. Introduction*

Six years ago, Fabian Richter Reuschle was just another civil judge at the District Court of Stuttgart, Germany. Like most of his colleagues, he routinely dissolved disputes between neighbours and businesses. Only occasionally he acted outside his chambers to speak at conferences or to publish in law journals. Reuschle was what most people would consider a good judge – impartial, fair, and out of the limelight.

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\* This text would not have been possible without the immense help of Anne Schäfer. Danke. All remaining errors are my own, of course.

Today, many argue that Reuschle is not a good judge. He plays a rather prominent role in the legal aftermath of Dieselgate, the emissions scandal involving Volkswagen and other German car manufacturers. Attorneys describe him as ‘ruthless’ and ‘obsessed’, newspapers report about his ‘war’ against the car industry.<sup>1</sup> Even some of his colleagues think that Reuschle went too far. Two years ago, in the arguably biggest case of his professional career, a class action against VW brought by its shareholders, he was barred from the bench. The superordinate judges of the Higher District Court worried that Reuschle was prejudiced because things with Volkswagen got personal: like many other German customers, Reuschle’s wife sued VW, claiming compensation for the family car, a ‘clean diesel’ that turned out to be everything but clean.<sup>2</sup>

Although Reuschle’s story is an extreme example, there are most likely some more. To date, more than 10 million Volkswagen cars are registered in Germany, which adds up to roughly 1/8 of the country’s population.<sup>3</sup> Since nothing suggests that car preferences of German judges differ substantially from those of the general population, it is highly plausible that ‘Reuschle-like scenarios’ – that is, a judge or a judge’s family member owning a ‘not-so-clean’ diesel and maybe even suing the car manufacturer – are a quite common phenomenon. When asked off the record, attorneys representing Volkswagen claim that a case is as good as lost if the judge owns a VW, let alone a diesel. Although this is (at best) anecdotal evidence and robust empirical studies are yet to be carried out, the mere probable existence of more ‘Reuschle-like scenarios’ points to one of the most fundamental problems in legal theory: can legal reasoning be objective? Or is objectivity a myth because legal reasoning is carried out by humans with individual backgrounds and values – and different cars in their driveway?

Of course, this question has been addressed many times. It could be argued that instead of readdressing it we should just pick a side.<sup>4</sup> Following

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1 Klaus Köster, ‘Schwerer Rüffel für den Stuttgarter Dieselrichter’ *Stuttgarter Nachrichten* (Stuttgart, 2 July 2020) <<https://www.stuttgarter-nachrichten.de/inhalt.dieselskandal-schwerer-rueffel-fuer-den-stuttgarter-dieselrichter.8ecd577a-92a7-4483-ac53-aad94bfd5e87.html>> accessed 26 October 2020.

2 See archyde, ‘Judge against judge – the diesel dispute in Stuttgart escalates’ (*Düsseldorf*, 9 January 2020) <<https://www.archyde.com/judge-against-judge-the-diesel-dispute-in-stuttgart-escalates/>> accessed 26 October 2020.

3 See Krafftahrtbundesamt, ‘Anzahl der in Deutschland zugelassenen Pkw der Marke Volkswagen von 2006 bis 2020’ <<https://de.statista.com/statistik/daten/studie/456681/umfrage/vw-pkw-bestand-in-deutschland/>> accessed 26 October 2020.

4 For an overview, see Philip M Bender, ‘Ways of Thinking about Objectivity’ (§ 1), especially under II.

Ronald Dworkin and his defence of applicational objectivity, one could emphasize legal principles and the Herculean judge who will find the one right answer eventually.<sup>5</sup> Correspondingly, one could go with the Habermasian approach or any other similar discourse theory, claiming that legal procedure, the very structure of the discourse in a courtroom, guarantees the most objective outcome possible.<sup>6</sup> Viewed from a sociological perspective, one could call upon Talcott Parsons and Niklas Luhmann to argue that objectivity is a highly idealistic, yet necessary concept to stabilize normative expectations.<sup>7</sup> And if one is more sceptic, the path of psychology or behavioural economics sounds promising, as it contends that any judgment is far from objective and at best a result of peer group pressure or a relaxing lunch break.<sup>8</sup>

In this paper, I will approach the concept of objectivity from an overlapping, yet fresh perspective: cognitive linguistics.<sup>9</sup> More precisely, I will focus on the role of metaphors in legal reasoning.<sup>10</sup> As I shall explain in

5 Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977).

6 Jürgen Habermas, *Faktizität und Geltung* (7th edn, Suhrkamp 2019), for an English summary see Jürgen Habermas, 'Paradigms of Law' (1995) 17 *Cardozo L Rev* 771; combining principle-theory and discourse-theory Robert Alexy, *Theorie der Grundrechte* (Nomos 1985), for an English summary see Robert Alexy, 'On the Structure of Legal Principles' (2000) 13 *Ratio Juris* 294.

7 Talcott Parsons, 'Law as an Intellectual Stepchild' (1977) 47 *Sociological Inquiry* 11; Niklas Luhmann, *Law as a Social System* (Oxford University Press 2004); a related approach is the expressive theory, see Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 *U Pa L Rev* 2021.

8 Chris Guthrie, Jeffrey J Rachlinski, and Andrew J Wistrich, 'Inside the Judicial Mind' (2001) 86 *Cornell L Rev* 777; Chris Guthrie, Jeffrey J Rachlinski, and Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93 *Cornell L Rev* 1; Richard A Posner, *How Judges Think* (Harvard University Press 2010); Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous factors in judicial decisions' (2011) 108 *Proceedings of the National Academy of Sciences* 6889.

9 Following the taxonomy presented in the introductory chapter of this book, one could speak of an example of structural objectivity, see Bender, 'Ways of Thinking about Objectivity' (n 4), under IV, especially text to n 310–312 ('thought-structures').

10 So far legal research has paid little attention to the role of metaphors in law. But see the important contributions by Haig A Bosmajian, *Metaphor and Reason in Judicial Opinions* (SIU Press 1992); Thomas W Joo, 'Contract, Property, and the Role of Metaphor in Corporations Law' (2001) 35 *UC Davis L Rev* 779; Linda L Berger, 'What Is the Sound of a Corporation Speaking – How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law' (2004) 2 *J Ass'n Legal Writing Directors* 169; Daniel Damler, *Konzern und Moderne* (Vittorio Klostermann 2016); Jörg Michael Schindler, *Rechtsmetaphorologie – Ausblick auf*

detail, cognitive linguistics claims that metaphors are pervasive in our daily thoughts and actions. Metaphors such as ‘time is money’ help us to understand an abstract concept (‘time’) in terms of another, more familiar concept (‘money’). But there is a catch, the feedback-effect. By perceiving time as if it was a scarce resource that can be ‘invested’ or ‘saved’, this metaphor systematically hides that time can be conceptualized differently. In this sense, metaphors can be self-fulfilling prophecies. A metaphor forces us to focus only on the aspects it highlights and leads us to regard its derivations as being true.<sup>11</sup> This has potentially wide-ranging consequences for the idea of objectivity. Although professional communication is mostly regarded as a pure technical enterprise, metaphors are also present in legal theory and doctrine. And with that comes the feedback-effect: while metaphors certainly help to understand abstract legal concepts, they highlight certain legal arguments and simultaneously hide others. What follows from this feedback structure appears intuitively convincing, almost natural, and provokes significantly less pressure for any justification. Consequently, what falls outside of the feedback structure causes irritation and demands an explanation.

To develop my argument, I will use German court decisions on Dieselgate as examples, namely tort claims of car purchasers seeking compensation from Volkswagen.<sup>12</sup> Relying mostly on media reports, the plaintiffs argue that VW engineers, with management’s backing, developed so-called defeat devices to disguise the emission levels under normal driving conditions and, therefore, the Volkswagen corporation inflicted an ‘intentional damage contrary to public policy’ (section 826 German Civil Code). In the beginning, these claims were generally rejected because the plaintiffs were unable to prove their case – according to the courts they failed to deliver enough facts to show that the management actually knew of the defeat devices. Today, however, almost all plaintiffs are granted compensation.<sup>13</sup> This is not due to an improvement of factual knowledge on the plaintiff’s side but to doctrinal innovation, which slowly shifted the burden of proof

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*eine Metaphorologie der Grundrechte* (Duncker & Humblot 2016); M Hanne and R Weisberg (eds), *Narrative and Metaphor in the Law* (Cambridge University Press 2018).

11 George Lakoff and Mark Johnson, *Metaphors We Live By* (1980).

12 For a prior publication in German see Jan-Erik Schirmer and Philipp Pauschinger, ‘Im Griff der Metapher – Eine (andere) Geschichte von juristischer Person und Dieselskandal’ (2020) 220 *Archiv für die civilistische Praxis* 211.

13 See Marc-Philippe Weller, Jana Smela, and Victor Habrich, ‘Abgasskandal – Ansprüche der Autokäufer auf dem Prüfstand’ (2019) 74 *JuristenZeitung* 1015.

from the purchaser to the car manufacturer. Three landmark cases of the Higher Regional Courts of Braunschweig, Karlsruhe, and Koblenz are representative of this change. While the Braunschweig court burdened the plaintiff and rejected her claim as too vague, the courts in Karlsruhe and Koblenz considered the media reports provided as sufficient evidence and argued that Volkswagen, in turn, was obliged (and failed) to refute the allegations brought against them.<sup>14</sup>

As I will show, these contrasting approaches regarding the burden of proof – Braunschweig relying on the plaintiff, Karlsruhe and Koblenz relying on Volkswagen as the defendant – can be understood as metaphorical feedback-effects. Disparate, almost contradictory conceptual metaphors of the legal person work in the background. While the courts in Koblenz and Karlsruhe use the personification metaphor to grasp the Volkswagen corporation, the judges in Braunschweig rely on the network metaphor. By doing so, the shift of the burden of proof is highlighted in the first case and hidden in the latter. Because the inner thought process of other humans is concealed from the outside gaze, – based on the personification metaphor – it seems almost natural to oblige Volkswagen to refute the plaintiff's allegations and prove that its management really did not know what happened. In contrast, a network reveals its internal structure straight away, intuitively making it feel more convincing to leave the burden of proof with the plaintiff and to demand more than vague media reports.

This does not suggest, of course, that the judgments on Dieseltgate can be explained entirely with feedback-effects, and certainly not that courts always judge based on metaphors. It does suggest, however, that metaphors matter. Because metaphors are present in legal reasoning, special attention should be paid to the feedback-effect. Just because a legal argument reflects metaphorical feedback, it does not make it wrong. But as natural as it may seem, that does not yet make the argument correct.

## *II. Dieseltgate in German Courts*

Even up until today, German courts are busy unravelling the Volkswagen emissions scandal. Judges have to cope with a variety of legal problems, some, such as the liability towards shareholders under capital market and securities law, haven't even been litigated yet. One central aspect, however,

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14 OLG Braunschweig (7 U 134/17) BeckRS 2019, 2737; OLG Koblenz (5 U 1318/18) BeckRS 2019, 11148; OLG Karlsruhe (17 U 160/18) BeckRS 2019, 14948.

has been solved for the most part: Volkswagen's liability towards car purchasers. Contrary to Volkswagen's approach in North America, that is, creating a claims fund and paying its customers a substantial lumpsum compensation, German customers are forced to rely on the courts to receive any compensation. In the beginning, customers did so by suing their respective retailers under sales law. The plaintiffs argued that the car they bought malfunctioned by emitting more nitrogen oxides, owing to installed defeat devices, than (impliedly) agreed upon in their respective sales contracts. This strategy, however, predominantly failed. In Germany, just like in other EU-countries, the seller has the right of supplementary performance (section 439 German Civil Code). The seller gets a second chance if the sold item is defective – the buyer may only demand compensation (ie expectation remedy) after the seller fails to replace or repair the item. This came in handy for the Volkswagen retailers. In order to prevent compensation, the retailers simply had to deinstall the defeat devices (which they eventually did). And since the courts found that the customers did not deliver enough facts to prove that the retailers were aware of Volkswagen's Dieselgate plot, their second line of argumentation, alleging that the retailers knew about the defeat devices and, thus, should still compensate them, did not go through.<sup>15</sup>

### 1. *Three judgments, two and a half opinions, one issue*

The customers, consequently, turned directly to Volkswagen. At first glance, their prospects looked even dimmer, though. The customers bought the cars from independent retailers and had no contractual relationship with Volkswagen. Thus, tort law was the only remaining option. Tort liability in Germany is limited to the violation of specific rights and interests such as property, health, or life.<sup>16</sup> In the customers' case, none of these were violated. By purchasing a 'not-so-clean diesel' the customers suffered a pure financial loss.

Stringent requirements must be met to compensate such a loss. One such option is claiming to have suffered an 'intentional damage contrary to public policy' (section 826 German Civil Code). However, this is par-

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15 For more details see Thomas Riehm and Lukas Lindner, "Dieselgate" and Consumer Law: Repercussions of the Volkswagen scandal in Germany' [2017] *Journal of European Consumer and Market Law* 39.

16 See generally Basil S Markesinis, John Bell, and André Janssen, *German Law of Torts: A Comparative Treatise* (5th edn, Hart Publishing 2019) 37, 88–105.



ticularly hard since the plaintiff has to prove that the defendant acted not only intentionally but *also* immorally.<sup>17</sup> Making matters worse, when going against a corporation it is not sufficient to show that any employee acted intentionally and immorally. Under German tort law, corporations are only liable if a ‘representative’ of its (higher) management commits a tort which is then attributed to the corporation (*Zurechnung*).<sup>18</sup> Concerning Dieselgate, the car purchasers, therefore, not only had to demonstrate that installing defeat devices was immoral but that members of the management body acted with intent, that is, approving the actions of the engineers involved.

Taking this into account, it comes as no surprise that the plaintiffs failed in court for a long time. The February 2019 decision by the Higher Regional Court of Braunschweig represents this struggle perfectly. The plaintiff argued that a high ranking Volkswagen engineer, the head of ‘Volkswagen type testing’, obtained an operating licence for the ‘clean-diesels’ by deceiving the authorities about the correct installation of the defeat devices – and all this with the management’s approval, expressly with that of the then chairman of the board, Martin Winterkorn. The Braunschweig court, however, did not concede. According to the judges, naming the engineer did not suffice because he could not be considered the corporation’s representative; and while Winterkorn truly was a representative, the plaintiff’s accusations were unsubstantial. By basing her argument solely on press reports about Winterkorn’s involvement in Dieselgate, the plaintiff failed to pinpoint a ‘concrete action/omission by the chairman of the board’.<sup>19</sup>

But this strict approach only persisted for a few months. In June and July, respectively, the Higher Regional Courts of Koblenz and Karlsruhe ruled it highly implausible for no one within the management to have known about what went on. Although in principle, it was still the plaintiff’s job to show (and, if necessary, prove) a representative’s involvement in the development of the defeat devices, the courts granted some relief. The plaintiff, the Koblenz court stressed, ‘only has publicly available sources at [her] disposal’.<sup>20</sup> Thus, delivering facts on specific actions and operational procedures was simply too high of a demand; ‘a more profound substantiation [by the plaintiff]’ as the Karlsruhe court put it, ‘[is]

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17 See generally *ibid* 78–82.

18 See generally *ibid* 126–127.

19 OLG Braunschweig (n 14) para 167 [this and all following quotations by the Higher Regional Courts are my translations, JES].

20 OLG Koblenz (n 14) para 155.

not possible'.<sup>21</sup> Instead, to contest the plaintiff's allegations, the defendant, ie Volkswagen, must 'inquire adequate information from within its own divisions' (Koblenz).<sup>22</sup> Volkswagen, as a legal person, has the 'duty to obtain the necessary information from individuals who acted under its guidance, supervision, or responsibility' (Karlsruhe).<sup>23</sup> Claiming on a global scale that no one within the management knew wasn't enough because otherwise 'the corporation could simply free itself from any liability by deferring to the alleged failure of other individuals' (Koblenz).<sup>24</sup> And because Volkswagen did not bring any such information to the table, the corporation, according to the Koblenz court, did not fulfill its secondary burden to refute the plaintiff's allegations properly (*sekundäre Darlegungslast*) – respectively, in the different, yet substantially similar words of the judges in Karlsruhe, Volkswagen conceded the plaintiff's allegations (*Geständnisfiktion* – section 138(3) German Civil Procedure Code).<sup>25</sup> This still stands today: in May 2020, the Federal Court of Justice, Germany's highest court in the system of ordinary jurisdiction, upheld the Koblenz and Karlsruhe decisions.<sup>26</sup>

## 2. Core question: burden of proof

The decisive discrepancy is, therefore, not one of facts, but one of normative valuation: while the judges in Braunschweig saw it as the plaintiff's responsibility to provide detailed information about the happenings, the courts in Koblenz and Karlsruhe left it to Volkswagen to refute the plaintiff's accusations.<sup>27</sup>

How to explain this discrepancy? Why does one court leave the burden of proof with the plaintiff, while two others, for the most part, shift it over to Volkswagen? Of course, a variety of reasons immediately come to mind. Different judges preside over the cases; diverse legal opinions are essentially ingrained in the juridical DNA; Wolfsburg, Volkswagen's

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21 OLG Karlsruhe (n 14) para 112.

22 OLG Koblenz (n 14) para 55.

23 OLG Karlsruhe (n 14) para 116.

24 OLG Koblenz (n 14) para 57.

25 See generally Peter L Murray and Rolf H Stürner, *German Civil Justice* (Carolina Academic Press 2004) 156–163.

26 BGH (VI ZR 252/19) BeckRS 2020, 10555.

27 See also Weller, Smela, and Habrich, 'Abgasskandal – Ansprüche der Autokäufer auf dem Prüfstand' (n 13) 1022–23.

hometown, is located near Braunschweig, not Koblenz or Karlsruhe, etc. But as important as all these factors may be, I believe that a more profound factor plays a decisive role – one that up to this point has been largely underestimated in the legal discourse. As I will try to demonstrate in the following passages, different conceptual metaphors of the legal person are clandestinely at work. The resulting different ascriptions of the burden of proof can be understood as metaphorical feedback-effects.

### III. *Cognitive Metaphor Theory*

What is meant by conceptual metaphors and metaphorical feedback-effects? I draw upon the leading linguistic approach coined by George Lakoff and Mark Johnson, the so-called cognitive metaphor theory.<sup>28</sup> This theory regards itself as an alternative to traditional apprehensions that conceive metaphors as mere stylistic tools. The difference is best explained by an example: while reading this article you might be wondering whether doing so is a wise investment or simply a waste of your time (I hope the former is the case). Either way, your line of thought would be metaphoric in nature. In a literal sense, only limited resources (especially money) can be ‘invested’ or ‘wasted’. The fact that everyone still understands the implication, is, according to the traditional approach, a result of metaphors reflecting pre-existent similarities. Without explicitly emphasizing this, a phenomenon – in this case, time – is not described by its real, literal meaning, but rather with aspects of a phenomenon, which are different in content, but nevertheless inherently similar – in this case, money. In short, the words ‘investment’ and ‘waste’ are used figuratively in order to express the conduct of time in a more concise and elegant manner.<sup>29</sup>

The approach paved by the cognitive metaphor theory delves deeper. It stipulates that metaphors are not just rhetorical flourishes, but rather fulfill a fundamental function in understanding complex ideas through simpler terms. Metaphors such as ‘time is money’ help us to understand an abstract conceptual domain (‘time’) through expressions of another, more familiar conceptual domain (‘money’). The conceptual framework for dealing with money, which has been coherently organized by shared perceptual experi-

28 Lakoff and Johnson, *Metaphors We Live By* (n 11). For (to some extent) similar approaches by Kant, Weinrich, and namely Blumenberg see Schindler, *Rechtsmetaphorologie – Ausblick auf eine Metaphorologie der Grundrechte* (n 10) 46–87.

29 The classic example for this view is Aristotle, see Samuel R Levin, ‘Aristotle’s Theory of Metaphor’ [1982] *Philosophy & Rhetoric* 24.

ences, is projected onto the obscure concept of time. With this, we are able to understand time in terms of money; the conceptual metaphor allows for sub-categorizations and derivations. Because our everyday experience with money taught us that it can be ‘wasted’ or ‘sensibly invested’, time can thus also be ‘wasted’ or ‘sensibly invested’. And for the same reason we can also ‘save’, ‘give away’, or simply ‘have’ time.<sup>30</sup>

### 1. *Metaphorical feedback-effect*

But this feedback-effect has a catch. Inevitably, certain aspects are highlighted while others are hidden. In a way, we get caught in the metaphor’s undertow: time is not an abundant commodity, but first and foremost ‘valuable’ and should ‘not be wasted’.<sup>31</sup> The cognitive metaphor theory stipulates that this is not due to unalterable pre-existent similarities but is more a result of specific cultural associations. Time is not money, not even similar to money – the similarity is created by the metaphor, it essentially *arises* as its consequence.<sup>32</sup> This shaping power is the key feature of the theory. Metaphors play an essential role in how we understand reality and what we consider to be real – we actually perceive and act in accordance with the metaphors.<sup>33</sup> If we structured time by means of a different conceptual metaphor, new realities would be created and as a result, completely different aspects would be highlighted and/or hidden. If, for example, the conceptual metaphor were to be ‘time is a cycle’, it would not have provoked the association of whether or not you were ‘wasting your time’ with this text.

### 2. *Some empirical evidence*

Although the cognitive metaphor theory should first and foremost be understood as an epistemological hypothesis, experiments substantiate its

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30 Lakoff and Johnson, *Metaphors We Live By* (n 11) 7–10. Another example is the conceptual metaphor ‘argument is war’ (‘He attacked every weak point in my argument.’; ‘His criticisms were right on target.’), *ibid* 3–6.

31 *ibid* 10–13, 87–96.

32 *ibid* 215: ‘The similarities arise as a *result* of conceptual metaphors and thus must be considered similarities of *interactional*, rather than inherent, properties.’

33 Cognitive metaphor theory can thus be associated with constructivist epistemic approaches, see *ibid* 156–184, 226–7.

claim. Psychologists from Stanford University set-up a particularly memorable trial: two experimental groups were presented with a scenario of a small town that recently exhibits rising crime rates. The participants were provided with identical statistical evidence – however, one group received a written introduction describing the rise of crime rates as a beast attacking the city, while the other group received a text depicting the crime toll as a virus. Both groups were then asked to propose possible countermeasures against the rise of criminal activities. The first group predominantly advocated for repressive measures (stricter prosecution, harsher punishments), while the majority of the second group favoured preventive measures (social reforms, fighting poverty). Both propositions were justified with the (identical) crime statistics. The trial-subjects did not even consider that the respective metaphorical portrayals of crime – ‘hunt down’ beasts, ‘prevent’ viruses from spreading – could precipitate different propositions. And this effect, observable irrespective of any political affiliations or socio-economic factors, did not necessitate a richly illustrated story – a single word sufficed to trigger the conceptual metaphor and its respective feedback-effect.<sup>34</sup>

#### *IV. Dieselgate Metaphors: Of People and Networks*

Against this background, let us get back to the decisions of the Higher Regional Courts of Braunschweig, Koblenz, and Karlsruhe and take a closer look at the respective justification patterns. By doing so, two distinctive conceptual metaphors with considerably different feedback-effects will come to light: the personification metaphor on the one hand and the network metaphor on the other.

##### *1. Personification metaphor*

Before the Higher Regional Courts of Koblenz and Karlsruhe address any questions concerning the burden of proof, both courts start exploring tortious conduct, ie whether the defendant acted intentionally and contrary to public policy. The Koblenz court finds that ‘the defendant’s deceptive course of action’ aimed in two directions: on one hand, the defendant ‘deluded’ the authorities to believe that the vehicle was tested under real

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34 See Paul H Thibodeau and Lera Boroditsky, ‘Metaphors We Think With: The Role of Metaphor in Reasoning’ (2011) 6 *PloS ONE* e16782, e16782.

driving conditions, thus ‘obtaining [its operating licence] through deception’<sup>35</sup>. On the other hand, customers that ‘did not have an insight into the technical processes’ were also deceived.<sup>36</sup> All this is considered contrary to public policy, as the defendant had acted ‘largely in pure pursuit of profit’ and ‘calculatedly exploited’ the guilelessness of the customers.<sup>37</sup> Finally, the judges also assume wilful intent. The impending revocation of the operating licence after the discovery of the illegal defeat devices ‘must have been clear to the defendant and was clear’, because ‘the defendant’s behaviour after the discovery cannot be understood otherwise.’<sup>38</sup> The Karlsruhe court takes the same line. The defendant deceived because the vehicles ‘were circulated with the fraudulently obtained type approval’ and exploited ‘the customers’ trust in the Volkswagen corporation’.<sup>39</sup> Plus, no one could doubt the defendant’s preponderant motives (‘greed’).<sup>40</sup>

Regardless of whether or not one shares these assessments, the courts’ statements intuitively appear understandable and coherent. Even if we don’t know all the details (or even doubt the stipulated facts), we at least understand what the courts are getting at when speaking of ‘deceit’, ‘greed’, and the ‘customers’ [disappointed] trust in the Volkswagen corporation’. However, this is anything but self-explanatory. The defendant is not a human being with motives, preferences, or necessities. The defendant is a legal person. Strictly speaking, the Volkswagen corporation cannot ‘delude’, ‘deceive’, or ‘exploit trust’ any more than one cannot literally ‘save’ or ‘invest’ time.<sup>41</sup>

This is where the cognitive metaphor theory comes into play. The judge’s reasoning feels so natural to us because it coherently follows a conceptual metaphor. Although Volkswagen is not a human being, we treat it as such in our everyday language. The corporation is personified. We naturally talk about buying a car from Volkswagen, get it repaired by Volkswagen, and end up complaining about Volkswagen’s sloppy work. There is, from the cognitive metaphor theory’s point of view, a simple reason for this: a ‘corporation’ is an abstract, rather puzzling conceptual domain that we understand with the help of a very familiar conceptual

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35 OLG Koblenz (n 14) para 30–1, 18.

36 *ibid* para 33.

37 *ibid* para 45, 40.

38 *ibid* para 49.

39 OLG Karlsruhe (n 14) para 94.

40 OLG Karlsruhe (n 14), para 89, 110.

41 See generally Jan-Erik Schirmer, *Das Körperschaftsdelikt* (Mohr Siebeck 2015), 131–206.

domain.<sup>42</sup> For this, we use the most basic perceptual experience of all: interacting with other people. By virtue of the metaphor, ‘the corporation is a person’, we make use of human categories to cope and interact with corporations intuitively. Seen this way, it is only logical that Volkswagen can ‘sell’, ‘repair’, or ‘work sloppily’. But since humans can also ‘lie’ and ‘cheat’, the metaphorical feedback-effect reaches even further. Volkswagen can also ‘delude’, ‘deceive’, or ‘exploit trust’.<sup>43</sup>

*a. The corporation is a different person*

However, this does not yet answer the *Gretchenfrage*: why does it apparently cause so little irritation to speak of ‘deception’ or ‘calculated exploitation’, when we actually don’t know for sure what happened within the Volkswagen corporation? Indeed, whether the development of the defeat devices was arranged or simply tolerated by the management, continues to be unclear.<sup>44</sup> This does not seem to play a major role in the eyes of the public, though – even if we are still missing details about the internal operations and responsibilities, it is apparently clear that *Volkswagen* did ‘lie and defraud’.<sup>45</sup> How does that fit together?

In my opinion, the personification metaphor’s feedback-effect also delivers a plausible explanation for this. As the general public is just not part of the corporation, it is perceived as if it were a *different* person. Other persons are outside us, we view them from an external perspective. What Lakoff and Johnson call the ‘in-out orientation’ is a typical feature of this: we know from experiencing our own physicality that people have their own inner world with distinctive motivations, goals, and needs. But because this inner world is bounded by the surface of our skins and

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42 Lakoff and Johnson, *Metaphors We Live By* (n 11) 25–34. For the cultural-historical background of the personification metaphor see Daniel Damler, *Rechtsästhetik* (Duncker & Humblot 2016), 61–123.

43 This feedback-effect can also be observed in many US Supreme Court decisions preceding the famous and highly debated *Citizen United* case concerning corporate free speech, see Adam Winkler, *We the Corporations* (Liveright Publishing 2018).

44 See Sören Amelang and Benjamin Wehrmann, ‘“Dieselgate” – a timeline of the car emissions fraud scandal in Germany’ <<https://www.cleanenergywire.org/factsheets/dieselgate-timeline-car-emissions-fraud-scandal-germany>> accessed 26 October 2020.

45 Mentioned by the German chancellor Angela Merkel at a party summit in October 2018.

detached from the rest of the world, we experience *other* people only as different physical wholes.<sup>46</sup> If another person, let's call her Mary, knocks over a vase by moving her arm, we automatically assume that her inner world-mechanisms lead to external behaviour. Disregarding obvious situations where our experience dictates a diverging understanding (eg Mary being a toddler or Mary being pushed), it is up to Mary to instruct the outside world why our perception doesn't do her inner world justice – maybe because she was frightened or just didn't see the vase. Although the legal assessment might be more complex, the everyday perception is quite clear: what manifests itself as a person's external behaviour is initially deemed to be the overall result of inner mechanisms. We ask others 'what they were thinking' because we simply 'cannot see inside them'.<sup>47</sup>

*b. The inner structure stays hidden*

Hence, the personification metaphor highlights the congruence of externally perceptible behaviour and inner mechanisms. That does not mean, of course, that a divergence is impossible. But because any divergence of the inner processes and external apprehensions is systematically hidden in the conceptual metaphor, it falls outside its feedback-effect and thus calls for legitimization. The situation compares to us 'having abundant time'. This statement does not coherently follow from the conceptual metaphor 'time is money', which we use to structure time as a scarce commodity, and will, therefore, regularly incite questions regarding the underlying reasons: Good for you, how did you do that?, How can you afford that?, etc. While the statement 'my time is limited' as a metaphorical feedback seems normal and doesn't require any further justification, the statement 'having abundant time' strays from the metaphorical structure and thus demands an explanation and justification.<sup>48</sup>

Taking this into account, it is hardly surprising that the Higher Regional Courts of Koblenz and Karlsruhe essentially place the burden of proof on Volkswagen. Because both courts conceptualize Volkswagen by

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46 Lakoff and Johnson, *Metaphors We Live By* (n 11), 29–32, 56–60.

47 *ibid* 75: 'Here the STATE (desperation, loneliness, etc.) is viewed as a container, and the act or event is viewed as an object that emerges from the container. The CAUSATION is viewed as the EMERGENCE of the EVENT from the STATE.'

48 *ibid* 172–175. For the changed (in fact, reversed) approach to time among the elites and its impact on society see Daniel Markovits, *The Meritocracy Trap* (Penguin UK 2019) 77–110.



virtue of the personification metaphor, the placement of the burden of proof correlates to a coherent, almost innate metaphorical feedback. If we conjecture external behaviour and internal human mechanisms as congruent, it appears evident that ‘[g]iven the sheer number and quality of manipulated vehicles (...) it can be ruled out that the head of the development department had no prior knowledge of the manipulations’<sup>49</sup>. And just as we automatically presume a moving arm to be a deliberate action, it initially seems plausible that the exhaust-manipulation was ‘predetermined by a strategic decision [on the management level]’.<sup>50</sup> One can hardly demand the plaintiff to deliver details on specific actions and operational procedures because, just as with another person, she ‘has no extensive insight into the decision-making structures of the defendant’<sup>51</sup>. As an outsider she merely has access to externally manifested occurrences, the plaintiff ‘only has publicly available sources at [her] disposal, a more profound substantiation [is] not possible’<sup>52</sup>. Instead, it is up to Volkswagen to ‘inquire adequate information from within its own divisions’.<sup>53</sup> Just as we can’t look into another person’s head, ‘[the] defendant – and she alone – (...) can construe the decision-making processes that led to the use of the software.’<sup>54</sup>

In other words, the courts project the human ‘in-out orientation’ onto Volkswagen. The inner world stays hidden away from us, we perceive the internal corporate happenings as manifestations of a physical whole – just as Volkswagen sells or repairs vehicles it manipulated the emission software. Thus, Volkswagen would have to explain why our extrinsic perception does not coincide with its inner world – all because Volkswagen is best at ‘listening to itself’ and ‘sharing its thoughts’.

## 2. *Network metaphor*

Let us now compare and contrast this to the justification pattern of the Higher Regional Court of Braunschweig. Its judges dive straight in. Volkswagen, ‘as a legal person, cannot commit an offence’.<sup>55</sup> The only possible

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49 OLG Koblenz (n 14) para 53.

50 OLG Karlsruhe (n 14) para 87.

51 OLG Koblenz (n 14) para 54.

52 OLG Karlsruhe (n 14) para 112.

53 OLG Koblenz (n 14) para 55.

54 OLG Koblenz (n 14) para 62.

55 OLG Braunschweig (n 14) para 149.

way of holding Volkswagen liable for any inflicted damages would be by attribution, that is, by treating offences committed by its representatives as if they were Volkswagen's. But for attribution only those individuals, who 'were assigned executive or other significant, essential [sc representative] positions in the legal entity' could be considered – and this just was not the case with the 'head of type testing', who was brought forward by the plaintiff.<sup>56</sup> Besides, even if this individual could be considered a representative in the light of the law, the 'position as "head of type testing" alone does not allow (...) definitive conclusions regarding his knowledge.'<sup>57</sup> They would require detailed knowledge of explicit production processes, but 'the "head of type testing" does not necessarily have to be an engineer or [involved] in the installation of the software (...).'<sup>58</sup> To summarize, the plaintiff's pleading failed to point to a 'concrete action/omission', and even if one wanted to focus on 'an approval by Martin Winterkorn [sc the then CEO of VW]' for installing the defeat devices, 'this action or omission could not be considered contrary to public policy [anyway].'<sup>59</sup>

Compared to the Koblenz and Karlsruhe courts, the chain of thought is thus inverted. It does not start with the question of whether the deception by Volkswagen was contrary to public policy and then 'additionally' concerns itself with deliberating matters of attribution.<sup>60</sup> Rather the Higher Regional Court of Braunschweig begins with questions of attribution and only later contemplates whether the representatives' behaviour could be classified as contrary to public policy.

Another prominent difference sticks out. Contrary to the justification patterns of the Higher Regional Courts of Koblenz and Karlsruhe, the judges in Braunschweig do not structure Volkswagen by virtue of the personification metaphor. Even though the court repeatedly refers to Volkswagen as a 'legal person', Volkswagen is not – apart from the use of the technical term – metaphorically conceptualized as *another person*. It is not called into question whether Volkswagen 'deceived', 'led them to believe' something, or 'exploited the customers' trust'. Rather, from the get-go, the court made it clear that Volkswagen is merely a legal construct: the plaintiff's allegation of Volkswagen committing an offence has never had

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56 *ibid.*

57 *ibid* para 161.

58 *ibid.*

59 *ibid* para 168-9.

60 OLG Karlsruhe (n 14) para 108: 'The liability of a legal person (...) *also* presupposes that a "constitutionally appointed representative" (...) has committed the objective and subjective requirements of a tort' [emphasis added, JES].

any merit because a corporation cannot in and of itself deceive.<sup>61</sup> The court's focus always laid on internal corporate processes – how did the decision-making actually work, 'which concrete action/omission' can be pointed out, and were the relevant people assigned 'significant, essential positions':<sup>62</sup>

*a. The corporation is a network*

Therefore, in the Higher Regional Court of Braunschweig's ruling Volkswagen appears as a complex structure for which a tortious liability can only be upheld if the plaintiff can describe the internal procedures in detail and name specifically who knew what at a certain point in time. Even if the court does not explicitly mention this, its approach is reminiscent of the *nexus of contracts theory's* conceptual metaphor. Here the corporation is not grasped as another person, rather it is understood as a conglomerate of contracts and attributive relationships – 'the corporation is a network'.<sup>63</sup> This induces completely different feedback. Aspects that the personification metaphor highlighted – liveliness, manifested behaviour, bound physicality – are now hidden. Even the perception as a stable whole is rattled, as networks represent diminutive, multidimensional relationships with amorphous, protractible conjunctions.<sup>64</sup> In contrast to the personification metaphor, it incipiently lacks the 'in-out orientation'. There is no overall external appearance that hides the inner mechanisms – even from afront, a network always remains a network, always manifesting its complex internal structure.<sup>65</sup> When conceptualized as a network, even from outside view one immediately sees the individual intersections and attributive relationships.

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61 OLG Braunschweig (n 14) para 149.

62 *ibid.*

63 Fundamentally Michael C Jensen and William H Meckling, 'Theory of the firm: Managerial behavior, agency costs and ownership structure' (1976) 3 *Journal of financial economics* 305.

64 See Johanna Braun, *Leitbilder im Recht* (Mohr Siebeck 2015) 139–155; generally, Gunther Teubner, *Networks as Connected Contracts* (Hart Publishing 2011).

65 Jensen and Meckling, 'Theory of the firm: Managerial behavior, agency costs and ownership structure' (n 62) 311: 'Viewed this way, it makes little or no sense to try to distinguish those things which are "inside" the firm (or any other organization) from those things that are "outside" of it.'

b. *The inner structure is revealed*

So, if the defendant is understood as a network and the plaintiff wants to hold it liable, it only seems consequent to ask her to identify the connections that liability would be based on and to point out a ‘concrete action/omission’.<sup>66</sup> When the inner world is not concealed from the outside gaze, the plaintiff can very well take ‘extensive insight into the decision-making structures’.<sup>67</sup> Within the metaphorical structure of the network metaphor, demanding details about the corporation's internal interconnections appears plausible since the ‘head of type testing’ really doesn’t have to be ‘an engineer or [involved] in the installation of the software (...)’.<sup>68</sup> Just as it seems far less self-evident for the plaintiff to rely ‘only (...) [on] publicly available sources’.<sup>69</sup> Because if it is not a matter of looking into Volkswagen, but of finding connections within a network, then it is not ‘[t]he defendant – and she alone – (...) [that] can construe the decision-making processes that led to the use of the software.’<sup>70</sup>

Thus, the attributes that the personification metaphor highlights are hidden within the conceptual structure of the network metaphor. If the inner structure of a network is revealed anyway, it feels incoherent to help the plaintiff out with a redistribution of the burden of proof.<sup>71</sup> Of course, this doesn’t definitively preclude shifting the burden of proof onto the legal person. But from the cognitive metaphor theory’s perspective, it comes as no surprise that the Higher Regional Court of Braunschweig did not even consider it. Because the metaphors’ respective feedback-effect does not cover this reassignment of the burden of proof, it strays from the conceptual structure – and thus needs a different, more profound string of arguments to be highlighted and justified.

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66 OLG Braunschweig (n 14) para 169.

67 Contrary to OLG Koblenz (n 14) para 54.

68 OLG Braunschweig (n 14) para 161.

69 Contrary to OLG Karlsruhe (n 14) para 112.

70 Contrary to OLG Koblenz (n 14) para 62.

71 The US Supreme Court’s argument for corporate free speech in the famous *Citizen United* case – piercing the corporate veil and, therefore, viewing the corporation as a mere association of its constitutionally protected shareholders – can be considered another example of this logic, see Winkler, *We the Corporations* (n 43) 324–76.

## V. *How to Deal with Metaphors?*

What does this tell us? In any case, it does not mean that the respective metaphorical feedback-effects found in the justification patterns of the Higher Regional Courts of Braunschweig, Koblenz, and Karlsruhe are solely responsible for the different outcomes, and definitely does not mean that judges exclusively base their decisions on metaphors. To be clear, valid reasons for shifting the burden of proof onto Volkswagen and for leaving it to the plaintiff exist. I by no means intend to deny that the court decisions are rationally plausible and legally justifiable. But they are reflections of conceptual metaphors as well. And the justification patterns expressly coincide with the feedback of their respective metaphor. Neither more nor any less.

### 1. *Come to stay*

Should we, therefore, for the sake of objectivity, ban all metaphors from legal discourse? Various voices demanded this in the past.<sup>72</sup> Yet according to the cognitive metaphor theory, this is illusory. At its core, the theory asserts that metaphorical concepts are deeply rooted in human thinking and understanding – one cannot simply switch them off, we ‘live by metaphors’.<sup>73</sup> And not just in our everyday lives, but everywhere. Even professional communication such as legal theory and doctrine is susceptible to it.<sup>74</sup> Therefore, it is no contradiction that even this text entails several metaphors. Sooner or later metaphors always come into play – especially when talking of highly abstract constructs like the legal person.<sup>75</sup> Admittedly, jurists have close to no difficulty when dealing with legal persons on a regular basis. One must only look at the written law if one wants to know whether the executive or supervisory board is in charge, for example. And even in the absence of clear legal rules, case law and legal

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72 For various examples see Schindler, *Rechtsmetaphorologie – Ausblick auf eine Metaphorologie der Grundrechte* (n 10), 113–8.

73 Lakoff and Johnson, *Metaphors We Live By* (n 11) 3–6.

74 *ibid* 218–22.

75 See Bosmajian, *Metaphor and Reason in Judicial Opinions* (n 10), 49: ‘Nonliteral language is often needed to explain the abstraction (...) that cannot be conveyed as effectively and persuasively through literal language.’ With an emphasis on the legal person Berger, ‘What Is the Sound of a Corporation Speaking – How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law’ (n 10) 178–80.

theory created practicable doctrines.<sup>76</sup> But as the rulings in Braunschweig, Koblenz, and Karlsruhe demonstrated, one needs a rudimentary understanding of what a legal person exactly *is* to answer new or fundamental questions – and that’s when metaphors factor in. This would hold true even if one were to apply one of the many theories of the legal person. Although they are obviously devised ambitiously and carefully substantiated, these theories – like most academic theories<sup>77</sup> – also build upon powerful metaphors.

This is far from new, of course. Otto von Gierke, arguably one of leading 19<sup>th</sup>-century theorists of the ‘nature’ of legal persons, emphasized the role of metaphors more than one hundred years ago. In order to better explain his concept of legal personality, he consciously drew a parallel to the individual human being. ‘Like the single organism [sc like a single human]’, he elucidated in his famous speech on the nature of corporations, ‘we perceive the social whole as a living being.’ This ‘imagery’, as he calls it, ‘is used partly for the sake of clarity and partly due to lingual necessity. All intellectual progress was achieved with the help of imagery. Even our most abstract concepts are made through imagery.’<sup>78</sup> Newer approaches, especially the nexus of contracts theory, work no differently. Indeed, the theory’s conceptual metaphor is deliberately chosen to contrast. By using the network metaphor, Michael Jensen and William Meckling, who put forth the theory in the 1970s, wanted to emphasize ‘that the personalization of the firm (...) is seriously misleading. The firm is not an individual.’<sup>79</sup> What many rightfully celebrated as a theoretical revolution is thus also a metaphoric revolution. As Lewis A. Kornhauser accurately comments, ‘in some sense, the revolution has simply replaced one legal metaphor (...) with another legal metaphor, the nexus of contracts.’<sup>80</sup>

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76 Emphasizing this ‘domain of legalist reasoning’ Posner, *How Judges Think* (n 10) 174–203.

77 Lakoff and Johnson, *Metaphors We Live By* (n 11) 18–9, 218–22.

78 Otto von Gierke, *Das Wesen der menschlichen Verbände* (Duncker & Humblot 1902) 16 [my translation, JES].

79 Jensen and Meckling, *Theory of the firm: Managerial behavior, agency costs and ownership structure* (n 62) 311.

80 Lewis A Kornhauser, ‘The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel’ (1989) 89 *Columbia Law Review* 1449, 1449.

## 2. *Metaphors matter*

Yet if the legal person and other legal concepts are, and to some extent must be, coined by metaphors, then we should always be beware of the feedback-effect. As we have seen with respect to the burden of proof, the conceptual metaphors systematically highlight certain aspects and hide others. What follows intuitively appears convincing, almost natural, and provokes significantly less pressure for any justification. Consequently, what falls outside of the feedback structure causes irritation and demands an explanation.<sup>81</sup> Chad M. Oldfather rightfully warned: ‘A reader who finds that a particular metaphor aptly captures a doctrine (...) will be likely in the future to think of the doctrine in terms of the metaphor. Even a metaphor that has no virtue apart from being memorable can increase the impact of an opinion.’<sup>82</sup>

This would not be much of an issue (or could largely be ignored), as long as the solution to specific legal issues can be derived from the conceptual metaphor – in other words: as long as the right answer coherently follows from the respective legal theory’s axiom. But this assumption in and of itself must be, at least from a methodological point of view, called into question. Although coherent theories are, of course, important stabilizing factors for the pursuit of objectivity,<sup>83</sup> they should not be the exclusive factor in finding an adequate solution for the issue at hand. With respect to our problem of the burden of proof: from my point of view, neither a specific theory of the legal person nor a corresponding conceptual metaphor is suitable or even capable to ratiocinate whether the customers or Volkswagen should bear the burden of proof. Even when merely arguing doctrinally (or formalistically, if you like), it is essential to carefully balance the aspects of legal personality *and* the law of evidence.<sup>84</sup> If done so, one of the answers found by the Higher Regional Courts might

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81 With regard to the corporate speech doctrine in the USA see Berger, ‘What Is the Sound of a Corporation Speaking – How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law’ (n 10) 186–190.

82 Chad M Oldfather, ‘The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions’ (1994) 27 Conn L Rev 17, 22.

83 Hans Christoph Grigoleit, ‘Subjectivism, Objectivism, and Intuitionism in Legal Reasoning: Avoiding the Pseudos’ (§ 2) (statement 12).

84 Additionally, private law doctrine should also be responsive to extra legal considerations (economical, ethical, sociological, etc), see Gunther Teubner, *Law as an Autopoietic System* (Blackwell Publishers 1993) 64–99; Hanoch Dagan, *Reconstructing American Legal Realism & Rethinking Private Law Theory* (Oxford University Press 2013) 104–28.

actually come to exist. But this answer should still be sensitive to the fact that when one deals with legal persons, powerful metaphors are at play, and that their respective feedback are initially just that: feedback. In and of themselves they carry no normative value.

Of course, put that way the statement is banal. But – and this is my main point – it is only a banality because it is a result of ‘reflective self-reflection’ (*reflektierte Selbstreflexion*).<sup>85</sup> The risk of getting caught in the metaphor’s undertow can be significantly reduced when one is aware of its power. A jurist’s pursuit of reasoning as objectively as possible – regardless of her being a judge or scholar – should entail keeping the important insights of the cognitive metaphor theory in mind.<sup>86</sup> Again, this is not new. Even though our understanding of the feedback-effect was not as developed back then as it is now, many jurists of the last century had the right intuition. As early as 1927, Justice Benjamin N. Cardozo warned that ‘[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it’.<sup>87</sup> And even more than two decades before him, Otto von Gierke captured the role of metaphors in law perfectly. ‘In [legal] academia, we can make use of images as long as we remain cautious and don’t take the image as fact.’<sup>88</sup>

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85 Braun, *Leitbilder im Recht* (n 63) 199.

86 Similar Berger, ‘What Is the Sound of a Corporation Speaking – How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law’ (n 10) 205: ‘An awareness of the cognitive power of metaphor, and of other methods of understanding one thing “in terms of” or “as” another, will help lawyers uncover the narratives, metaphors, and analogies that underlie much legal reasoning.’

87 *Berkey v Third Avenue Railway* 244 NY 602 (1927).

88 von Gierke, *Das Wesen der menschlichen Verbände* (n 78) 16 [my translation, JES]