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Looming on the Legal Horizon

Oliver Streiff

Exhibit A: Burning eaves fall onto the sidewalk as firefighters struggle against the rising blaze. Cornices can produce spectacular scenes, and spectacles in turn produce political consequences. **fig. 1** The legislature intervenes, passing laws that demand safer structures. But do cornices condition norms, or vice versa?

Exhibit B: A photograph from the New York Public Library's construction period shows a stone, 24 tons in the quarry, shaped into a 15-ton cornice. **fig. 2** The materiality of the stone collides

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fig. 1 *Firefighters*, 1975
Photographer:
Hans Krebs
Source: ETH-Bibliothek
Zurich, Bildarchiv CC
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with a conventional concept, and it is the concept that appears to be more durable. At the same time, the worker sitting casually atop the cornice does not appear to have conquered the stone alone. What forces, contracts, and methods converged to shape this rock? By using the neologism *lawscape*, Andreas Philippopoulos-Mihalopoulos addresses the idea of a reciprocal influence. ¹ He proposes to read the lawscape in terms of that reciprocal influence: the invitation of the law to be conditioned by the city and vice versa. ² His notion of the lawscape invites our own exploration of the mutual intertwining of cornices and the law.

1 Andreas Philippopoulos-Mihalopoulos, *Absent Environments: Theorising Environmental Law and the City* (London: Routledge-Cavendish, 2007), 43–81, here 90.

2 Andreas Philippopoulos-Mihalopoulos, "Introduction: In the Lawscape," in *Law and the City*, ed. Andreas Philippopoulos-Mihalopoulos (Abingdon: Routledge-Cavendish, 2007), 1–20, here 10.

3 Mariachiara Faliva, "New York City Local Law 11/98: Consequences of Administrative Regulations on the Conservation of Buildings," in *Built Heritage: Monitoring Conservation Management*, ed. Lucia Toniolo, Maurizio Boriani, and Gabriele Guidi (Cham, Switzerland: Springer, 2015), 45–53, here 46.

A Danger to Life

Cornices, in particular roof cornices, are overhangs at elevated height. If they are not properly constructed or maintained, they are dangerous. In New York, in 1979, part of an eave fell from a 1912 residential building at 115th Street and Broadway, killing a young student. ³ After this deadly accident with falling terra-cotta, a board

fig. 2 Scene during the construction of the New York Public Library, 1906. Photographer: unknown
Source: New York Public Library

⁴ Christopher Gray, "A Law and the Face of the City," *New York Times*, April 24, 2014. For a detailed description of the background of Local Law 10, see David May, "Critical Issues for Critical Examinations: New York City's Local Law 10 at Twenty," in *Building Façade Maintenance, Repair, and Inspection*, ed. Jeffrey L. Erdly and Thomas A. Schwartz (West Conshohocken, PA: ASTM International, 2004), 30–44, here 32.

⁵ See Karl-Heinz Ladeur, "The Postmodern Condition of Law and Societal 'Management of Rules' – Facts and Norms Revisited," *Zeitschrift für Rechtssoziologie* 27, no. 1 (2006): 87–108, here 91.

⁶ Local Laws of the City of New York for the Year 1980, no. 10, § C26-105.3.

⁷ Local Laws of the City of New York for the Year 1980. See also Faliva, "New York City Local Law 11/98," 46.

⁸ Gray, "A Law and the Face of the City."

⁹ Anemona Hartocollis, "Going Topless," *New York Times*, June 27, 2004.

¹⁰ Christopher Gray, "'Scalping' Predates the Legislation," *New York Times*, April 25, 1993.

¹¹ Faliva, "New York City Local Law 11/98," 53.

¹² Christopher Gray, "Along Broadway, Jettisoned Cornices Are Being Rebuilt," *New York Times*, January 7, 2007.

¹³ Cf. § 239 Paragraph 1 Planungs- und Baugesetz (PBG) vom 7. September 1975 (LS 700.1, Canton of Zurich, Switzerland).

of inquiry concluded that a facade inspection law was needed, and the city authorities responded in 1980 with Local Law 10. ⁴ The new law was grounded in a tangible proof of danger. ⁵ To ensure that facades were maintained in a safe condition, the law mandated the regular inspection of "a building's exterior walls and appurtenances thereof." ⁶ Owners were thus obliged to have facades, and hence cornices, periodically inspected. They, or rather their architects or engineers, had to file a report on the soundness of their facades every five years, at least for buildings taller than six stories. ⁷ In Local Law 11, which came into force in the 1990s, inspections were made even more rigorous.

The costly inspections were controversial. Preservationists like Philip K. Howard predicted "a terrible wave of destruction." ⁸ Normative action – one interpretation – led to a widespread "scalping" of historical buildings because, to avoid the costs for the inspection or to eliminate the risks completely, some cornices were permanently removed. ⁹ On the other hand, as some argue, this destructive practice predated Local Laws of the City of New York for the Year 1980. ¹⁰ Conservation managers even claimed that the inspections and repairs had a positive impact on building conservation overall. ¹¹ However, the visual effects of scalping on the characteristic appearance of some of Manhattan's streets has been considerable. In the case of the Allenhurst building at the southeast corner of 100th Street and Broadway, though, the scalping was followed by the installation of a fiber-glass imitation of the missing cornice. ¹²

Beyond Manhattan, in jurisdictions where cornices are not the subject of specific statutes, their maintenance falls under general clauses on the safety of buildings and installations. Section (§) 239 Paragraph 1 PBG for the Canton of Zurich is an example of such a general clause. It stipulates that the foundation, construction, and materials of buildings and installations shall not endanger persons or property, both during their construction and their existence thereafter. ¹³ This requirement clearly includes cornices.

Cornices enter the space of law by posing a risk. Danger (*Gefahr*), at least from a continental perspective, is one of several



concepts that force a negotiation between the socially defined role of architecture and the material properties of the cornice, whether it is constructed of terra-cotta, tin, or concrete. ^{fig 3} Management of this danger devolves to technical inspection procedures and criteria. ¹⁴ It is a statistical affair, a matter of periodically determining the condition of cornices from a technical-scientific point of view and then minimizing potential risks.

¹⁴ For this function of danger (*Gefahr*), see Ladeur, "Postmodern Condition", 91.

A Generator of Urban Space

Now consider another type of standard: the vertical position of roof cornices. The Canton of Lucerne grants municipalities the authority to set binding heights for eaves. ¹⁵ The setting of eave heights leads—in combination with the definition of construction lines—to the determination of the street profile. The standards for the height of eaves play a key normative role in urban design, so the presence of eave height in both current legal norms and classical manuals on urban planning and design is unsurprising. ¹⁶ This standard finds its architectural expression in an often distinctive design of the roof cornice. In this case, the starting point is not a factual event but an ideal of urban space.



To implement the ideal, legal norms are used as instruments. This starting point is thus not a reaction to existing structures. It is, rather, a spatially motivated and anticipatory action, a specification for the design and construction of buildings. The urban ideal determines the legal norms, rather than the legal norms changing a preex-

isting built environment. How the law is made—"la fabrique du droit"—here plays a pivotal role. ¹⁷ The question is: *who* shapes legal norms? Do technocratic processes dominate, or do the voices of designers find a hearing in the legislative process? Epistemologically, the situation we face is, at best, one of coproduction of knowledge. ¹⁸

A Field of Compositional Freedom

In addition to being a (potential) danger to life and an instrument of planning, the cornice must also be considered within the constellation of compositional freedom.

Fundamental rights guarantee a sphere of freedom from state intervention. Property owners, for example, can invoke the freedom to build. The freedom to build is part of the broader

¹⁵ Cf. § 139 Paragraph 5 Planungs- und Baugesetz (PGB) vom 7. März 1989 (SRL 735, Canton of Lucerne, Switzerland): "Die Gemeinde kann Traufhöhen festlegen." Cf., for Zurich, § 62 Paragraph 1 Baugesetz für Ortschaften mit städtischen Verhältnissen vom 23. April 1893.

¹⁶ For the remarkable presence of street profiles in the classical manuals on urban planning and design, see Helene Bihlmaier, "Strassenprofile," in *Manuale zum Städtebau: Die Systematisierung des Wissens von der Stadt 1870–1950*, ed. Vittorio Magnago Lampugnani et al. (Berlin: DOM, 2017), 21–28, here 21.

fig. 3 Construction workers secure a roof cornice during the construction of the New York Public Library, 1905. Photographer: unknown
Source: New York Public Library

¹⁷ *La fabrique du droit* is the descriptive title of a publication by the French sociologist Bruno Latour in which he describes the conditions under which legal norms emerge in the Conseil d'État. See Bruno Latour, *La fabrique du droit: Une ethnographie du Conseil d'État* (Paris: La Découverte, 2002).

¹⁸ For the coproduction of knowledge as an interpretative framework to avoid both social and technoscientific determinism from the perspective of science and technology studies, see Sheila Jasanoff, "Ordering Knowledge, Ordering Society," in *States of Knowledge: The Co-production of Science and Social Order*, ed. Sheila Jasanoff (London: Routledge, 2006), 13–45.

19 See the ruling of the Swiss Federal Court, BGE 145 I 156ff., 160 Recital 4.2: "Die Baufreiheit erlaubt die uneingeschränkte bauliche Nutzung eines Grundstücks."

20 Cf., for example, Article 21 of the Swiss Constitution, and for the anchoring in international public law, Article 10, Paragraph 1 of the European Convention on Human Rights. The Swiss constitutional notion of art includes architecture. See Christoph Meyer and Felix Hafner, "St. Galler Kommentar zu Art. 21 BV, Rz. 4," in Bernhard Ehrenzeller et al., *Die Schweizerische Bundesverfassung, St. Galler Kommentar*, 3rd ed. (Zurich: Dike, 2014), 493–99.

21 On the freedom to build, see, for example, the Ruling of the Swiss Federal Court, BGE 145 I 156ff., 160 Recital 4.1, and Article 36 of the Swiss Constitution.

22 See, for profiles in general, Michael Hill and Peter Kohane, "The Signature of Architecture: Compositional Ideas in the Theory of Profiles," *Architectural Histories* 3, no. 1 (2015): art. 18, 1–21, here 1, <http://doi.org/10.5334/ah.cu> (accessed August 23, 2021)

23 See Hill and Kohane, "Signature of Architecture," 10. These authors underline the special place that Germain Boffrand's *Livre d'architecture* occupies in this context. Cf. Germain Boffrand, *Livre d'architecture* (Paris: Guillaume Cavelier, 1745), 22.

24 Cf., for a general aesthetic clause, instead of many, § 238 Planungs- und Baugesetz (PBG) vom 7. September 1975 (LS 700.1, Canton of Zurich, Switzerland): "Bauten ... sind so zu gestalten, dass eine befriedigende Gesamtwirkung erreicht wird; diese Anforderung gilt auch für Materialien und Farben."

25 For this concept in legal theory, see Pierre Moor, *Pour une théorie micropolitique du droit* (Paris: Presses universitaires de France, 2005), 52–53.

26 For one of the few cases in Switzerland in which an administrative court gave its opinion on the design of cornices, see decision VB.2007.00038 (July 4, 2007) of the Administrative Court of the Canton of Zurich. In this decision, one of the points of controversy concerns the question of whether a 50-centimeter-wide balcony can be regarded as an expansive cornice. The cornice is thus, even if rarely, the matter of aesthetic reasoning in the courts. Unlike the cornice, the roof shape, for example, is often subject to legal disputes. See, for example, the landmark ruling of the Swiss Federal Court, BGE 114 Ia 343ff.

27 Cf. § 33 Bau- und Planungsgesetz (BPG), 17. November 1999 (SG 730.100, Canton of Basel-City, Switzerland).

freedom of ownership guaranteed in Switzerland in Article 26, Paragraph 1 of the Swiss constitution. In a landmark ruling, the Swiss Federal Court stated that the freedom to build allows the unrestricted use of a plot of land for construction purposes.¹⁹ Authors, in turn, are given the opportunity to express themselves freely through the freedoms of communication, especially the freedom of artistic expression.²⁰ These freedoms, however, can be restricted with explicit conditions.²¹ This is regularly achieved through spatial planning measures, such as setting a maximum number of floors. By contrast, we rarely find compositional specifications for cornices. From this perspective, therefore, cornices appear to be relatively autonomous architectural elements.

The cornice as a compositional problem has a long tradition in architectural history. The conceptual framework consists of different strands.²² From a rhetorical point of view, the design of cornices becomes a communicative phenomenon.²³ The cornice can be understood as akin to a "linguistic" expression protected by fundamental rights.

The conditions that restrict such free expression are, primarily, aesthetic clauses or specific design regulations.²⁴ These limitations gain effectiveness from a perspective of control *ex post*; that is, from the discretionary application of law by the administration or judiciary. The cornice becomes the object of micropolitics.²⁵ Designers must routinely address the everyday and tangible applications of power that are at the discretion of officials—particularly those in lower levels of government.²⁶ In some cases, the freedom of the cornice is protected as if it belonged to the artistic freedom of expression. In the building code for Basel, for example, the regulations on distances and the limitation of building depth do not apply to cornices that are used exclusively for the "decoration of the building walls."²⁷ Cornices are thereby partially removed from the legal sphere and coexist, as it were, with the ordinances that regulate building. This ambiguous condition leads to a final question: How can we grasp the theoretical relationship between cornices and the law?

A Bridge to Theory

The cornice can be regarded at once as a danger to legally protected interests, as a legally controllable instrument for the pursuit of spatial ideas, and as a relatively autonomous expression of artistic freedom. It links to the process of law-making in the *fabrique du droit* as well as to the micropolitically influenced application of existing rules. The correlation between cornices and the law is therefore manifold. To abandon both the hierarchical notion of an encumbering regulation of architecture and the notion of an unquestioned state authority to foresightedly normalize space thus seems appropriate. Following a primarily sociological strand, we could try to approach the theorization of the intertwinement of law and architecture by means of systems theory. According to the legal sociologist Niklas Luhmann, the legal system is an autopoietic and functionally differentiated subsystem of society. With systems theory, the difference between the legal system and its environment comes to the fore.²⁸ The focus of interest moves to the periphery, to the disruptions at the dividing lines between law and its environment, including the built environment too. **fig. 4** This approach clearly differs from a structural analysis of positive law interested in unity through internal connections.²⁹ From the systems theory point of view, law is no longer hierarchically determined but evolves through the communication within and between systems.³⁰

The simultaneously closed and open character of systems is helpful for capturing the ambiguity described above.³¹ On a normative level, systems are closed. A norm is not overturned just because it is not observed: even if facades in New York City are not regularly inspected, the obligation to inspect them remains. On a cognitive level, by contrast, systems are open. Environmental facts affect the system. The question of whether a cornice must be removed, for example, is determined through its technical examination, thus through environmental signals. If a system now presupposes and relies on aspects of its environment, we speak of "structural couplings."³² But can we make these considerations fruitful for architecture? The cornice draws particular



fig. 4 Where are the cornices? Advertising of a construction company as vernacular emblem for profiles in a fragile sphere of relative freedom; near Rotterdam. Photograph taken by the author

28 Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt: Suhrkamp, 1993), 41.

29 For a structural approach, see especially the seminal publication of Hans Kelsen, *Reine Rechtslehre*, 2nd ed. (Vienna: Deuticke, 1960), which partly integrates earlier works by Adolf Julius Merkl.

30 Luhmann, *Recht der Gesellschaft*, 144. Cf. Karl-Heinz Ladeur, "Die Netzwerke des Rechts," in *Netzwerke in der funktional differenzierten Gesellschaft*, ed. Michael Bommes and Veronika Tacke (Wiesbaden, VS-Verlag, 2011), 143–71, here 151.

31 For the legal system, see Luhmann, *Recht der Gesellschaft*, 77.

32 Luhmann, *Recht der Gesellschaft*, 441. The selective character of structural couplings is emphasized by Galf-Peter Calliess, *Prozedurales Recht* (Baden-Baden: Nomos, 1999), 151.



attention to normative niches, where we can locate the cornice in a fragile sphere of relative freedom. A surprising coincidence can be found with positions in architectural theory. In his general theory of architecture, Patrik Schumacher adopts the system-theoretical approach in architectural theory in a comprehensive manner and describes architecture as a social system too.³³ Schumacher and his theory have both been subjects of controversy, but even this provides evidence for the pertinence of systems theory to architecture.³⁴

We must keep in mind that the system-theoretical view on law is an evolving subject, one exposed to criticism and not only within architectural theory.³⁵ We should, therefore, regard it as a proposal, as one possible theoretical frame of reference for the analysis of the correlation between law and the built environment. **fig. 5**

fig. 5 Demolition of the Chicago Stock Exchange Building, 1972. Photographer: Richard Nickel. Source: Ryerson and Burnham Art and Architecture Archives, The Art Institute of Chicago, Digital File # 201006_110516-010

³³ See Patrik Schumacher, *The Autopoiesis of Architecture: A New Framework for Architecture*, vol. 1 (London: Wiley, 2011), 364–90. See also Gordon Pask, “The Architectural Relevance of Cybernetics,” *Architectural Design* 93, no. 9 (1969): 494–96, here 496. For system-theoretical investigations in space, see the project “Total Space” of the Jaap Bakema Study Centre, <https://jaap-bakema-study-centre.hetnieuweinstituut.nl/en/total-space-0> (accessed October 13, 2021). For a historical analysis of the cybernetic approach to architecture, see Georg Vrachliotis, *Geregelte Verhältnisse: Architektur und technisches Denken in der Epoche der Kybernetik*, 2nd ed., *Bauwelt Fundamente* 162 (Berlin: Birkhäuser Bauverlag, 2020).

³⁴ For criticism of Schumacher’s position, see, for example, Peter Buchanan, “The Autopoiesis of Architecture Dissected, Discussed and Decoded,” *Architectural Review* 229, no. 1369 (2011): 68–75.

³⁵ For a critical comparison of alternative approaches, see Arno Scherzberg, “Systemtheorie als sozialtheoretische Grundlage der Verwaltungslehre,” in *Staat, Verwaltung, Information: Festschrift für Hans Peter Bull zum 75. Geburtstag*, ed. Veith Mehde, Ulrich Ramsauer, and Margrit Seckelmann (Berlin: Duncker & Humblot, 2011), 767–94. For a trenchant emphasis on a discourse-theoretical conception of law, see Philippe Mastrorandi, “Recht und Politik – Systeme oder Diskurse? Eine wissenschaftstheoretische Reflexion,” in *Geisteswissenschaftliche Dimensionen der Politik*, ed. Roland Kley and Silvano Moeckli (Bern: Haupt, 2000), 341–66. For the further development of the theory, see Gunther Teubner, *Recht als autopoietisches System* (Frankfurt: Suhrkamp, 1989), 100; Andreas Fischer-Lescano, “Systemtheorie als kritische Gesellschaftstheorie,” in *Kritische Systemtheorie: Zur Evolution einer normativen Theorie*, ed. Marc Amstutz and Andreas Fischer-Lescano (Bielefeld: transcript, 2013), 13–37.