

Legal Narratives as Imaginary Constructions: Siegfried Kracauer, Historiography and Law's Stories

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1. *On the Construction of Legal Narratives*

At the University of Bergen, “The Bergen School of Literature- and Law-studies”, our research group have had two research projects funded from RCN (Research Council of Norway), the first one called “The Dramaturgy of Miscarriages of Justice: On the Construction of False or Fictitious Stories in Court” (2009–2013), the second had the title “A Narratology of Criminal Cases” (2016–2021).¹ Both were international interdisciplinary projects within the fields of Law and the Humanities. Moreover, the University of Bergen financed our “Center for Humanistic Legal Studies” (2013–2019).

Our main focus has been on *the construction of legal narratives*, not only from a narratological point of view, but in the context of new and classical rhetoric, semiotics, hermeneutics and critical theory (Linneberg 2021). In this paper I will point at Siegfried Kracauer’s relevance for the understanding of law’s stories, especially the importance of his philosophy of history, or rather his theory of historiography.

2. *Discontinuity in Space and Time*

“The room that Kracauer has been allocated in the Frankfurt School is sparse,” Gertrud Koch wrote in *Siegfried Kracauer zur Einführung* (Koch 1996, viii).² Since then, there have been significant attempts to bring Kracauer out from behind the shadows cast by his friends of the Frankfurt School. Anyway, I will start with a short introduction to Kracauer, before discussing the parts of his oeuvre that I find most interesting concerning legal discourse.

Siegfried Kracauer (1889–1966) was born in a German-Jewish family in Frankfurt. He held a doctoral degree in architecture and for some years he even worked as an architect. Furthermore, he studied sociology (Georg Simmel

¹ The first led by Arild Linneberg with the fulltime researchers Johan Dragvoll and Bjørn Chr. Ekeland, the second led by Frode Helmich Pedersen, both projects with parttime researchers from Nordic and European countries and the US. For some of the results, see Dragvoll et al. (2014), Helmich Pedersen et.al. (2021), Linneberg (2021, 2022).

² Quoted from the English edition, *Siegfried Kracauer. An Introduction* (Koch 2000).

was his teacher) and philosophy, and he was a prominent writer in Germany under the Weimar Republic. From 1922–1933 he was the feuilleton-editor in *Frankfurter Zeitung*, where he wrote more than fifteen hundred articles, essays and reviews of literature and film. He and his wife Lili³ lived in Berlin from 1931 to 1933. After the Reichstag Fire in February 1933, they moved to Paris. From 1933 to 1941 they were refugees in Paris and Marseille. In April 1941 they managed to flee to the US with the last ship with refugees from Lisbon to New York. After the second world war Kracauer became a leading film theorist, and in cooperation with the research group “*Poetik und Hermeneutik*” in Giessen he contributed to a shift of the paradigm in the philosophy of history.⁴ From 1941 until his death in November 1966, the Kracaues lived in New York.⁵

The exile years highly influenced Kracauer’s thoughts about his own biography and more generally his concept of history. He began to think of history and life not in terms of continuity, but in terms of discontinuity in space and time. His own lifeline was disrupted, and he began to consider disruption as a main characteristic feature of history as such. Walter Benjamin once wrote that “history is a constellation of dangers” (Benjamin 2002, 470). Due to his own experience in exile Kracauer began to regard history as a constellation of danger, fear, suffering and hope (Bratu Hansen 2012, 281–283).

To perceive history as a coherent development did not correspond with reality: real history was characterized by contingency, chance and open-endedness. Naturally, the traditions of general history became highly problematic, traditional history-writing did not grasp what it was meant to do according to the well-known expression “*wie es eigentlich gewesen*”.

3. “*The horrible last-minute run of the transcendental subject*”⁶

In 1921 Kracauer wrote a review of Georg Lukács’s *Die Theorie des Romans. Ein geschichtsphilosophischer Versuch über die Formen der großen Epik* (Kracauer 1921). Lukács discussed the historical development of the western canon of epic literature on the basis of and as a parallel to Hegel’s philosophy of history. Kracauer then got the idea to write about the most popular literature at the time, the detective novel, on the basis of and as a parallel to some main concepts in Sören Kierkegaard’s philosophy and Kant’s *Zur Kritik der Urteilskraft*. It was a brilliant idea, but as it seems it was too original for its time, because after all Kracauer wrote his treatise on the detective novel in the years from 1922–1925, but

³ Lili Kracauer (born Ehrenreich) (1893–1971), at the time Lili and Siegfried Kracauer met (in 1926), she was librarian at *Institut für Sozialforschung* in Frankfurt.

⁴ The group was constituted in 1963, its most prominent members were Hans Robert Jauß, Clemens Heselhaus, Hans Blumenberg and Wolfgang Iser.

⁵ For a more detailed account, Später (2016).

⁶ See Linneberg (2022).

it was first published in 1971: *Der Detektiv-Roman. Ein philosophischer Traktat* (Kracauer 1979).

To a Norwegian it is interesting that one of Kracauer's main examples is taken from Sven Elvestad (1884–1934) alias Stein Riverton, the most famous writer of detective novels in Norway. Elvestad wrote 98 detective novels, 89 of them were translated into German in the author's lifetime, and many of them are still being published anew, above all in Germany. His novel *Døden tar inn på hotellet* (Elvestad 1921) – “Death checks in at the Hotel”, was printed in Germany in 1923, *Der Tod kehrt im Hotel ein*.

Kracauer's *Der Detektiv-Roman* was published in English in 2007 as *The Detective Novel: A Philosophical Treatise*. A central quotation in a central chapter in the book, “The Hotel Lobby”, is taken from Elvestad's novel. The storyteller tells us: “Once again it is confirmed that a large hotel is a world unto itself and that this world is like the rest of the large world” (Elvestad 1921, 37, Kracauer 1995a, 184). The novel's story about what is taking place in the hotel is so to speak a story about what is taking place in the large world. The detective novel mirrors society: “Just as the detective discovers the secret that people have concealed, the detective novel discloses in the aesthetic medium the secret of a society bereft of reality, as well as the secret of its insubstantial marionettes” (Kracauer 1995a, 175).

The detective as a figure is almost pure reason. The detective represents a higher reason, the principle of rationality. Because of their intelligence, their *ratio*, the detectives stand above other humans, they are almost divine.

The detectives are “rationally constructed complexes” and as such “comparable to the transcendental subject” (Kracauer 1995a, 177). As an individual the detective is “detached from the existential stream of the total person” and “reduced to an unreal, purely formal relation” (Kracauer 1995a, 177). Kant himself “still believed there was a seamless transition from the transcendental to the preformed subject-object-world” and was therefore “able to overlook this horrible last-minute sprint of the transcendental subject”. The transcendental subject's last-minute sprint can be observed in the hotel lobbies in these novels: In “tasteful lounge chairs [...] a civilization intent on rationalization comes to an end” (Kracauer 1995a, 190–191).

The detective novel is a rational construction of reality which discloses the rationality underlying this reality. Kracauer compares this rationally constructed complex with the abstract idealistic philosophical systems since the Enlightenment. These systems intend to circumscribe and define the totality, but because they are too abstract, they do not catch the empirical reality, they do not embrace human existence and everyday life. They are not capable of grasping reality in its totality.

Kracauer considers the detective novel as a further development of the abstract philosophical systems, or rather as a new version of the abstract system

of rationality. In the last chapter of the book, Kracauer argues that the solving of the mysteries, the solution of the problem, in the detective novel is not a real one, but an aesthetic construction. It is *Kitsch* (Kracauer 1979, 131–134). The image of reality in the detective novel is not a true picture, it presents an illusion, the illusion that we can grasp reality through rational abstractions.

Kracauer's remarkable conclusion is that the abstract philosophical systems are *Kitsch* as well, and for the same reason. The detective novel and the philosophical systems both create apparently coherent stories meant to explain the hidden meaning of the world we live in. But both types of stories are insufficient constructions of reality, not reality itself.

4. "Reality is a construction"

In the first chapter of *Die Angestellten* (1929–1930)⁷, Kracauer states that "*Wirklichkeit ist eine Konstruktion*" – "reality is a construction" (Kracauer 2016, 16). At the time this was an extraordinary statement. Kracauer discusses the new journalistic genre "reportage" and he concludes that "the reportage photographs life"⁸ (Kracauer 2016, 16, my translation). He draws a connection between photography and writing.

The first time Kracauer highlights this connection is in his essay "Photography" (Kracauer 2014a). An important subject in this essay is the problem of referentiality. What do we see when we look at a picture of someone, for instance a photography of our grandmother? "Did the *grandmother* look like this?" Kracauer asks (Kracauer 2014a, 28). We know we see the grandmother in the picture, because someone has told us who the photographed person is:

The viewer of old photographs feels a shiver. For they make present not the knowledge of the original sitter but the spatial configuration of a moment; it is not the human being that emerges from the photograph but rather the sum of everything that can be subtracted from that being. (Kracauer 2014a, 37)

Already in the opening sequence of the essay, Kracauer points at the distance between what we see in the photography and the photographed person. The photography is a technological reproduction of reality: "If one looked through a magnifying glass, one could recognize the grid, the millions of tiny dots that form the [film] star [...]. But the subject of the picture is not the network of points; it is the living star" (Kracauer 2014a, 27).

A photograph is a construction of reality, a reportage is photographed reality, and so is history-writing. Taking the "principle of Goethe philology" as a point of departure, Kracauer draws a remarkable line from photography to historiog-

⁷ First published in *Frankfurter Zeitung* 1929, then as the book in 1930.

⁸ Kracauer (2016, 16): "*Die Reportage fotografiert das Leben.*"

raphy. In the Goethe Society's *Jahrbücher* he found a series of photos, and his comment to this finding is amazing:

The principle of Goethe philology is that of the *historicist* thinking that has become dominant at approximately the same time as modern photographic technology. Its representatives assume, overall, that one can explain any phenomenon purely by tracing its origins. [...] Photography provides a space-continuum; historicism would like to fulfil the time continuum. The entire mirroring of the intra-temporal course of a period contains, according to historicism (*Historismus*) the meaning of everything that has happened in that time. [...] For historicism, it is a matter of the photography of time. What could correspond to its photography of time is a huge film which would depict the processes linked together in it from all sides. (Kracauer 2014a, 30)

It is exactly this correspondence between historiography and film that is Kracauer's main concern in his writings on film and history.

5. *Photography, Film and History*

Kracauer's first interventions in the interconnections linking photography, film and history we find in his film-reviews and essays on film in the twenties. In the essay "Calico World" he analyzed "the illusionist studio wizardry in various UFA films" (Levin 1995, 24). Kracauer showed "how stupid and unreal film fantasies are the daydreams of society, in which its actual reality comes to the fore. [...] The more incorrectly they present the surface of things, the more correct they become and the more clearly they mirror the secret mechanism of society" (Kracauer 1995b, 333). "Everything guaranteed nature," Kracauer here wrote about these film illusions, the only problem being that these constructions of reality actually repress access to the real. All we have is constructions of reality, not reality itself.

His brilliant book *From Caligari to Hitler* (1947) deals with the cinematic history of the Weimar Republic, "the psychological history of German film". The horror movies paved the way for the horror of Hitler's Nazi regime, and teach us about the sociopsychological climate leading up to the Third Reich.

Theory of Film. The Redemption of Physical Reality (1960) is more optimistic when it comes to the contributions of filmic constructions of reality. According to Kracauer, films could help us to see the beauty of our physical environment and thus contribute to save our habitat on earth.

In history writing it is almost the other way around. History writing is not only constructions of historical reality, but false constructions of real life.

5.1 A Realistic and a Formative Tendency

When Kracauer died in November 1966 he had not finished his final work, *History. The Last Things Before the Last*. Completed by Paul Oskar Kristeller it was published in 1969. Like Aristotle Kracauer meant that it was very much truth in fiction. According to Kracauer authors like Laurence Sterne, Lev Tolstoj, Marcel Proust and Franz Kafka not only gave more insight into the real life of a historical epoch than did the works of historians, but these authors also reflected more profound on the philosophical problems of history-writing.

In his foreword Kristeller wrote that Kracauer tended “to criticize the general theories of history formulated by Hegel and Nietzsche, Spengler and Toynbee, Croce and Collingwood, and to disregard the theories of Heidegger and the analytical philosophers” (Kristeller 1969, xiii).

The problem was not fictitious stories about history in literary fiction; the problem was that it is very much fiction in the factitious stories told in the general history-writing. In his last work Kracauer focused on this problem when he analyzed the construction of stories in historiography.

In the “Introduction” to *History* Kracauer recalls his earlier studies of photography:

I realized in a flash the many existing parallels between history and the photographic media, historical reality and camera reality. Lately I came across my piece on “Photography” and was completely amazed at noticing that I had compared historicism with photography already in this article of the twenties. (Kracauer 2014b, 4)⁹

Kracauer always recognized film as a photographic medium and discussed the referential problem in film and history in accordance with his discussion of photography. Based on his *Theory of Film* he stated that film and history share two main characteristic features; they both have a realistic and a formative tendency (Kracauer 1960).

A film refers to elements of reality, that is the realistic tendency. However, the filmic reproduction of these elements of reality regroup the elements into a new order in new sequences of events. This regrouping of elements is the formative tendency. The overall problem is not that film and history do not refer to reality, but how they do it, in what way, i.e. the relation between the realistic and the formative tendencies.

5.2 The historian as a detective

In his treatise on the detective novel Kracauer for the first time analyzed the construction of stories in philosophy and fiction. And in his work on historiog-

⁹ In October 1950 Kracauer received some of his old manuscripts from Germany and in a letter to Adorno October 1, 1950, he wrote this comment (Adorno 2008, 449).

raphy Kracauer actually discusses the historian as a detective. The historian is a detective, but of what sort? “Collingwood should have read more detective novels,” Kracauer writes, because the historian Collingwood acts like a Sherlock Holmes, finding facts, clues, traces and solves the problem by putting these traces, clues and facts into a storyline. The historian, however, should act more like the detective Arnold Pike in Philip MacDonald’s *Murder gone mad* (1931), because Arnold Pike not only finds the facts and makes a story out of them; the most important characteristic of Arnold Pike as a detective, is his interpretations and thus the understanding of the facts (Kracauer 2014b, 77–78).

The problem with historiography in general is not the realistic tendency, but the formative one. The storytelling in historiography is a distortion of the real because of the stylistic devices and rhetorical tricks that the history-writer uses to establish a false coherence (*Schein*), fill in gaps, and create a continuity where there is none. Instead of keeping in mind the incongruences of reality, historiography fabricates what Kracauer calls *the fata morgana of unity* (Kracauer 2014b, 164–191).

6. *Historiography as Imaginary Constructions*

Historiography creates “pseudo-scientific” imaginary constructions of reality (Kracauer 2014b, 191–221). A main reason is that traditional storytelling in history-writing is based on outdated novel-structures from the psychological, realistic novels with outdated plot structures and their principles of coherence and continuity. A more updated way of telling stories should be based on structures taken from modern novels, from the works of authors like Virginia Woolf or Marcel Proust. Or even from old writers like Laurence Sterne. Kracauer’s main example and his favorite among story tellers is Laurence Sterne and *The Life and Opinion of Tristram Shandy, Gentleman* (1759–1767).

At the end of the last chapter before the last of *History. The Last Things Before The Last*, Kracauer asks: “The general historian’s problems; is there a solution to them?” (Kracauer 2014b, 189). He continues: “Tristram Shandy’s answer to the question of how to penetrate chaos is so memorable that I cannot resist the temptation of reproducing it”.

Since, after all, this lengthy quotation from Sterne’s novel is so important to Kracauer and so enlightening, I will also quote his quotation here:

Could a historiographer drive on his history, as a muleteer drives on his mule – straight forward; – for instance from Rome all the way to *Loretto*, without ever once turning his head aside, either to the right hand or to the left, – he might venture to foretell you to an hour when he should get to his journey’s end; – but the thing is, morally speaking, impossible. For, if he is a man of the least spirit, he will have fifty deviations from a straight line to make with this or that party as he goes along, which he can no ways avoid. He will have views and prospects to himself perpetually

soliciting his eye, which he can no more help standing still to look at than he can fly; he will, moreover, have various

- Accounts to reconcile;
- Anecdotes to pick up;
- Inscriptions to make out;
- Stories to weave in;
- Traditions to sift;
- Personages to call upon;
- Panegyrics to paste up on this door;
- Pasquinades at that; – All which both the man and his mule are quite exempt from. To sum up all; there are archives at every stage to be look'd into, and rolls, records, documents, and endless genealogies, which justice ever and anon calls him back to stay the reading of: – In short, there is no end of it ... (Kracauer 2014b, 189)¹⁰

“General history, then, is a hybrid,” Kracauer concludes after the quotation; what “to us appears as an ‘imaginary construction,’ has been the *raison d’être* of general history most of the time.” Our preoccupation with the course of history “is grounded in religious prophecy, theological computations, and metaphysical ideal about mankind’s lot”. These “old questions, goals, and mirages” linger on, join forces “with the needs and interests which arise from the historian’s involvement in the affairs of his day”. Together both the contemporary and traditional concerns invite the historian “to account for temporal sequence, the past as a whole”. Therefore, the historian “cannot help driving his mule straight to Loretto” (all Kracauer 2014b, 190).

7. *Non-Narrative Elements in Non-Linear Processes*

What is at stake in Kracauer’s recount and discussion of this passage from Sterne’s novel? In my opinion he focuses on an antinomy of narrative and non-narrative elements that is indicated in Sterne’s comment on historiography. To drive the mule straight to Loretto is to tell a continuous story without breaks caused by reality’s incongruent flow of events, people, things, what we could call non-narrative elements that do not fit in in a seamless storyline. The subtitle of *Theory of Film* was *The Redemption of Physical Reality*. In the foreword, Kracauer mentions the first film he remembers to have seen as a young boy and what intoxicating impression it made upon him:

What thrilled me so deeply was an ordinary suburban street, filled with lights and shadows which transfigured it. Several trees stood about, and there was in the foreground a puddle reflecting invisible house façades and a piece of the sky. Then a breeze moved the shadows, and the façades with the sky below began to waver. The trembling upper world in the dirty puddle – this image has never left me. (Kracauer 1960, xi)

¹⁰ Kracauer’s quotation is from the paperback edition of the novel (Sterne 1940, 36–37).

Film could show us such marvels of everyday life, help save the beauty of the physical world and “do justice to the human condition in our time. Perhaps our condition is such that we cannot gain access to the elusive essentials of life unless we assimilate the seemingly non-essential?” (Kracauer 1960, xi).

For the historian, to save reality would mean to work out the dichotomy between the realistic and the formative tendency, I think that implies to clear up the antinomy of narrative and non-narrative elements.

To Kracauer the language of what Walter Benjamin called “the optical unconscious” was similar to the language of the unconscious; a dream-like flow of pictures (Benjamin 2015 [1931]). The surface-structure of reality as we experience it is actually similar to this dream-like flow of pictures, Kracauer argues; such is the real structure of historical reality with all its contingency and incongruences. The surface-structure of reality is similar to the structure of the unconscious. In accordance with this view, Kracauer argued for another concept of reality, based on sense perception, based on cinema (Bratu Hansen 2012). This implied a fundamental critique of both the abstract, idealistic and of the positivistic philosophies and world views, a critique grounded in an alternative view of reality with a weight on non-linear processes and thus a different concept of temporality.

The task of the historian is to try to live up to such expectations.

8. *The Construction of Reality in Law’s Stories*

The construction of reality in legal narratives could be considered as inherent historiography. Imaginary constructions have been the *raison d’être* not only in historiography, but in law’s stories, from the police reports via the prosecutors to the judges’ judicial opinions in the verdicts. The use of stylistic devices and rhetorical tricks to establish a false coherence in a *fata morgana* of unity instead of keeping reality’s incongruences in mind, characterizes most of the criminal cases I have investigated and analyzed through the years.

I could have demonstrated my conclusion so far with examples from many of the cases we in our research group have looked into and written about during a period of more than twenty years. But my main concern today was only a try to sketch the relevance of some prominent aspects of Siegfried Kracauer’s impressing work on historiography for the study of legal narratives. He showed us how to proceed.¹¹

¹¹ See Linneberg (2021).

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