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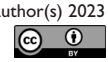

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Abstract

A principal element of law is the unpredictable outcome of its proceedings. This unpredictability has fueled the hopes of many and the fears of equally as many. In recent years populists and other political mavericks have become highly capable at exploiting the element of chance in law, aiming not so much to prove guilt or maintain innocence, but rather to reconfigure the judiciary affectively as a game of winners and losers. Populists' legal and luysory tactics make it urgent to reconsider the relation between the fields of law and the humanities. By paying more attention to the genres and media of play and game we can better assess the ways in which contemporary actors are playing with law and exploring the limits of the rules of the game. Here, the plurality that characterizes culturally and medially determined forms of *legality*, as Greta Olson calls it, has a counterpart in an equally culturally inspired and mediatized form of totalitarianism. In analyzing the populist play with law, my guide will be Johan Huizinga's *Homo Ludens*, in which he considers law's origin in play and chance. For Huizinga, play is serious, as is the law. The populist play with law is equally serious, since it may have serious consequences for the *Rechtsgefühle* of citizens.

Keywords

legality, judiciary, populists, legal rules of the game, play, wager, match, chance

The lot is cast into the lap, but its every decision is from the Lord.
Proverbs 16:33, *New King James Version*

Dr Dealgood: 'But ain't it the truth: you take your chances with the law, justice is only a roll of the dice. A flip of the coin. A turn. . . of the Wheel.'
Mad Max beyond Thuderdome

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I. Unprecedented: Shit flooding the zone

This article focuses on ways in which populists play with the judiciary in a game defined by the notions of wager, match and chance, thus reducing court cases to elements in a game of wins and losses.[1] The article's argument is that this attitude toward the law – the populist willingness to play with it – has consequences for the *Rechtsgefühle* of a populace, as Rudolph von Jhering defined it: a people's collective feelings of justice.[2] Immediately after the United States elections of 2020, for instance, former president Donald Trump and his allies initiated close to 60 lawsuits against their official and legitimate outcome.[3] Although this is an impressive number, it pales in comparison to the number of legal cases that Trump and his businesses have been involved in. According to investigative journalists Nick Penzenstadler and Susan Page, it concerned approximately 3500 cases in the decades prior to his presidency. Penzenstadler and Page called this figure "unprecedented for a presidential nominee."[4] Such a figure would be highly exceptional for anyone. Or, the sheer number of cases is aberrant, and is evidence of what I will come to call a "lusory attitude" toward the law and the judiciary.[5]

The populist willingness to play with the law has an analogy in the field of politics. In a 2018 conversation with Michael Lewis, shortly after Trump's State of the Union address, Trump's former consultant Steve Bannon stated: "The Democrats don't matter. The real opposition is the media. And the way to deal with them is to flood the zone with shit."[6] Flooding the zone with shit derails and de-rules the political field, unmooring particular events from their anchorage in time and space. Drowned in the flood of shit, the nuances of debate become general impressions. Trump's judicial strategy is analogous to this political strategy: 3500 cases look like a flood. In the legal context, "flooding the zone with shit" means not engaging questions of one's guilt but simply drowning out

1. I want to thank those who commented on this paper: Frank Chouraqui, Bram Ieven, Sanyie Ince, Sybille Lammes, Angus Mol, Sara Polak, the editors and peer reviewers of this journal, and especially Anthony T. Albright.
2. R. von Jhering, *The Struggle for Law* [1879], trans. from the 5th edition in German by John J. Lalor, (New Jersey, 1997).
3. P. Williams and N. Via y Rada, 'Trump's election fight includes over 50 lawsuits. It's not going well,' *NBC News*, November 23 2020, https://www.nbcnews.com/politics/2020-election/trump-s-election-fight-includes-over-30-lawsuits-it-s-n1248289.
4. N. Penzenstadler and S. Page, 'Exclusive: Trump's 3.500 lawsuits unprecedented for a presidential nominee', *USA Today*, June 2 2016. Archived from the original on June 2, 2016. Retrieved June 2, 2016. Trump himself was directly involved in 169 of the cases. Surely less than 3500, but still an impressive number. On this see R. Stockman, 'We Investigated Donald Trump is Named in at Least 169 Federal Lawsuits', *Law Newz* by Dan Abrams, February 16 2016, https://lawandcrime.com/high-profile/we-investigated-donald-trump-is-named-in-at-least-169-federal-lawsuits/ – accessed March 2022.
5. On the lusory attitude, see B. Suits, *Grasshopper: Games, Life, and Utopia* (Ontario, 2005; originally published in 1975).
6. M. Lewis, 'Has Anyone Seen the President' was originally published in *Bloomberg View*, February 9 2018, and then published as an 'audio investigation'; see https://www.bloombergquint.com/business/has-anyone-seen-the-president.

hostile arguments with a flood of counterarguments and countersuits, the content of which matters less than their quantity.

The consequences for collective feelings of justice can be sketched as follows. When one is the subject of a court case only a few times, whether as a plaintiff or a defendant, these cases remain still anchored in time, in a present between a past and a future, resulting in a distinct historicized impression of a defendant's guilt or innocence. But if this happens 3500 times, the cases are a flood of shit, collectively leaving no impression of a defendant's guilt or innocence because their sheer number overwhelms any true sense of historical context. This changes the historical and the theatrical role that court cases have for a wider public, which desires justice to be done.[7] Trump's court cases leave too much to be seen, and nothing specific as a result. For the excessive plaintiff or defendant the only issue is whether they will come out of the case as a winner or a loser. And coming out as a loser a couple of times need not be detrimental because the defeat will be drowned in numbers anyway, or the wider public will consider it as a familiar, intrinsic part of a game. A defendant might say: "There's some cases I lost, some I won, so what?" The populace witnessing someone surviving all these cases will be split. For some, the sheer number of trials inevitably connotes the criminality of the person and the businesses concerned. To others, the affectively powerful image is of someone *surviving* all these cases, which regardless of their outcomes may in itself look like vindication. Or, surviving such a number of cases may connote that this person is favored by luck, which is a great asset when playing a game. It will turn such a person, as long as the lucky streak lasts, into some sort of a talisman, a magical figure, or a mascot.

Lawyer and talkshow host James Zirin sketches how Trump's approach to lawsuits involved a tactic he discovered relatively early in life, with the help of lawyer Roy Cohn.[8] The tactic can be defined as follows: "The flaw in the American system is that, if you are willing to spend the money, scorched-earth tactics often work. In short, he abused the process of a lawsuit, making it into something it was never intended to be—a way to win out against whomever he considered to be his adversary."[9] Zirin's use of the term "abused", or the phrase "it was never intended to be", suggests that a proper intention of the process of a lawsuit exists. People normally expect, for instance, the legal process to have the intention that two parties appear before the judge to have their dispute settled, not to enlarge the dispute. Yet Trump has been capable of exploiting some characteristic in the structure of a court case, something intrinsic to the court case, even as it causes the law to deviate from its proper intentions.

In what follows, I consider ways in which populists take advantage of the judiciary by playing with primordial affordances intrinsic to the structure of the court case. These

7. On this theatrical role with regard to the audience at large, see Y. Horsman, *Theatres of Justice: Judging, Staging, and Working Through in Arendt, Brecht, and Delbo* (Stanford, CA, 2011)
8. On this see the legal expert J. D. Zirin, *Plaintiff in Chief: A Portrait of Donald Trump in 3.500 Lawsuits* (New York, 2019).
9. J. D. Zirin, 'The Lawsuit That Changed Donald Trump's Life,' *Slate*, September 24 2019, https://slate.com/news-and-politics/2019/09/plaintiff-in-chief-excerpt-donald-trump-first-lawsuit.html.

affordances entail that winning a case establishes truth not because of any hermeneutical or rational standard, but because of the very fact that one comes out of a test – one etymological origin of *trial* – as a winner. Defining populists' use of this primordial affordance as play, I argue that they approach the law not as a rule-bound ritual to establish truth but a game to be won or lost. If these affordances are indeed intrinsic to the judiciary, populists' play with the judiciary demonstrates it has no real defense against this play. It may even be the case that through such play, the supposed reasonableness of the judiciary – the result of a long-term historical struggle – is eclipsed by a much more brutal, ancient characteristic of its constitution. In my conclusion I propose that a defense against this threat, and its consequences for the *Rechtsgefühle* of a populace, requires a better understanding of how the notions of play and game affect the judiciary in the contemporary mediatized situation. This better understanding could be offered by a new component in the interdisciplinary field of law and the humanities.

II. Historical origins of the lawsuit as a wager, a match, or a chance

Any "scorched earth tactics" in a legal case, as a means "to win out against whomever one considers to be the adversary" is perhaps a particular flaw of the U.S. judicial system, as Zirin suggested. The possibility of such tactics may also reflect the historical origins of jurisdiction. These origins were sketched by Johan Huizinga in his 1938 study *Homo Ludens: proeve eener bepaling van het spel-element der cultuur - Homo Ludens: essay to determine the play-element in culture*.[10] According to Huizinga, the lawsuit is a matter of "pure agonism," a struggle that is historically and formally captured in the generic forms of chance, match, and wager. These terms relate to distinctive aspects of the judiciary. A wager is a challenge to someone or something else, captured, for instance, by the phrase "see you in court!" In the legal context the challenge to bring a case before a judge is future oriented in two ways: the challenge is to take a case to court (the case has not started yet), and implicitly the challenge implies confidence in the case's outcome. A match consists in a competition between equal partners that takes place in the present. In the legal context this is always dramatic: one never knows what the developments of a case are going to bring. A game of chance consists in an arbitrary distribution that will favor one of the parties. In the legal context a truly arbitrary outcome may seem undesirable, as if the outcome is only the result of throwing the dice. Still, as Huizinga argues, this is one origin of the judiciary in the sense that whatever the outcome is, one has to subject oneself to it. When the outcome of a case is up to chance, it is by implication already something of the past since whatever the outcome is, one has to subject oneself to it. Or, the outcome is already known insofar as it will not be 'truth established' or 'justice served' but a win or a loss.

10. J. Huizinga, *Homo Ludens: proeve eener bepaling van het spel-element der cultuur (Haarlem 1940)*. Huizinga's study was translated into English via the German translation, which is why I use the Dutch original in the second edition from 1940, republished in 2008. There are currently two new translations in English in the making.

The chapter in which Huizinga deals with the issues is called 'Spel en rechtspraak' and although the current English translation is 'Play and Law', the title means: 'Play and jurisdiction'. This title implies Huizinga is not talking about the fundamentals of law, or the system of law, but is considering how law speaks, in court, in a *rechtsgeding*, with the term *geding* originally meaning a gathering, but also conflict, or agreement, hence a court case – a trial or process. The historical origin of jurisdiction, in Huizinga's reading, consists in a battle, known in classical Greek as ἀγών (*agon*). Legally, this battle takes place in a sacred meeting of opposing parties, with a judge as arbiter (114), in a particular space (a court), with predetermined roles (also involving dress codes), and good faith adherence to the rules of the game by all parties (115-116). Then Huizinga comes to the core of his argument:

> What is at stake in the procedure in front of a judge, in all times and in all circumstances, is the intense, the vehement, the exclusive desire to win, so much so that the moment of agon cannot be eliminated, not for a minute. (my translation; 116).

The radical nature of Huizinga's contention may be clear: there is no moment whatsoever, no circumstance, in which concern for winning is not somehow part of the judicial game. Moving further back in time, Huizinga consequently argues that the element of play in in sofar as legal case can be won or lost, has a historical prefiguration in games of chance. Huizinga defines a moment in time when decisions "by means of oracle, divine judgment, throwing the dice, that is through play, [. . .] or by means of judicial pronouncement, are understood as one complex" (my translation, 117). This complex is the point of departure from which Huizinga will define three basic legal generic forms: chance, match, wager.

Throwing the dice or drawing a lot is a game of chance, also as a matter of fate or *Schicksal*. Huizinga notes in this context that the Dutch term *lot* both equates with English *fate* and connotes the *lot* in 'lottery'. Implicitly arguing against Carl Schmitt's definition of the relation between law and politics, Huizinga rejects the argument that human jurisdiction finds a historical source in divine judgment.[11] He suggests that both divine and human legal judgment have their origin in an agonistic decision, such as the drawing of a lot. The difference from Schmitt's standpoint could not be more fundamental. For Schmitt, state law has a transcendental, theological underpinning: the state's sovereignty is transferred from God. For Huizinga, state law has an origin in something that precedes divinity, namely contingency.

Secondly, Huizinga considers how issues of justice have historically been settled through physical contests like battles and fights, the outcomes of which determined which participant was right (122). To be sure, such an outcome could be seen, and historically has been seen, as the consequence of a divine judgment. But here as well, Huizinga's point is more basic. It is first and foremost the physical battle itself that is decisive.

11. See C. Schmitt, *The Concept of the Political*. Translation and intro George Schwab (Chicago, 1996).

Thirdly, and finally, Huizinga discusses the relation between jurisdiction and wager. He mentions the linguistic connection between the Dutch term *wedkamp* (match, fight, battle) and *weddenschap*: wager. A party to a legal case tries his luck, or wagers his right when challenging his opponent to prove otherwise. This logic of trial-as-wager also translates itself to the behaviors of a trial's spectators. Particularly in England, Huizinga recognizes, it has long been common for the public to place wagers on the outcomes of court cases, as happened for instance when Anne Boleyn and her accomplices were brought to trial (Huizinga 124).[12]

Huizinga's definition of the lawsuit as basically a battle is problematic to some legal scholars. For instance, Jack L. Sammons contends:

> that when Huizinga says *law* he means *lawsuit*, or, as I have termed it, the legal conversation [. . .] we are not discussing the state's creation and enforcement of social rules (and whether or not they are just ones), but the process by which the meaning of those rules are determined for their enforcement: a conversational process that operates as a restraint on the state's use of force, as a reduction of the general to the particular, and as a continuation of the rhetorician's ancient fear of written law.[13]

The "legal conversation" is a process here that has a civilizing role. In the eyes of Sammons, the lawsuit restrains the force of the state, and opens up law to a (rhetorically invigorated) conversation that avoids the instrumental application of written laws. Sammons' conception of the lawsuit as a conversation may be sensible, even laudable. In Sammons' view (much like Zirin's), litigants who do not care for conversation but simply come to win their case abuse the law's proper intentions. Huizinga, however, would not see this as abuse; he would see it as a vestigial, but intrinsic characteristic of the lawsuit.

As said, Huizinga considers a match and a wager to be connected due to their coincident etymological origin, in Dutch: "*wed*kamp" (match) and "*wedden*schap" (wager) – analogous to the German *Wettbewerb* and *Wette*. The element of battle becomes explicit in the connection between "wed*kamp*" (match) and "woord*kamp*": a battle of words, like Inuit song battles, for instance (somewhat similar to what nowadays are called 'rap' battles). Such word-battles may seem to prefigure an actual court case, but conceptually speaking they are analogous, rather, to physical battle. As a specific genre, word battles are of interest in a broader cultural context since they are examples of what Greta Olson calls *legality* (on which more below). As for jurisdiction, I want to focus on the distinction between the aspect of jurisdiction being a match, whether physical or verbal, or it being a wager. These two, in turn, are distinct from the play of chance.

A wager, a battle (or match), and chance do not appear to be very suitable instruments of justice. However, they remain as a lingering historical potential in the structure of

12. Cf. M. S. Schauer and F. Schauer, 'Law as the Engine of State: The Trial of Anne Boleyn,' *William and Mary Law review* 22 (1980), pp. 49-84.
13. J. L. Sammons, 'Justice as Play,' *Mercer Law Review* 61 (2010), pp. 517-550. In talking about the "rhetorician's ancient fear of written law," Sammons is referring to Peter Goodrich, 'Law,' in Thomas Sloane (ed.), *Encyclopedia of Rhetoric* (Oxford, 2006), pp 417, 422-23.

court cases that can be actualized. In fact, when the populist endeavor is to use this potential, such use is made possible by an ambiguity intrinsic to the construction of the modern judiciary; this ambiguity is captured by the dialectically related terms *reassurance* and *uncertainty*. If the task of the judiciary is to come to a decisive and potentially divisive verdict, this verdict is underpinned by the *reassurance* that all parties have a fair and an equal chance beforehand. At the same time, any verdict must also be a matter of *radical uncertainty* in that all parties concerned, including the judiciary, cannot know in advance what the trial will bring. Here the outcome of the procedures remains a matter of chance which involves inequality and, ultimately, a splitting of the parties involved.

The ambiguity that is the result of this dialectically related pair of legal reassurance-uncertainty has a perverse counterpart, when a fair chance does not exist because the legal system is biased, or when the outcome is fixed beforehand for whatever reason and the trial does not consist of a real test but is simply a ritualistic going-through-the-motions. As for the first, the U.S. criminal justice system, for instance, often has been biased against African Americans. Globally, all marginalized groups that have experienced discrimination have mostly been at a disadvantage when brought to court. As for the second, examples abound where the judiciary acts in the service of totalitarian and quasi-totalitarian powers. For instance, in Russian jurisdiction, both that from the Soviet period and the contemporary situation, many cases are decided beforehand and only consist in their ritual handling. In such cases, the legal uncertainty that is dialectically required at the start of a process is turned into its perverse opposite.[14] The treatment of the opposition leader Aleksei Navalny by the Russian judiciary is just one case in point. When he was poisoned by Russian state agents in 2020, he returned home when recovered in January 2021 and was immediately arrested and imprisoned – and even in prison he was brought to court when in February 2022, Russian authorities accused Navalny of of having insulted a judge and having stolen $4.7 million (€4.1 million) from donations to his political organization.

As we will see, this perverse counterpart of jurisdiction's intrinsic dialectical ambiguity is relevant in the play of populists with the judiciary. Yet, the constitutive ambiguity of the lawsuit – the dynamic between reassurance and radical uncertainty –facilitates populists' calculated reliance on the generic forms of wager, match, and chance: the historically defined affordances of the trial form. Below, I will examine three paradigms that, when considered individually, illustrate the persistence of Huizinga's three archaic affordances in the modern judiciary: the former Italian primeminister Silvio Berlusconi, the former U.S. president Donald Trump, and the former Brazilian president Jair Bolsonaro. While Berlusconi's tactics could be considered in relation to either wager, match or chance, this article uses his example to demonstrate how relying on the form of a wager plays out in court. Trump, likewise, could illustrate all three possibilities. Here,

14. The lawsuit becomes a "comedy" in Goethe's sense: "I call this a comedy; because, probably, everything had been already prepared when the public exhibition took place. The judges knew what they had to say, and the parties what they had to expect." Goethe *Italian Travels*, Vol. 12, Oct 3, p. 162. A sobering note here is that Goethe preferred this comedy over the German "hobbling law affairs."

I will argue that Trump's engagements with the law resonate with Huizinga's account of the trial's match-like quality. Bolsonaro's example, finally, could be read to exemplify qualities both of wager and match, but here elucidates a legal strategy that banks on chance.

III. Wager – or the asymmetry in *Rechtsgefühle*

On the face of it, Blaise Pascal's famous proposal in favor of a 'wager on God' – "a watershed in the philosophy of religion" – does not appear to have much relevance for the judicial issues considered here.[15] Conceptually, however, Pascal's argument is distinctly relevant. In response to the question whether to believe in the existence of God, Pascal argues that it would be wise to put one's wager on God even if one does not believe in his existence. The reason is that God will offer infinite reward to those who believe in Him, whether their belief in is expressed sincerely or as a matter of pretense. Those who refuse to believe in him, however, will burn in hell. For non-believers the rational choice is to wager on God, then, and trust their finite lives to God in the light of an infinity that, in Pascal's considerations, is embodied in a trustworthy and reasonable divine power. The term that Pascal uses to name this wager is *pari*: something in between an estimated guess and a calculated gamble.

In the context of our argument, an analogous wager on the judiciary implies the following. If a system is (largely) fair, those who *believe* in the system will expect to be dealt with fairly when brought to court. Still, when a fair (reasonable) judicial system is in place, people may not believe in this system. Those who do not believe in the system can at least wager on that system, if we follow Pacal's reasoning, since the system will deal with them fairly *by rewarding them*. To be sure, if the system is fair, it must be formal, reasonable and trustworthy to all: a truly fair justice system, that is, will judge indifferently of where people have placed their cards. From the side of the non-believers, however, their wager is not that they will be judged indifferently; their wager is that they will be rewarded. This is one aspect of how populists engage in court cases. They may not believe in the system of law really, but their calculation is comparable to Pascal's *pari* – this mixture of an estimated guess and a calculated gamble that does not imply too much risk.

Let us consider the case of Berlusconi (1936—) in closer detail here. Berlusconi, a popular yet controversial businessman and media tycoon, first rose to prominence through his financial support of the AC Milan soccer team, which carried the team to national, European and global successes in the late 1980s, and early 1990s.[16] Riding a wave of popularity, Berlusconi turned to politics. A right-wing populist, Berlusconi established his

15. Cf. A. Hájek, 'Pascal's Wager,' in Edward N. Zalta, ed., *The Stanford Encyclopedia of Philosophy* (Stanford CA, Summer 2018); Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/sum2018/entries/pascal-wager/

16. For an overview of the thirty-one years that Berlusconi was the president of AC Milan since 1986, see J. Sherman, 'The Devil's Odyssey: How Silvio Berlusconi Turned AC Milan into a Superpower,' *These Football Times – The Magazine*, 19-08-2019, https://thesefootballtimes.co/2019/08/19/the-devils-odyssey-how-silvio-berlusconi-turned-ac-milan-into-a-superpower/.

own party, *Forza Italia*, in 1993. Winning elections and allying himself with the *Alleanza Nazionale*, a semi-fascist party, Berlusconi served as primeminister of four Italian governments: from 1994 to 1995, from 2001 to 2006, and from 2008 to 2011. His dominance in Italian politics in two decades led analists to define his rule as *Berlusconism*, combining a flexible mix of populism, neo-liberalism, anti-communism, and the personalization of politics in Berlusconi's figure. In the course of his career as a businessman and a politician, Berlusconi was defendant in close to thirty court cases, with only one leading to a conviction.[17] The accusations included attempting to overthrow the state, associating with the mafia, bribery, fraud, illegal financing of political parties, corrupting judges, and false accounting. Several cases took place in multiple stages as their verdicts were appealed to higher courts for reconsideration. In many of these, due to lengthy legal proceedings, the legally imposed time limit to deal with the case expired.

Clearly, Berlusconi has lawyers who are experts in finding all the possible formal loopholes and escape routes in Italian law, and who know especially well how to drag out the proceedings to Berlusconi's advantage. Meanwhile, it is well-known that Berlusconi considered the Italian legal system to be ruled by leftist judges that would not give him a fair chance. After a conviction in 2013, he found the judiciary "uncontrollable and uncontrolled," accusing it of persecuting him with a "fury that has no equal anywhere in the civilized world".[18] In Berlusconi's rendering, prosecutors and judges "want to eliminate me because for 20 years I have been the only obstacle between the left and power." He reassured his supporters that his party will "fight in Parliament to enact a reform of the justice system that cannot wait any longer."[19]

Still, despite not believing in the fairness of the existing system, Berlusconi could time and again wager on the system's fairness to deal with him indifferently, justly, formally, providing him *de facto* with the possibility to not be convicted – and in this sense to reward him. The positive results for Belusconi may be clear. Nevertheless, subjects who wager on the judiciary illustrate a troubling asymmetry in the *Rechtsgefühle* of a populace. For those who do not believe in a fair system of justice, and who do not support it, but who just pretend they do and wager on the handling of their case, there is always the option of acting either in accordance with the system or against it, or not caring about it. It is an option that subjects who believe in the fairness of law do not have. Playing a game with the system is out of order for them, or a matter of bad form. Indeed, when Rudolf von Jhering formulated the very idea of collective feelings of justice and their importance for a functioning *Rechtstaat*, citizens who desired justice according to their rights were at the center of his considerations.[20] In contrast, those who do not really

17. Wikipedia may be a source that should be dealt with cautiously, but the Italian lemma presents a well-documented overview: 'Procedimenti giudiziari a carico di Silvio Berlusconi'; https://it.wikipedia.org/wiki/Procedimenti_giudiziari_a_carico_di_Silvio_Berlusconi
18. L. Davies, 'Berlusconi rails against 'uncontrollable' judiciary after criminal conviction upheld,' *The Guardian*, Friday August 2, 2013.
19. E. Povoledo, 'Berlusconi Rallies Supporters, With Defiant Words for Judges and Prosecutors,' *New York Times*, May 11 2013.
20. R. von Jhering, *The Struggle for Law* [1879], trans. from the 5th edition in German by John J. Lalor, (New Jersey, 1997), p. 107.

believe in a fair system of justice can consider the judiciary as something to bet on and to play a game with. This option is possible partly because of the conceptual dialectic of reassurance and uncertainty inherent in a fair system of justice, but more fundamentally because the origin of the court case consists in a wager.

The possibility to play a game with the judiciary need not only be through a wager, though, for one other forms of play is the match. So, what happens when populists seek to wield the judiciary as a weapon in a match in which the particulars of a case are not central, but the litigant's intention is to attack either the other party involved, or the judiciary.

IV. Match and the logic of attack – or the reverse side of 'legality'

Roy Cohn (1927-1987) was a U.S. lawyer who gained fame at age twenty-four as the state prosecutor in the Rosenberg trial, which resulted in the 1953 execution of Julius and Ethel Rosenberg for espionage. This fame propelled him into the machinery of U.S. senator Joseph McCarthy that targeted so-called communist infiltration of the United States. Both McCarthy and Cohn lost their power in the late 1950s, after which Cohn began using his talents as a private-practice lawyer, serving as a 'fixer' in his clients' dubious affairs. Real estate developer and landlord Donald Trump happened to meet Cohn in the early 1970s, after Cohen had made a reputation for himself as a successful lawyer whose trademark was to win cases not on the basis of content but by intimidating the opponent. The first time Cohn was legal representative for the Trump business concerned a case in which Trump senior was accused of violating a component of the Civil Rights Acts of 1968 known as the Fair Housing Act. In what seemed to be an unwinnable case, the younger Trump was looking for someone who could defend the family business, and Roy Cohn proved to be the man for the job. He went into the attack.

If we consider the work of the judiciary as a match, it is a match that can be played by the book, by seeking the limits of the rules of the game, or by cheating. In Zirin's analysis, Trump has shown a "consistent antagonism towards legal standards – normative rules that he has regarded his entire professional life as made to be broken."[21] As this quote suggests, in the legal game, Trump does not follow the rules of fair play. Rather, Trump bends the rules or tests the limits of the rules in order to win. On the occasion of a documentary made about Cohn's life – Matt Tyrnauer's *Where's My Roy Cohn* (2019) – Michael Kruse described him as:

> indicted four times from the mid-'60s to the early '70s—for stock-swindling and obstructing justice and perjury and bribery and conspiracy and extortion and blackmail and filing false reports. And three times he was acquitted—the fourth ended in a mistrial—giving him a kind of sneering, sinister sheen of invulnerability.

The passage affirms that one of the effects of repeatedly surviving court cases is that someone acquires the aura of invulnerability. This invulnerability is not necessar

21. Zirin, *Plaintiff*, p. 1.

limitless; Cohn was disbarred at the end of his career. By that time, however, he had already inflicted much damage on others, meanwhile compromising not so much 'the' collective *Rechtsgefühle* of 'the' United States populace but at least subsets of that populace.

For instance, the case in which Cohn represented both Trump senior and junior in the early 1970s concerned African Americans to whom the Trumps had charged higher rents in order to guarantee a white majority of renters in their buildings. Cohn's strategy was to sue the government for defamation, which led to a mediation, a fine, and some reassurances from the Trump side that this would not happen again. Trump was not declared guilty because there had not been a real case. This left all those who were discriminated against, who may have previously had reasons not to entirely trust the United States judiciary, with even more reasons for distrust.

In the process, Trump had learned how to win lawsuits. According to Sam Brown, who calls Roy "a master of situational immorality," the simple strategy was: "1. Never settle, never surrender. 2. Counter-attack, counter-sue immediately. 3. No matter what happens, no matter how deeply into the muck you get, claim victory and never admit defeat."[22] It is a strategy affirmed in a 2020 documentary made by Ivy Meeropol, *Bully. Coward. Victim: The Story of Roy Cohn*. Reflecting on her documentary, Meeropol suggested that a historical contextualization of Cohn should not make audiences forget that the cases in which he was involved always concerned "real issues that are hurting real people."[23] As the grandchild of the Rosenberg couple Meeropol's knowledge of Cohn's tactics was affectively charged. Less affectively charged were evaluations by members from within the judiciary, which confirmed that Cohn's actions were "prosecutorial misconduct."[24] Meeropol's documentary, further, shows another troubling aspect of Cohn's life: his professional trajectory up until his death in 1986 was closely intertwined with U.S. American politics. Historian Eric Hobsbawm makes the same point in 'Epitaph for a villain: Roy Cohn'.[25] In Hobsbawm's analysis, Cohn was not just a sign of the times but a force influencing the times.[26]

One instance of Cohn and Trump being signs of the times and influencing the times, is that both, besides being a lawyer and real estate developer, became media-figures.

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22. M. Brown, 'How Donald Trump and Roy Cohn's Ruthless Symbiosis Changed America,' *Vanity Fair*, June 28 2017.
23. Ivy Meeropol in conversation with her father, one of the two sons to the Rosenberg couple; https://www.youtube.com/watch?v=gD9ufYUseHU.
24. B. Dunkins, 'Unsealed Rosenberg Grand Jury Documents May Show Perjury: Initial testimony of Ethel Rosenberg's brother does not name her as a spy for the Soviet Union', *GW Today*, July 20 2015; also see David Vladeck's comments in *'Rosenberg Grand Jury Files Released:* **Ruth Greenglass Testimony Directly Contradicts Central Trial Charge against Ethel Rosenberg;' https://nsarchive2.gwu.edu/news/20080911/index.htm.**
25. The article was published first in The Independent Magazine October 28 1989, in a series called 'Heroes and villains', later republished in E. Hobsbawm, *Uncommon People: Resistance, Rebellion and Jazz* (New York, 1998).
26. Cf. J. G. Crossley on Hobsbawm and Cohn, *Jesus in an Age of Neoliberalism: Quests, Scholarship and Ideology* (London, 2012), p. 78.

Encounters with the law did not compromise their public personas; in fact, Cohn and Trump could even use these encounters to their advantage. In this context, we witness a reversal of what Greta Olson defined as 'legality'. Responding to Richard Sherwin's argument in *When Law Goes Pop* (2000), Olson took issue especially with the subtitle of Sherwin's study: *The Vanishing Line between Law and Popular Culture*. In his study, Sherwin suggests that this "vanishing line" threatens to turn lawsuits into a spectacle, corroding the heart of the judiciary. In response, Olson argues that the issue is not so much a vanishing line, but rather a multiplication of what people feel to be law in a society with a more diverse legality, or a plurality of legalities. This is how she defines the latter:

> Law is the dissemination of legal processes in verbal, visual, haptic and, to a large extent, medial forms. Law is then what I call "legality." It is the expression of state and non-state notions of normative order, rules of behavior, and concepts about how to resolve conflicts. Law as legality is also expressed in people's affectively experienced legal identities.[27]

Elsewhere Olson confirms:

> there are forms of **legality** – expressions of law in the largest sense – to which people feel more affectively drawn than to state-enforced law. Individuals' and communities' *Rechtsgefühle* cause them to identify with alternative legalities more than with "the law" that currently binds their behavior.[28] (emphasis in text)

Olson describes a shift, then, in a media landscape that is connected to, but also distinct from 'the law' or 'state-enforced law', and by means of which people's feelings of what is legal, or what people feel to be legal or just, is more informed, influenced and shaped by cultural media than through the legal system. In effect Oslon argues for *alternative legalities*, with which parts of the populace identify more easily and that have an alternative, affectively determined binding force.

Still, there is a perverse flip side to this deeply mediatized situation. It is not difficult to see how in their dealing with the law, the likes of Trump have been influenced by the affordances of the law in their overlap with the affordances of the contemporary media landscape. This may include, for instance, that the lawsuit is somehow not experienced as a thing in itself but rather as an extension of a larger, mediatized setting. More awkwardly, it is easy to see how this particular media effect undermines the kind of legality that Olson envisions. Considering lawsuits as a match or a battle dominated by a win-or-lose mentality changes the lawsuit itself into something that comes to shape a media-landscape. The consequences for the *Rechtsgefühle* of a citizens may be equally vast when feelings of justice are more determined by who comes out of a lawsuit as a winner or a loser than by who was judged to be right or wrong. This is to say that for parts of the populace, in the contemporary situation, feelings of justice may be determined by what Huizinga identifies as an archaic element of jurisdiction: the outcome of a match.

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27. G. Olson, *From Law and Literature to Legality and Affect* (Oxford, 2022), p. 64.
28. Olson, *From law and Literature*, p. 126.

If the reduction of the lawsuit to a win-or-loss logic is one aspect of a "lusory attitude" toward the law, yet another one is the reduction of lawsuits to chance, as if it were a lottery, a game determined by throwing the dice, as in a casino or a family board game. My last example of how populists play with the judiciary indeed concerns a family of which all the members appear to be playing a game with lawsuits in a comparable fashion: Brazil's Bolsonaro family, with the former president Jair Messias Bolsonaro as its head.

V. Chance – or the brutal side of the lusory attitude

According to analysts and critics, the Brazilian legal system is currently being threatened by politicians, administrators, legislators, and parts of the populace alike, through what in the context of Bolsonarism (just like Berlusconism indicating the personalization of neoliberal forms of politics) is defined as a form of "institutional warfare".[29] Examples of this institutional warfare include the protests by Bolsonaro supporters who came together before the Federal Supreme Court in Brasília wearing white masks and carrying torches on May 30, 2020. This was followed by a bigger event a day later when Bolsonaro joined the protesters demanding that the Federal Supreme Court be shut down. Slightly more than a year later, on the Brazilian Independence Day of September 7, 2021, the Federal Supreme Court was threatened explicitly by Bolsonaro, addressing protesters in Brasília and Sao Paolo. Many feared Brazil would experience an insurrection comparable to the January 6 storming of the U.S. Capitol Building by supporters of Donald Trump in 2021. This materialized on January 8, 2023. In a climate of serious threats not only by the president but also by senior officials, one of the members of the Supreme Court, Justice José Celso de Mello compared the Brazilian situation to that of the last days of the Weimar Republic, implying that Bolsonarism could lead to Bolsonaro's take-over of the entire judicial system.[30] When Celso de Mello said that that "With due regard, the 'snake's egg,' [. . .] seems to be about to hatch in Brazil," he referred to an old cultural topos but also appeared to refer to Ingmar Bergman's 1977 movie *The Serpent's Egg* about the rise of Nazism in Germany. If in Olson's view *legality* encompasses a plurality of legal sentiments, this example provokes the question whether the reduction of plurality to one dictatorial form of law may equally well fall under the umbrella of legality.

It is clear that Bolsonaro and his allies do not have much respect for the existing system of law. A president who joins demonstrators in demanding the closure of the Supreme Court, or who on the nation's Independence Day makes thinly veiled threats against Supreme Court justices, no longer pretends to have any faith in the law's major institutions. One could read Bolsonaro's engagement with the judiciary as a match or a battle, with opposing parties in court. Yet Bolsonaro and his followers are threatening the legal system from a political side, caring little for what the existing system of law offers them, or grants them. I would like to suggest that in caring little for the existing legal game, its

29. E. P. N. Meyer and T. Bustamante, 'Judicial Responses to Bolsonarism: The Leading Role of the Federal Supreme Court,' June 16 2020; https://verfassungsblog.de/judicial-responses-to-bolsonarism-the-leading-role-of-the-federal-supreme-court/.
30. M. Bergamo, 'Supreme Court Justice Compares Brazil to Hitler's Germany and Says Bolsonaro Supporters Want 'Abject Dictatorship',' *Folha de S. Paolo*, June 1 2020.

rules, and its outcomes, they consider lawsuits as a matter of chance. This holds especially for Bolsonaro and his family.[31]

Since Bolsonaro and his family have not explicitly stated that they consider lawsuits only as a matter of chance, the numbers will have to speak for themselves. Checking the sites (September 2022) of the Brazilian Ministry of Law, the Supreme Federal Court, and the courts in Rio de Janeiro and São Paolo, where the Bolsonaros do their business,[32] it appears that Jair Messias Bolsonaro, the former president and a member of Congress from 1991 to 2018, has been a plaintiff or a defendant in somewhere between 426 or 499 cases.[33] His wife, Michelle de Paula Firmo Reinaldo Bolsonaro, was involved in three cases. One of these concerned a ruling by the Federal Supreme Court prohibiting nepotism in government hiring. Following the court ruling, Michelle was fired in 2008 from her position as her husband's private secretary, then a member of Congress, who had raised her salary to unexplainable heights. Bolsonaro's second ex-wife, Ana Cristina Siqueira Valle, has been involved in 109 lawsuits. Bolsonaro's oldest son, Eduardo Nantes Bolsonaro, a member of the Chamber of Deputies of Brazil, in 86; his second son, Carlos Nantes Bolsonaro, a Rio de Janeiro city councilor, in 24 lawsuits. His third son, Flávio Nantes Bolsonaro, a lawyer and member of the Brazilian Federal Senate, has been involved in 120 lawsuits.[34] The youngest son, Jair Renan Valle Bolsonaro, has been involved in two lawsuits. While it may be a coincidence that one family is involved in such an impressive number of court cases, the pattern and the scale of the numbers also open an alternative route. What if these cases, taken together, suggest that the Bolsonaro family considers the law to be a game of chance, nothing more, nothing less?

The Bolsonaro family's dealings with the law offer an opportunity to consider how chance could be an archaic element of jurisdiction revitalized by populists. When Huizinga traced one origin of lawsuits in the workings of chance, he considered the issue anthropologically, studying cultures that frame the element of chance as a divine or magical force, such that chance was "part of one complex" with (ordained) fate. One had to

31. I was much helped, here, by Dr Luana Renostro Heinen and Marcos Neto de Cordova, who introduced me to the legal specificities of the Brazilian judicial system. An overview of the Brazilian judiciary system and what threatens it can be found in A. Zimmermann, 'How Brazilian Judges Undermine the Rule of Law: A Critical Appraisal', *International Trade and Business Law Review* 11 (2008), pp. 179-217.
32. Supreme Federal Court, https://portal.stf.jus.br/processos/list; *Tribunal de Justiça Sao Paolo* - Court of Justice (1st Instance), https://esaj.tjsp.jus.br/cpopg/search; *Tribunal de Justiça do Rio de Janeiro* - Court of Justice, https://esaj.tjsp.jus.br/cpopg/show;
33. https://www.jusbrasil.com.br/processos/nome/28584221/jair-messias-bolsonaro. I leave aside here the six charges that have been brought to the International Court of Justice in the Hague against Bolsonaro since 2019; see 'Bolsonaro é denunciado pela 6ª vez no Tribunal Penal Internacional; relembre todas as acusações,'; https://www.brasildefato.com.br/2021/10/12/.
34. This involves the Supreme Federal Court - 21 lawsuits, https://portal.stf.jus.br/processos/listarPartes.asp?termo; TJRJ - Civil - 4 lawsuits; TJRJ - Criminal - 2 lawsuits; TJRJ - Business - 1lawsuit; TJRJ - Public Treasury 8 – lawsuits; TJRJ - Court of Justice (2nd Instance) - 16 lawsuits, https://www3.tjrj.jus.br/consultaprocessual; TJSP - 1 lawsuit (Compensation for Property Damage), https://esaj.tjsp.jus.br/cpopg/show.do; Public Civil Action - 65 lawsuits, https://www.jusbrasil.com.br/processos/nome/28561260/.

accept the roll of the dice, the luck of the draw. Likewise, the modern judiciary can be played with, as if in a game of chance, insofar as the question is not whether one is guilty or not guilty, but a winner or a loser. In many instances, high-level government officials, even those at the very top, have been brought to court and have escaped because they could not conclusively be proven wrong or guilty since the judiciary system offered them a chance to survive prosecution. In this context, chance can be considered in two different modalities. Firstly, one can be brought to court not caring what the outcome is because it will have no effect anyway. Secondly, one can look for legal loopholes, ways of bending and skirting the rules of the game, to increase one's chances of legal victory.

Such loopholes point to the importance of (fore-)knowledge as a means to play with chance to one's advantage. Those who know the rules to a game in which chance plays a role have an advantage over those who do not. Even though players' moves in Monopoly, for instance, are determined by a roll of dice, those who know where to buy properties have an advantage over those who don't, regardless of what the dice tell. In the case of Brazil's judiciary, government officials gain an advantage from knowing how the legal system is organized and what their options are in court. They know, for instance, how the so-called *foro privilegiado* works, a legal prerogative that comes with official positions. Under the Brazilian Constitution, mayors, judges of the first instance, members of the Public Ministry, and state representatives can only be judged in second instance courts. Governors are brought before the Superior Court of Justice. The president of the Republic, the vice-president, ministers of State, senators, and federal deputies can only be judged by the Supreme Federal Court. The case of Flávio Bolsonaro proves how this can be put to one's advantage. The latter was accused in 2018 of participating over a decade in *rachadinhas*: salary transfers that are aimed at laundering money, often through ghost accounts. The accusation concerned acts he had supposedly committed when he was a Deputy in the Legislative Assembly of the State of Rio de Janeiro. As a result, the lawsuits were initiated by the *Tribunal de Justiça do Rio de Janeiro*. Meanwhile, however, Flávio Bolsonaro was elected as senator in 2018, which meant he was entitled to privileged jurisdiction. In November 2021, the appeal by the Public Ministry of Rio de Janeiro that Flávio Bolsonaro be brought to court was rejected by the Superior Tribunal de Justiça of the Supreme Federal Court. Before this, a website offered the possibility to bet on the question: "Will Flávio Bolsonaro be convicted in the *rachadinhas* scandal by the end of 2021?"[35] 90% of participants wagered on "no" and 10% on "yes"; the no's had it.

VI. Law and the humanities: playful legalities

According to the World Justice Project's 'Rule of Law Index' – an independent organization located in The Hague, Washington DC, Seattle, Singapore, and Mexico City – the rule of law, defined as 'regulatory enforcement', has been declining in Brazil from a mean of 0.51 in 2015 to 0.48 in 2022.[36] There a telling discrepancy, however, between

35. https://futuur.com/q/132136/will-flavio-bolsonaro-be-convicted-in-the-rachadinhas-scandal-by-the-end-of-2021
36. See https://worldjusticeproject.org/rule-of-law-index/global.

civil justice and criminal justice. In 2022, the average for the first was 0.50 (down from 0,53 in 2015), and for the latter 0.33 (down from 0.37 in 2015); a figure that brings Brazil in the orange-red zone of the index. In contexts where the guilty almost routinely act with impunity, I would like to suggest that legality, as conceptualized by Olson, acquires a game-like quality. In terms of playing a game, the issue is not what is ethically just, but what one can get away with as a matter of chance. Populists provoke the question of how the judiciary might best defend itself against this kind of play.

The answer to this question cannot come fully from within the domain of law itself because determining the answer requires comprehension of play and game in the contemporary situation – notions that are studied in greater depth in the humanities. To date, however, the most influential theory of relations between law and the humanities is what Olson defines as "the idealist strand of Law and Literature research" that entails an effort "to restore a presumably lost ethics to adjudication and legal processes more generally. It may also respond to a sense of loss caused by the historic differentiation of legal studies from the Humanities."[37] Figures studying this both ethically and empathically determined relation between law and literature include Martha Nussbaum, James Boyd White, and Jeanne Gaakeer. Olson likewise affirms the value of the humanities in solving legal problems, but instead of expanding on this idealist strand, Olson considers another problem, namely how people are affectively related to law and why it matters to them.

In the idealist strand, a major ethical danger is the instrumental implementation of law by state officials. With the concept of legality, Olson, in a study that is underpinned by both cultural studies and legal anthropology, aims to takes seriously people's need to feel connected to law. In Olson's view this feeling of connection cannot only concern state law. With legality she suggests that, affectively speaking, a plurality of feelings of justice binds people in different ways to law. Yet with growing global pressures on the rule of law by corrupting forces – forces both political and criminal – the problem is yet again different. If corrupting forces would rather play with the judiciary or with the rules of the legal game, there are consequences involved for people's feelings of justice, both in terms of legal procedures and in terms of what they feel to be just.

To be sure, a lusory attitude toward jurisdiction may have innovative effects, or may even be a matter of law's "becoming".[38] Still, there is also a brutal side to the lusory attitude, when it includes the infliction of pain and of destruction. A historical reconsideration of play in the legal domain will show that there have been many cultures at a certain point in time where the infliction of pain and destruction was "part of the game". Still, in the course of time, most legal systems and the judiciary came to work against such lusory infliction of pain and destruction. Populists, however, as they play with the modern judiciary through the generic forms of wager, match, and chance, evade accountability for the pain and destruction they cause.

In response to this, the legal situation may be helped by the humanities with its expertise on people's ethical and empathic potential. A second option, as Olson argues, is that

37. Cf. G. Olson, 'De-Americanizing Law-and-Literature Narratives: Opening up the Story,' *Law & Literature*, 22, (2010), pp. 338–64.

38. This was one aspect of the argument in E. Mussawir, *Jurisdiction in Deleuze: The Expression and Representation of Law* (London, 2011).

the humanities can explain how people feel to be bound to law, in different forms of legality that are influenced by popular culture's role in people's daily lives. A third option is that the humanities can teach the modern judiciary how its rules find their origin in play – and, consequently, how those rules can still be played with today. Here, the study of what I propose to call *playful legalities* can serve, and care for, a judiciary that understands its lusory characteristics. Through such understanding the judiciary might be more capable of defending itself against malicious play. More in general, understanding the lusory characteristics of law, both the judiciary and the general populace can better respond to our era's diverse, sometimes disparate, often desperate calls for justice by providing all with an equal and fair chance.

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