

For the Record Media as *Nomoi*

Angela Condello

1 Theme and Vocabulary

Scena. We are experiencing an explosion of recording (Ferraris 2015), which generates a proliferation of ontological and epistemological dimensions. For instance, our life *here and now* and our life in the *datasphere* (what we buy, when and why we were at the hospital, when we travel and with whom, etc.) today constitute two parallel dimensions intersecting and reciprocally defining each other (Floridi 2014). There is one Dr. AC buying milk, standing in front of a supermarket fridge on *that* date in *that* place, and there is one Dr. AC inhabiting the web *through* her publications, her visiting fellowships, and *in* the organisation of events, plus there is a patient, a mother, a daughter, etc. (the list made by John Searle is usually pretty long and contains all the functions we can have in the social world): the more that is recorded, the more can be traced back, and the more what we appear to be depends on how easily a *datum* can be found, iterated, re-interpreted. Technology, more than ever, is permanently producing and filling in a universal - almost infinite - archive, where information, transactions, communications (emails, telephone conversations, chats), intentions, mistakes and various other forms of human existence and traceability are contained.¹ Usually, this explosion of recording is considered as the reason for a great revolution in the field of privacy

and thus in the definition of the difference between the private and the public dimension of human life. I shall try to add another perspective on this, which I consider crucial for legal discourse: indeed, I shall address this great transformation, following the most recent works of Maurizio Ferraris (who elaborates on Derrida's philosophy of traces and archi-writing), from the perspective of the responsibility produced by these huge, universal and almost infinite archives. That is to say, I will try to show that, first, without technology there would be no normativity; and, second, that technology itself has its own capacity to produce responsibilities and obligations. New media certainly convey information through recordings - for this reason, though they are usually referred to as IT, information technology, Maurizio Ferraris insists on the fundamental function of recordings in the way new technologies influence our life. What matters is not, in other words, the fact that data, emails or online transactions contain information that could (and often is) used otherwise; what matters is, instead, that all this remains, and keeps existing (as a kind of data-storage) because it is traced down on devices that are constructed as archives. In 1967, Derrida had foreseen the 'end of books' as means of communication and of preservation of knowledge; yet, at the same time, he had foreseen a new explosion of writing: his view was certainly prophetic to this extent, since computers, the web and the contemporary universe of communication constitute a mainly written dimension, in which the devices of recording multiply and in which, thus, traces proliferate also independently of the will or intentions of individual subjects (Ferraris 2011: 15; Ferraris 2015, 2018).

Proscenium. There are a number of key-concepts often occurring in the earlier as well as in contemporary reflections on how a grammatological view of the world could influence a different perspective on how we perceive language, communication and normativity. The meaning of these concepts must be deconstructed in order to be re-used today: (a) *nomos*, a word that means 'law' or 'custom'. The word originally translated the concept of law in ancient Greek thought. Currently, 'norm' indicates a proposition that contains an obligation. (b) *Grammata*: signs, traces: that which is written, that

which is drawn and traced down. (c) *Inscriptio*: from *in* plus *scribere*. To write in or to write on something. (d) *Record*: the act of repeating, or to reiterate; rehearse, repeat and report by heart. From Latin *recordari*: remember, call to mind, think over, be mindful of. Integration of *re-*, restore and *cor* (genitive *cordis*), heart - as the metaphoric seat of memory. (e) *Technologia*: a word composed by the terms ‘*tèchne*’, that means art or technique, a way of making things and/or the knowledge about how to make things; and *logia*, deriving from *logos*: discourse, treaty (itself deriving from *lego*, which means speaking, describing). The composition of these two terms into *technologia* indicates a doctrine of how to apply the rules, the knowledge about how to make things.

Through a progression going from the trace, to the document, and finally to the archive, the ambivalence and double bind between *presence* and *absence* is the underlying theme characterizing both Derrida’s theory of grammatology and of the force of law, on the one hand, and Maurizio Ferraris’s works on new technologies and mobilisation, on the other. In both philosophical systems (as in Plato’s *Phaedrus*), the act of writing is aimed at inscribing something that otherwise would disappear: recording guarantees the possibility of presence and preserves the temporality of an event, of an act, of a contingent proposition beyond its contingency. Writing is first and foremost a technique, a *tèchne*, an *ars*: a procedure that implies the capacity of crafting something that is not there and of extending the duration of a contingent act or fact *beyond its contingency*. Inasmuch as the archive, as Goodrich recalls in his paper,² ‘attempts an accurate description of what did not occur’ (Goodrich 2018), *Phaedrus* (the protagonist of the Platonic dialogue) needs the written version of the discourses he has heard (which he hides under his cloak) since he is afraid of forgetting them; similarly, we are all obsessed with being present: to the extent that new technologies allow us to be everywhere at anytime precisely because we are afraid of being absent, here and now and also there and then, and more generally since we are afraid of death. Cornelia Vismann wrote that the archive refers to that which does not speak and keeps what otherwise would get lost (Vismann 2008); in a similar way, a norm contained in the text of a law is a norm that otherwise would not exist *as norm* and would not be

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respected. Inscriptions stand to make things enduring and contextually remind us that otherwise things (norms, messages, orders, love letters) would be ephemeral. Because that is what they are: ephemeral. Just like life itself. No wonder that the philosopher of textuality, traces and grammatology *par excellence* was afraid of death (Ferraris 2011). *Nomoi* must be inscribed, codified, in order to *exist and persist as* such. Thus, the whole history of juridical normativity is a history of codification, of transcription of intentions on a limited piece of material that could be found, interpreted and accessed.

Today's technological revolution thus amplifies an archaic drive: tracing down not to forget. It also shows that such a drive is ambivalent: for something to exist, there must be trace of it; once it is traced down, the device on which it is inscribed also informs the way it circulates and it is understood.

A Circularities

Ambivalence is thus a crucial characteristic of writing. A proposition stands there to remind us that otherwise we would forget its content. A law indicates that otherwise our behaviour would not follow the normative content of a certain proposition, that we follow just because it is law (Derrida 1992). The ambivalence of writing and its double bind with memory and forgetting, thus, resembles the ambivalence of the juridical *pharmakon*, which stands to remind us that – if it was not there – we would need it. In both double binds, the relationship between presence and absence is the engine, the force that moves the dynamic. The double and ambivalent relationships between writing and its content, and between the law and its content, involve a circular movement. The ambivalence (the sign is necessary but then it ends up hiding something or meaning something else) is related to the *instrument* which records and preserves the content.

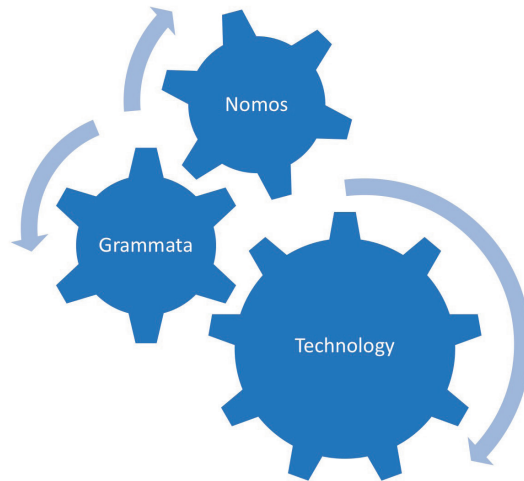


Figure 1. Circular movement in which the three poles, *nomos*, *grammata* and technology, interact.

We can understand the ambivalence better by imagining a circular movement in which three poles interact (see Figure 1).

Pole one. Nomos - Grammata. In order for something to exist socially and to produce consequences, it must be inscribed. This is true in particular in the legal realm, as Derrida noted (Derrida 1992). Following the principle that nothing exists outside of the text, Derrida notoriously analysed the English expression 'to enforce the law'. When talking about this expression, Derrida claims, one:

loses the direct or literal allusion to the force that comes from within to remind us that law is always an authorised force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable. Applicability, or what we term 'enforceability', is not an exterior or secondary possibility that may or may not be added 'as a supplement to law' (Derrida 1992: 5).

Pole two. Grammata - Technology. Signs, traces, documents and

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archives do not float in the atmosphere. The materiality of the traces is crucial: without it, the trace would only be a mere sign. A determined material life on a determined type of device (for instance, a code that contains laws) attributes to the sign the status of a *qualified* trace, capable of producing consequences. The technology plays a central role because without it, there would be no inscription and thus no normative force. Ferraris explains it clearly (Ferraris 2009; 2015), first in his work on documentality, then in his more recent work on documediality. He writes:

The documedial revolution is a technological, social and anthropological revolution. It has indeed been possible thanks to the constructive force of documentality in conjunction with the communicative and mobilizing power of the web. It is a connection of documents and media that has involved a very large number of people, in a completely unexpected way. Therefore, it is anthropological because it directly concerns human beings, modifies their lifestyle in more than one way and at the same time highlights some essential human characteristics; it is social because it is given in the social world at the base of which there is documentality; it is technological because it is triggered by the strength and peculiarity of the web (Ferraris and Martino 2018)³.

Ferraris bases his claims on documentality, at first, and on documediality, more recently (after the explosion of the web and of technology 4.0), on two strong theses: *i.* social reality is constituted by recording, and what is not recorded does not exist; *ii.* recording is normative. As a matter of fact, traces produce responsibility: once I know a message has been sent, or once I know I have received a message, either I expect the receiver to respond or I know that the sender might expect a response. In both cases and directions, the trace of the communication contains a question/an order/a proposition and thus it produces a form of responsibility between sender and receiver. By following this line of reasoning, Ferraris develops his theory on (what he defines as) Derrida's 'anxious ontology' (Ferraris 2011: 17): in other words, an ontology characterised by the human fear of being forgotten, of missing the traces of what has been, and which has notoriously translated into grammatology.

Pole Three. Technology - Nomos. Against this background, the relationship between technology and normativity becomes clearer. The recording makes it possible for the norm to be read, seen, understood, received - thus, it is necessary for its existence. For it to exist, it must be inscribed (codified). Once traced down, once inscribed and codified, then, one cannot claim that it was impossible to have access to that norm - thus the inscription makes it an obligation. As Derrida writes, we do not obey it because it is just or unjust, but because it is *written down as a norm*.

This circular movement (from *nomos* to *grammata*/inscription, from *grammata* to technology, from technology to *nomos* and back) is the background movement that makes law enforceable: thus, the nature of *law as law* appears to be intrinsically connected to its materiality. The gap between the materiality and the value attributed to it (this *différance*, to say it in Derridean terms) produces what in physics is defined 'potential': an unrealised ability, which could be realised or is about to be realised (but could also remain just a potential). This potential displaces all oppositional logics and opens a dynamic perspective on normativity, in which *nomoi*, *grammata*, *codices as recording technologies* constantly define each other. Actually, this circularity shows that the very sense of the law lies in its inscription: Derrida's main thesis in the *Mystical Foundation of Authority* (1992: 6) is that the enforceability of law shows how 'there is no such thing as law (*droit*) that doesn't imply *in itself, a priori*, in the analytic structure of its concept, the possibility of being "enforced", applied by force'. And what enforces the law is precisely its materiality. So it is very interesting that, decades later, and within the explosion of recording (just think of smartphones, the web, big data), a disciple of Derrida (Ferraris) engages in a philosophy of actuality starting from the normative force of new technologies - which, as he says, have the power to make us feel obliged *like* a formal norm written down on a text.

This is how his article on *total mobilisation* (Ferraris 2014) begins:

It is the night between Saturday and Sunday, the night that is traditionally consecrated to rest. In the dead of night, I wake up. I

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want to see what time it is and I obviously check it on the cell phone, which tells me that it is three o'clock. But, at the same time, I notice that someone has sent me an email. I cannot resist the curiosity, or better the anxiety, (the mail concerns a matter of work), and that's it: I read it and reply. I am suddenly working on Saturday night, no matter where I am. The Internet is an empire on which the sun never sets, and having a smartphone in your pocket means having the world in your hand, but it also automatically means being in the hands of the world: at all times a request can reach us, and at all times we will be responsible for dealing with it.

The possibility of recording makes it possible to realise something which was unbelievable until recently (communicating with a colleague who lives on the other side of the planet, as if she was there in front of us); yet, the technology that makes this communication possible produces a bond between those two subjects and potentially all the other subjects that could use similar instruments of mobilisation. Just like the double value of law as an authorised force (*Gewalt*) that always needs to be justified (Derrida 1992), the act of writing and recording has to do with justification, on the one hand, and simultaneously produces consequences, on the other hand. Similarly, the medium - the email, or chat, which is mainly characterised by recording - reproduces the double bind between *dike* and *adikia*, i.e. between what is just and what is unjust.

The double movement between absence and presence is also the theme of the opening pages of Giorgio Agamben's book *The Fire and the Tale* (2017: 1ff), where he engages with literary historiography starting from an old anecdote found in a book on Jewish mysticism. Here is what the story tells. There was, once, Baal Schem, the founder of Hasidism. Each time he had a difficult task to face and resolve, he would go to the woods, in a specific place; he would then light a fire and meditate in prayer, and what he had set out to perform was done (Agamben 2017: 1). A generation later, the Maggid of Meseritz had to face the same task: he went again to that specific place in the woods, saying 'we can no longer light a fire, but we can pray'; and, again, what he had set out to perform was done and everything he wanted, finally

happened. Then, another generation passed, and Rabbi Moshe Leib of Sassov had to face a task. He said: 'We can no longer light a fire, nor do we know the secret meditations belonging to the prayers, but we know the place in the woods, and that can be sufficient'. And in fact it was sufficient. But, then, another generation passed and Rabbi Israel of Rishin was asked to perform the task. He finally said that they could no longer light the fire, they could not speak the prayers, they did not know the place, but they could still tell the story of all that. And, again, it was sufficient.

The short story talks about the function of literature and narrative: historically we have moved further from the sources of our knowledge, from the original sources of law. What remains of all the mysteries that are no longer traced is literature, narration, narratives and that - the Rabbi comments - can be enough. 'We can tell the story of this', is what the last Rabbi says: by saying so, he means exactly the opposite. 'All this' is an undetermined sea of signs where all knowledge depends on the story.

Derrida was obsessed with a similar loss of the fire, of the signs, and thus he suggested paying attention to all signs and to consider all the world within the text, the documents, and archives; Ferraris adds, to this, that grammatology has a cost. If traces remain, and if we make it possible for them to remain eternally and to be found anytime and anywhere, thus they become sources of obligation. Like the Platonic *pharmakon*, presence and absence are linked together and define each other. Interestingly, the allegory of the fire and the tale talks about oral and written culture, which again, as in all Derridean grammatology, suggests something relevant for legal discourse: that all normative culture should be reconsidered in light of the technological transformation we are experiencing.

2 *Materia of the nomoi*

The double bind linking the presence and the absence of traces on technological devices invites a redefinition of what is 'normative'. If there is no law without enforceability, and no applicability or

enforceability of the law without a justification of the use of force (which can only derive from an inscription), then the material life of norms is a fundative part of norms themselves. The constitution, or inscription, of a legal norm *as* law is a matter of *différance* - i.e., in Derridean terms, of the relation 'between force and form, between force and signification, performative force, illocutionary or perlocutionary force, of persuasive and rhetorical force, of affirmation by signature' (Derrida 1992: 7). For Derrida, the act of inscription is the origin of all meaning, persistence, and value:

For me, it is always a question of differential force, of difference as difference of force, of force as *différance* (*différance* is a force *differée-différente*), of the relation between force and form, between force and signification, performative force, illocutionary or perlocutionary force, of persuasive and rhetorical force, of affirmation by signature, but also and especially of all the paradoxical situations in which the greatest force and the greatest weakness strangely enough exchange places.

By linking dishomogeneous objects - force and form, presence and absence - and by showing their reciprocal coexistence, *différance*, as aforementioned, displaces all typically oppositional logic and makes it necessary to rethink the rigid categories that had led to thinking of ontology as the mere, solid, reality standing in front of us, and of epistemology as a transcendental dimension where concepts fluctuate without any hold on the world.

Technology, this is another intuition that we owe to Ferraris (2018), connects these two dimensions - ontology and epistemology - and inhabits that differential space that for Derrida was constituted mainly by textuality and for Ferraris is constituted both by textuality and by the technological devices where signs, traces, texts, words are deposited. The recording is where the norm is present: it is written down and thus it exists and it remains valid through the sign. Its inscription constitutes its presence: it is there, and it is valid, because of its material definition through the recording - be it in a code (in the case of a law), or on an electronic device (in the case of data transmitted on informatic devices). The act of writing down the norm represents something that otherwise

would not exist. Normative language needs to be traced down, or it would be impossible to know or understand its content; the act of tracing down the content of the norm is, at the same time, an act of hiding the norm behind those words. This inscription, or recording, is necessary: without it, there would be only a fluctuating content of a norm that does not exist outside of the mind of the person who has imagined it.

As Peter Goodrich noted in *Languages of Law*, our memory is narrational, and:

[T]he law maps that narrative in a story of origins or of the sources from which the law comes, precedent being nothing other than the cartography of that elastic temporal expanse between the beginning and end of a story, between the emergence and the conclusion, between the exordium and the peroration (1990: 36).

If we try to link this original drive, or need, for origins, to the *arché* that justifies and explains the reasons of everything, then the fundamental importance played by technology today emerges even more quickly. How messages are transmitted, deposited, found: all the material life of the legal files, already described in the wonderful work of Cornelia Vismann, is now expanding and proliferating. If, on the one hand, logic gives order and structure to legal narrative, legal norms on the other hand need a justification to be legitimated. Goodrich writes (1990: 39) ‘the connective principle, already adverted to, is not, however, simply one of visual recollection or remembering. It is more than that; it relies upon a first cause, an origin whose presence is to be traced throughout the argument.’ The questions that emerge concern the material life of laws and obligations - that could emerge, for instance, from a tweet: indeed, a tweet creates a link between one person and a community, and it thus constitutes a whole world of expectations, responsibilities, questions and answers. Again, it is Goodrich who, while discussing the linguistic roots of the common law, claimed that jurists should pay more attention to:

[H]ow are these texts produced, where are these texts kept, by whom are they used, how do they move or circulate, who receives them, who interprets them, who would understand them, whose office is

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it to understand and to send on that understanding, to transmit that custody? (Goodrich 1990: 113).

Bringing legal theory back to the technologies of law is now recognised as a necessary gesture by many legal scholars. The issue that we must consider is the technology or mode of production of law, or more generally of norms. Such a grammatological - or, today, *documedia* - analysis of law touches upon legal rhetoric as well, this last understood not only as a mechanism to win a case, but also as an *ars*, a *tèchne*, a know-how: in its original meaning, *tèchne* meant both knowledge (epistemology) and the art of making, of being in the world (which relates to ontology). That is exactly where technology stands: in between those two dimensions. The technology of the law is memory, as archives and files show:

[L]egal writing was a ritual system of inscriptions. The text was necessarily true; [...] It was a language not of speech but of memory, of memorials and of monuments addressed not so much to any immediate audience as to posterity and to God' (Goodrich 1990: 139).

A Decentralized, Autonomous, Impersonal. New Technologies of Normativity

In her book *Files* (2008) Cornelia Vismann showed how files (*Akten*) are the basic variables in the universes of writing and of the law: they proliferate, they mushroom. Files are recording devices that register everything in the medium of writing, also that which is not writing:

Files are comprehensive recording devices that register everything in the medium of writing, even that which is not writing. They register events, voices, gestures, and appearances. It is not until the twentieth century, when competition arises in the shape of the analog recording of events by technological media, that the inaccuracy of written files becomes apparent. From then on, these new technologies set the standard for recording accuracy and promote the linguistic analysis of the loss that accompanies the conversion of speech into files. It is not until linguistic pragmatics provides the appropriate framework (Vismann 2008: 10).

This was before the big data, and before the use of artificial intelligence in legal practice: Vismann already recognized the diffuse ignorance of legal scholars towards the sources and the instruments of the practices at the core of their work. As if a reflection on the tools was intellectually less exciting than a reflection on the concepts and on the juridical issues. The current technological revolution has even amplified the presence of files of all sorts; following Ferraris, we could distinguish between files or documents in a strong sense - and files or documents in a weak sense. In a strong sense, a file contains the intentions of one or more subjects. For instance, a contract is a file in a strong sense. The trace of an event, or the sign of a communication, is a document or file in a weak sense (according to Ferraris' distinction). Vismann argued for a similar distinction:

Documents or certificates differ conspicuously from records by their representative use of writing. They are not designed for any particular administrative use; rather, they are made to impress. Their letters are signs of power; their very appearance represents the authority of the issuer. The layout of a document is a 'gesture of power'. Disregarding all aesthetic concerns related to typeface, page format, and placement of letters, it is the prestigiousness of the signs alone that determines the size and arrangement of the letters on a document (2008: 72).

Vismann focuses on the ambivalent nature of the German term '*Akten*', which indicates both the written text, and whatever inscribed trace - and the devices to archive the texts: *Akten* are both the single instances (of documents, traces, etc) and the spaces of their collection as *Akten*. I shall summarise the main transformations occurring in the present time in three main points/characteristics: *i. decentralisation* and distribution of archives (and thus of documents and of the traces within); *ii. absence of state authority, autonomy*; *iii. unmodifiable nature of the traces, since they also proliferate from each other and do not derive (or not always) from the action of a subject.*

As to *i.* (decentralisation and distribution), registers - for instance those that work through blockchains - have copies of the data: this means that nobody can say that he or she has the exclusive and unique

copy of a document, since the archive is everywhere and anyone who has access to it. In a certain way, contemporary archives have realised the fantasy represented in Italo Calvino's *The memory of the world*, a short story written in 1963, in which all the information about each individual, place, city, event, relationship was contained within one, gigantic, universal archive (interestingly enough, by the way, the narrator says in a dialogue that the gigantic and universal archive had been built because humanity was afraid to be forgotten, a fear familiar to Derrida's obsession with textuality). We currently have the equivalent of many NSA Towers, all distributed around the world into archives that are apparently immaterial (but that consist of infinite traces, that produce more and new traces).

As to *ii.* (autonomy and absence of authority), a good exemplification is offered by blockchains (the instrument used for the bitcoin monetary circuits): there is no subject to verify the operation, but an algorithm controls and calculates all the operations of the transaction. There is no authority to check the transactions, which appear to be much more accessible by everyone, everywhere, anytime.

As to *iii.* (traces cannot be easily modified), each transaction made through these distributed registers (such as blockchains) can only be modified by a counter-operation. Data, once inscribed, gain a life of their own.

The philosophical concept of documediality ties in well with Vismann's work in particular because it invites a reflection on the apparent antinomy between the norms of law as classically defined and the norms understood as legal 'remediation'. The circulation of law changes as well with the current technological revolution, showing a certain *archetypical (virtual) nomos*, counterposed to the confines of the traditional archive or library. The opposition invites to recall Vismann's example of lead rolls whose principal significance was their gravity, their weight, their perdurance, the fact that something was there and defined a space, a confinement in the library or archive, currently counterposed to the free play, evanescence and unbearable lightness of clips and tweets and hastags.

In conclusion, as Mark Antaki rightly recalls in his dialogue with Richard Janda, Hannah Arendt has developed an idea of a 'negative solidarity' as a characteristic of humanity, forged by technology and tied to humanity's capacity to destroy itself. And to destroy itself by looking, potentially, for a better living, or for an easier one. Through these elaborations on Derrida and Ferraris, hopefully, the ambivalence of technology has re-emerged as some sort of *fil rouge* that has accompanied human history since antiquity. The artificial normativity of the law, as a matter of fact, grows parallel to the other systems of laws, first of all those of the world outside and before the law. On top of such an already complex normative universe, norms - in order to be enforceable and to be valid - need to be inscribed. And this explosion of inscription has transformed the Panopticon into a system of reciprocal observation of everyone, everywhere, anytime. Technology preserves and deposits traces on top of an already complicated thread of natural norms and social norms.

Notes

1. See Maurizio Ferraris' chapter in the present volume for specific aspects of the current technological transformation, in order to understand what he means when referring to the current ontological and epistemological revolution.
2. In the present volume: *Heretical Archives*: pp. 53 ff.
3. In the present volume: pp. 21 ff.

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